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Gerald B. Stanford*

Canadian Perspectives on
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I. Introduction

Canada's declaration of a 200 mile Exclusive Economic Zone (EEZ) in the forefront of a rush by coastal states to stake their claims to the resources of the seas and the extension of coastal state jurisdiction was considered by some to be pre-empting the outcome of the Third United Nations Conference on the Law of the Sea, (UNCLOS III). It is certainly contrary to the call of Ambassador Arvid Pardo in 1967 before the General Assembly of the United Nations, seeking the reservation of the sea-bed and its resources beyond the recognized boundaries of state jurisdiction as "the common heritage of mankind". However, Canada's claims and extension of jurisdiction are unique in the method of implementation and as a study for modalities of enforcement of the Exclusive Economic Zone. Examination of Canada's unilateral actions shows that they are still in keeping with her policies in the development of a Law of the Sea Treaty in UNCLOS III, but implemented through effective diplomacy as a prelude to unilateral action and an alternative to possible enforcement conflicts. The outcome of a treaty being still conjectural, it is the purpose of this paper to examine Canada's successes and problems in enforcement of the Exclusive Economic Zone as a model for the future of the EEZ in international law in the event of failure of UNCLOS III to develop a final Treaty.¹ From the Canadian approach lessons and conclusions can be drawn showing a smoother path to the resolution of problems which would beset the régime of the EEZ were it left to a world community divided by its conflicts and pursued by extremes of unilateral action. Final agreement on all the issues of the law of the sea may not be essential for further evolution of the law through

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1. Even if a Treaty is evolved, the possibility of unilateralism will remain. See Robert W. Smith and Robert D. Hodgson, *Unilateralism, The Wave of the Future* (Proceedings of the 10th Annual Conference, Law of the Sea Institute, University of Rhode Island, 1976) at 137

treaties and custom, the general movement of reform in UNCLOS III and international bodies such as IMCO, and the further unilateral developments of states. Enforcement is not the whole issue in the EEZ, especially in view of the benefits which can be shown for other nations besides the coastal state through conservation and management. Equity plays a large part in the acceptance of the régime, which can be met to a great degree by conservation and management of resources to provide a greater surplus for sharing on the one hand, and benefits to land-locked or disadvantaged countries on the other.

Canada's moves in extending jurisdiction over the EEZ during 1977 have been largely interim measures. Major problems remain to be resolved, but the success of the first year is reflected in the acceptance of Canadian regulations, the lack of conflict or violations, and the developments in resolution of problems of boundary settlement and jurisdiction. Canada's success shows that even without a Treaty as a direct result of UNCLOS III, the doctrine of the EEZ can be implemented unilaterally, bringing many of the benefits sought in a new maritime world order.

II. *Canadian Policy in Law of the Sea* *Canada in UNCLOS III*

Canada's leading role in UNCLOS III, combatting over-exploitation of the resources of the sea and the increasing danger to the marine environment through pollution, has pursued policies supporting the revision of the law of the sea by treaty but explicitly coastal, taking a functional approach for uniform definitions of limits and maintaining a varying degree of coastal state authority.² In her support of the principle of custodianship, with the rights of the coastal state being balanced with responsibility for the protection and management of the resources and uses of the sea, Canada advocated the principle of the EEZ as the keystone of overall accommodation in the law of the sea.³ Her policies are based on a 12 mile territorial sea and a 200 mile EEZ, but extending the

2. For a review of the development of Canadian policy in the law of the sea, see B. Johnson and M. W. Zacher, eds., *Canadian Foreign Policy and the Law of the Sea* (Vancouver: Univ. of British Columbia Press, 1977)

3. Claude C. Emanuelli, *Canadian Approach to the Third Law of the Sea Conference* (1975-76), XXIV U.N.B.L.J. 3 at 6, quoting J. Alan Beesley, Leader of the Canadian Delegation to UNCLOS III, in the First Committee 30 November 1972.

EEZ to the Continental Margin where that is beyond the 200 mile limit. Canada's stand on the marine environment was established in the 1971 Intergovernmental Working Group on Marine Pollution, in which the draft Canadian texts proposed the policy of primary though not exclusive responsibility for coastal area environmental protection. This was also the rationale for unilateral legislation,⁴ taken for extension of territorial jurisdiction,⁵ management of fisheries,⁶ and for protection of the marine environment in coastal waters⁷ and areas of special vulnerability.⁸

Because of the ineffectiveness of flag-state jurisdiction over shipping and the weakness of international anti-pollution measures Canada would also preclude flag-state jurisdiction over environmental matters in the EEZ, and has been successful in the re-definition of innocent passage. There is provision against passage which could present a danger to the environment of the coastal state,⁹ and a provision against willful pollution but which, as major pollution accidents are hardly willful, is still not wide enough to bar such passage as may threaten the environment of the coastal state.¹⁰ While there has not been full acceptance of her principles Canada continues her stand in respect to her unilateral action relying on

4. D. M. Johnston, *International Environmental Law: Recent Developments and Canadian Contributions* in MacDonald, Morris & Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: Univ. of Toronto Press, 1974) at 355

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

6. (i) *Canada Gazette*, Pt II, January 1, 1977, SOR/77-62; *Territorial Sea and Fishing Zones Act*, PC 1977-1 January 1, 1977 and SOR/77-50; *Foreign Vessel Fishing Regulations*, PC 1976-3178, December 23, 1976.

(ii) *Coastal Fisheries Protection Act*, R.S.C. 1970, c. C-21, as amended by S.C. 1969-70 (1st Supp.), c. 8.

(iii) *The Fisheries Act*, R.S.C. 1970, c. F-14 as amended by S.C. 1970 (1st Supp.), c. 17

7. *The Canada Shipping Act*, S.C. 1971, c. 27

8. *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c. 2

9. *Informal Composite Negotiating Text*, A/CONF. 62/WPIO, July 15, 1977 at Article 19

10. The Canadian draft text to the 1971 Intergovernmental Working Group on Marine Pollution stated:

No state has the right to pollute the marine environment A state may exercise special authority in areas of the sea adjacent to the territorial waters where functional controls of a continuing nature are necessary for the effective prevention of pollution which could cause damage or injury to the land or the marine environment under its exclusive or sovereign authority.

extrapolation of the principle of the *Trail Smelter* case.¹¹ Meanwhile the increasing number of tanker casualties and the scope of pollution involved are bringing home to other nations the increasing urgency of the problem, further emphasized by the grounding of the super-tanker "*Amoco Cadiz*".¹²

While supporting the principle of the "common heritage of mankind", beyond the EEZ, Canada does not quite agree with the means of control of those resources and views the International Sea-bed Authority as a promotional rather than regulatory body. Compromise appears possible on this, subject to coastal control over the continental margin, with a régime for fisheries management and protection of the environment.¹³ Meanwhile the regulating function of the coastal state is seen as the key factor in safe management and operation of shipping for the prevention of pollution,¹⁴ with absolute liability on the part of the shipowner and the cargo owner.¹⁵ Canada has successfully demonstrated what is necessary, while events give further justification, and states faced with direct evidence on their own coasts are moving towards unilateral regulations¹⁶ and are also seeking more effective measures for tanker safety through IMCO.¹⁷

Canadian Unilateral Actions

While declaring a 12 mile territorial sea, Canadian legislation has asserted jurisdiction for preservation of the environment and

11. *United States v. Canada* (1944), 3 U.N.R.I.A.A. 1905. Under international law no state has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another.

12. [1977] 3 LMCLQ 434. In 1976, 20 tankers or 1,172,000 total DWT were total losses; while in January and February 1977 alone, four tankers broke in two and sank, spilling 162,000 tons of oil. The grounding of the super-tanker *Amoco Cadiz* on the Brittany coast further emphasized the problem.

13. See G. W. Alexandrowicz, *Canadian Approaches to the Seabed Regime in Canadian Perspectives on International Law and Organization*, *supra*, note 4 at 410

14. L. H. T. Legault, *Maritime Claims in Canadian Perspectives*, *supra*, note 4 at 377

15. (i) *Canada Shipping Act*, S.C. 1971, c.27, s.734.

(ii) *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c.2, s.6

16. [1977] 3 LMCLQ 442: The U.S. Federal Administration is moving, through Congress, to establish a pollution damage fund, new regulations are proposed to govern tankers entering U.S. ports, including construction, safety equipment and crew training.

17. [1974] 4 LMCLQ 609

management of resources and put this into effect through regulations. Under the *Arctic Waters Pollution Prevention Regulations* the Arctic waters north of 60° North are divided into 16 control zones on the basis of geography and environmental hazards, while ships are categorized under 10 Arctic classes depending on their suitability for Arctic operations. Clearance must be obtained to operate north of 60° North and ships are limited by their classification for given zones in specified times of the year. Despite initial opposition to such measures, the services offered in return have made compliance an advantage to shipping. These range from meteorological and ice information and routing advice to ice navigation assistance, and icebreaker service, providing safety for the ships as well for the environment.

South of 60° North, the pollution prevention regulations¹⁸ extend to the territorial sea and fisheries zones as declared in 1970,¹⁹ thus limited to the territorial sea and those fisheries zones that were enclosed by fisheries closure lines.²⁰ The *Canada Shipping Act* regulations are not as extensive as the Arctic Waters regulations and it remains to be seen whether the jurisdiction will be extended further. The Canadian declaration of the EEZ is really over a 200 mile Exclusive Fisheries Zone, claiming jurisdiction for conservation and management of fisheries. This has not changed the status of control over the seabed and its resources which continues under the 1958 Geneva Convention to extend to the continental margin “to a depth of 200 metres or such depth as permits exploitation”.²¹ It has, however, introduced the concept of managerial jurisdiction with the principle of the preferential rights of the coastal state. Meanwhile, as fish do not observe an arbitrary 200 mile limit, Canada has continued negotiations for a new regional fish-management scheme beyond the EEZ. This “son of ICNAF” or *Northwest Atlantic Fisheries Organization* (NAFO) will provide for management of fish stocks in the convention area outside the EEZ in a manner consistent with the Canadian régime within the EEZ, treating the fish stocks of the EEZ and the outer fisheries areas as a whole. The agreement awaits ratification by the countries concerned, but

18. Under *Canada Shipping Act*, S.C. 1971, c.27, Part XX

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

20. *E.g.*, Gulf of St. Lawrence, Bay of Fundy, Hecate Strait, Dixon Entrance.

21. *1958 Convention on the Continental Shelf*, Geneva, 29 April 1958, U.N. Doc. A/CONF 13/30, Article 1

meanwhile Canadian ICNAF fisheries patrols continue in the areas beyond the EEZ.

Differences in Approach to the EEZ

Previous claims, such as the earlier Latin-American 200 mile claims, were maintained with strong enforcement in the face of opposition by states and users who refused to recognize such claims. Consequently U.S. tuna fishermen ended up in South American courts with some frequency. Iceland went through three "Cod Wars" and years of acrimonious diplomatic conflict to expel foreign fishermen, particularly British fishing vessels, from Icelandic waters to establish exclusive ownership of fisheries within the 200 mile limit. Canada's declaration came when the concept of a 200 mile limit had gained greater acceptability in international diplomacy and become essential for national interests. In Europe the European Economic Community (EEC) and Britain also declared 200 mile limits. While the EEC limit is a common one in which the fisheries of the entire area are open to all members, there is in addition to old jealousies of fishing interests, the need for re-location of fishing efforts. Consequently Britain is seeking to claim her own EEZ exclusively for fisheries as well as the sea-bed, under the traditional approach and the 1958 Convention,²² to the median lines.²³ Norway has established her fishery based on the 200 mile limit, but the Soviet Union having decreased quotas for West European fishing vessels in the Barents Sea to minimal quantities is now excluded from North Sea areas. The United States has declared its own 200 mile limit and offenders are detained for long periods with heavy fines. The Argentine, in October 1977, arrested seven Soviet fishing vessels during an incident in which three Argentinian officers were lost overboard. Against such arbitrary, costly and rigorous enforcement, the Canadian approach has been low key, smooth and yet effective.

In the Canadian approach conservation and regulation by management to provide benefits to all participants has been the key. Without conservation and management it was clear that fish stocks would not survive, thus in preparation for implementation of a 200 mile limit Canada negotiated a series of 16 bilateral treaties with states having interests in the fisheries areas to be enclosed. The

22. *Id.*

23. *North Sea Continental Shelf cases*, [1969] I.C.J.R. 47

treaties call for co-operation in management of the fisheries, in conservation and in research. Under them foreign fishing vessels may be licensed by Canada to fish stocks surplus to Canadian requirements, subject to Canadian laws, regulations and quotas. The treaties also provide for the Canadian primary interest in the anadromous species, and for international management beyond 200 miles.²⁴ Under the treaties Canada is authorized to determine the total allowable catch, to measure and allocate the catch for Canadian vessels and, from the surplus, allocate quotas to foreign vessels under licence. Canada is given full discretion in the licensing of all vessels, allocating the areas and times for which the licences are valid. The quotas are based on figures established by the Canadian Department of the Environment (Fisheries) and, even though the foreign countries have a smaller proportion of the total allowable catch, the need for management and conservation and the benefits of rehabilitation of the depleted stocks are recognized by them. The foreign fishing fleets have thus become voluntary participants in the establishment and operation of the Canadian régime which while safeguarding Canada's primary interest will be of benefit to all.

The DOE (Fisheries) organization is based on regional management with overall control by the Minister in Ottawa. The importance of close liaison has been recognized by several distant fishing fleet countries which have sent accredited representatives for full-time liaison. These include the Soviet Union, Poland and Cuba. The importance attached to effective liaison and participation in the Canadian fisheries by the U.S.S.R. is reflected in the rank of their representative, Alexei Volkov, a Deputy Minister, resident in Halifax on a fulltime basis to provide a direct link through Moscow with both his government and the Soviet fishing fleet. Licensed vessels are required to report to the regional office of DOE (Fisheries) before entering the area, to report their catch on a weekly basis and to report again three days before departure. Aerial surveillance and periodic inspection verify compliance with licensing, area, gear and quota regulations. Breaches of regulations result in prosecution as well as confiscation of gear and catch and

24. *E.g., Agreement between Canada and the U.S.S.R. on their Mutual Fisheries Relations*, entered into at Moscow on May 19, 1976, and in force as of that date. Similar treaties were entered into with Britain, Cameroun, Cuba, Denmark, France, G.D.R., F.R.G., Italy, Japan, Nigeria, Poland, Portugal, Romania, Spain and U.S.A.

finer; but compared with U.S. penalties, Canadian fines have been moderate.²⁵

Environmental protection for the off-shore areas, except for the Arctic waters, has continued in accordance with the international convention,²⁶ under which sea areas up to 100 miles off-shore from the Canadian coasts are prohibited oil discharge zones. Enforcement, however, remains basically a flag-state responsibility, although Canada includes surveillance and detection of pollution and violations as a high priority of the coastal state. The emphasis, under the *Canada Shipping Act* has been on the safe and adequate fitment of ships, and in vessel traffic management. The *Eastern Canada Traffic System* (ECAREG CANADA)²⁷ is presently a voluntary system, but likely to become compulsory in 1978. Ships bound for Canadian ports are required to report to the regional MOT centre 24 hours before arrival. 80% of ships using the Canadian ports comply with the ECAREG regulations, while for the remainder reporting is completed through the pilotage authorities. The ECAREG reports require specific information, including a brief description of the cargo, especially pollutants or dangerous goods carried; defects in hull, machinery, navigation and communications equipment, and the date of expiry of the Non-Canadian Ship's Compliance Certificate if issued. Further calling-in points and additional reports are specified for entry, and for departure clearances. The emphasis is on the safety of ships using Canadian ports. Ships which do not comply are subject to inspection and may be diverted or held in port for rectification of defects or deficiencies. Ministry of Transport officials are presently satisfied with the effectiveness of the system in reducing and, hopefully, eliminating hazards of the type of ship looking for a convenient location for a disaster to happen. Thus as regards extension of jurisdiction further into the EEZ, Canada is prepared to await the outcome of UNCLOS III while remaining ready to take further unilateral action, as demonstrated in the Arctic, for areas requiring special consideration.²⁸

Some authorities hold that an extension of jurisdiction to provide any more effective system of safety standards would be very

25. DOE (Fisheries) interviews

26. *1954 International Convention on the Prevention of Pollution of the Sea by Oil*

27. *Canadian Notice to Mariners*, Nos. 25, 26/77 (Annual Edition) and No. 561/77

28. M.O.T. interviews

difficult to enforce, and that as the hazards are on-shore rather than off-shore the present system is adequate. Further, they hold that if a wider degree of supervision and control over ships was considered necessary off-shore, the extension of jurisdiction would not be feasible due to the vastness of the area and the effort required. It is debatable whether the present jurisdiction is sufficient, as for instance in consideration of jurisdiction over casualties at sea caused by accidents onboard, or by collision or grounding on off-shore rocks and shallows beyond the 12 mile limit. Some ships even if not making for a Canadian port may pose a hazard, whether they stay at sea or are diverted. Also the increasing number of VLCC tankers and LNG carriers making for terminals in or through Canadian waters raises the question of the necessity for extension of jurisdiction and vessel traffic management.²⁹

III. *Canadian Approaches in Enforcement Surveillance and Enforcement of Fisheries*

DOE (Fisheries) surveillance and enforcement capability has been greatly increased, with new facilities, new patrol vessels,³⁰ and more fisheries inspectors. Additional crews permit double-crewing of patrol vessels for optimum use. DOE resources, however, remain insufficient for the surveillance and enforcement effort necessary. The department therefore relies on government inter-department co-ordination and co-operation, under which all the aerial surveillance and 31% of the ship surveillance is provided by the Department of National Defence (Maritime Command), while another 13% of ship surveillance is provided by the Ministry of Transport (Canadian Coast Guard). Surveillance costs increased dramatically from \$5¹/₂ million in 1976 to \$12 million in 1977, plus the capital costs of three new fisheries patrol vessels.³¹ Naval ship allocation is approximately one destroyer on task full time throughout the year with fisheries inspectors embarked. For the period January 1 to December 31, 1977, air patrols totalled 3270 hours on the east coast, while 746 boardings were made at sea and

29. *Id.*

30. See D. W. Middlemiss, "Canadian Maritime Enforcement Policies", *supra*, note 1 at 311

31. C. G. S. *Cape Roger*, a fisheries patrol and research vessel, cost \$12,000,000 and the C.G.S. *Cape Harrison*, a fisheries patrol vessel for the Newfoundland region cost \$3,000,000. C.G.S. *Louisbourg* is a similar vessel for the Maritimes (Nova Scotia) region.

292 in port.³² Additional surveillance is provided by Maritime Command, by double tasking units as operations permit in conjunction with operational or training missions in the EEZ or on passage to or from other operational areas.

Joint departmental surveillance ensures the whole EEZ is surveyed once a week and active fishing areas are covered three or four times per week, or more often if special monitoring of particular areas is required. This monitors the identity, position and activities of fishing vessels within the EEZ and ensures the reporting of unlicensed vessels or vessels fishing outside their allocated area. Ship surveillance and inspection off Nova Scotia and on the Newfoundland Banks is "good", but is admitted to be poor in the remote areas of the Labrador Sea. The efforts on the Pacific coast are comparable, though while the fishing areas do not extend so far off-shore from Vancouver Island as they do off Newfoundland, the area is long in relation to the bases and facilities available.

Inter-departmental co-ordination and co-operation is good. Operations Co-ordination Centres are established in the Maritime Headquarters at Halifax, N.S. and Esquimalt, B.C., so that in "emergency" or other times requiring joint operations, the operations are integrated and controlled through the Maritime Commander's headquarters.³³ The Operations Co-ordination Centres do not obviate the need for independent MOT and DOE operations centres for their particular needs and day to day operations. Thus, MOT maintains the ECAREG Operations Centre at Dartmouth, N.S., and DOE (Fisheries) has operations centres at Halifax and St. John's, Nfld. for the east coast and at Vancouver, B.C. for the Pacific coast. The Fisheries Operations Centres maintain a tote and computer record of all fishing vessels in the EEZ and provide a direct link to DOE (Fisheries) Ottawa. Thus, when a possible violation is spotted by a patrolling aircraft or a ship, it can be reported directly to the Regional Director of Fisheries by voice radio. Action in respect to a serious violation is referred directly to Ottawa by the Regional Director's "hot-line", where a report

32. DND (Maritime Command) and DOE (Fisheries) reports

33. *E.g.*, Following a major oil spill on land in a Labrador coastal community, personnel and equipment were flown in by Maritime Command aircraft, on-site control was despatched by a naval Captain from Maritime Command Headquarters, Halifax, while containment and cleanup of the spill involved personnel from the Canadian Armed Forces, Ministry of Transport and Department of the Environment, as well as local personnel. Inter-departmental co-ordination was effected through the Operations Co-ordination Centre, Halifax.

respecting a foreign vessel is also referred to the Department of External Affairs. Concurrently if the incident involves a naval ship or aircraft, the incident is reported to Maritime Command Headquarters with a direct telephone "patch" to the duty senior officer. National Defence Headquarters, Ottawa, is alerted to be prepared for consultation or request by DOE (Fisheries) who, after consultation with Department of External Affairs, will probably request Department of National Defence to arrest the offending vessel. In the meantime the duty destroyer or a destroyer at sea will already have been alerted and be heading for the location, to make the arrest with minimal delay as soon as authorized.

While the system works well, this does not overcome the difficulties of covering large areas and long coastlines in difficult weather conditions. Bad weather is a major factor which may cause an air patrol to be aborted or rendered ineffective, and prevent boardings, although Fisheries Inspectors and the naval crews have strong stomachs and versatile and seaworthy boats for boarding in all but the worst conditions. However, limitations of the units themselves also limit the extent of coverage that can be given in any one mission; thus, a "Tracker" aircraft can fly out for one hour in transit, cover an 80 mile radius patrol area in four hours and return to base for a total 6 hour mission. If there are a large number of vessels to be identified or visibility is poor, the extent of coverage may be much more limited. However, mission coverage is often extended by transiting via patrol to bases in Newfoundland, Labrador or Baffin Island, operating out of base for a further mission and then returning via patrol to home base.³⁴

Environmental Protection and Pollution Control

While Canadian jurisdiction beyond the territorial sea for pollution control has only been extended over the Arctic Waters north of 60° North, Canadian interest in the off-shore areas in respect to pollution extends at least to the 100 mile limits of the "prohibited zones" prescribed under the 1954 Convention.³⁵ The surveillance provided by government departments for fisheries protection also provides for detection of pollution offences. Enforcement, however, is dependent on detection requiring daylight and good weather. Pollution is not detectable in darkness without infra-red

34. Discussions with Maritime Command staff and aircrew

35. *Supra*, note 26

detectors, and is difficult to detect in bad weather. Added to this are the evidentiary problems in prosecution. Under optimum circumstances with the presence of a patrol ship, photographic evidence and pollutant samples can be obtained. In September 1963 a ship causing pollution in the Strait of Georgia off Vancouver, B.C. was spotted by an RCAF aircraft which took aerial photographs while an Air-Sea Rescue Boat obtained oil samples, leading to conviction in the Provincial Court. This was the first case in Canada in which it was possible to match oil taken from the sea with samples from the offending ship's bilges following arrest on the aircraft's report. However, in September 1970, in the case of *The s.s. "Huntingdon"*, after she had been sighted by a Maritime Command "Argus" long range patrol aircraft trailing an oil slick 2 miles long, 22 photographs were taken and the observations of 12 aircraft crew members recorded. As the ship was beyond Canadian jurisdiction the case and recorded evidence were referred to Britain for action in the English courts. British government officials interviewed the aircraft crew members in Halifax in May 1971 and the case was finally tried in the English Central Criminal Court in October 1972, resulting in the conviction of the Master and the Owners after a lengthy process. However, the problems of light and weather conditions prevail regardless of jurisdiction. The current levels of surveillance provide a reasonable anti-pollution coverage, and a more direct jurisdiction over shipping, requiring a greater effort for inspection and enforcement, might be at a disproportionately increased cost.

The government policy of diplomatic rather than aggressive unilateral action in respect to enforcement and prosecution of pollution offences beyond the territorial sea thus depends on flag state prosecution. However, even within the territorial sea, Canada's prosecution of pollution offences has been described as modest in nature and in penalties.³⁶ Indeed, in relation to the costs of ship operation the small fines often levied in the small number of successful prosecutions have been related to "parking tickets". This is not encouraging, but neither is the pollution that originates from the land, including refineries and power stations, which are also indicative of a continuing lack of appreciation of the problem and its effects. Small spills do not make headlines, neither do surreptitious bilge discharges, but tanker owners perhaps have

36. Middlemiss, *supra*, note 1 at 334

some grounds for maintaining that the more spectacular spills from tanker accidents account for only a small proportion of the total ocean pollution.³⁷ However, these measures provide some deterrence and are reasonable considering that 100% anti-pollution surveillance is impossible, weather conditions can be difficult and evidence hard to obtain.

Employment of the Armed Forces in Enforcement

The question may be asked: "Why use expensive sophisticated naval vessels for fisheries protection duties?" It is not limited to the Canadian Forces but has been asked in the armed forces of many of the Western democracies. The traditional roles of sea-power in peacetime have been limited by the changing world order and the retreat of empires, while national concerns have increased over their local sea areas and resources. At the same time the pressures of technical advances and inflated costs have forced maritime states not only to question their naval functions, but to demand greater cost effectiveness in the employment and performance of their armed forces. The *raison d'être* of navies still arises out of maritime defence and the national requirements for use of the seas for transportation, and military diplomacy ranging from support of policies and alliances in national defence to the presence or use of force. Additionally there is the increasing concern for protection and control of resources in or under the sea.³⁸ The basic roles in an ascending scale break down into the main functions of diplomacy, police or enforcement, and military roles. In Canada these are reflected in the commitment to NATO, both as a function of diplomacy bringing economic benefits in trade, and as a defence through collective security. Consequently the contributions of forces to NATO and North American defence are the key factors of Canadian defence policy,³⁹ and the resultant commitment of specific units basically determines the minimum size and composition of the Canadian Forces. This is particularly so of the maritime forces which in wartime would be completely allocated to the allied defence commands and in peacetime have commitments to NATO and North American defence for training purposes as well

37. [1977]4 LMCLQ 623

38. See Ken Booth, *Roles, Objectives and Tasks: An inventory of the functions of Navies*, [Summer 1977] U.S. Naval War College Review 83

39. Canadian Government White Paper, *Defence in the 70s* (1971)

as commitment of units to major exercises and to the NATO Standing Naval Force Atlantic. Defence policy must also take into account the requirements for exercise of sovereignty and independent control over national interests and resources. These may be met by units which would be fully allocated to the allied commands in wartime but which in peacetime remain under national command and control. While maintaining combat ready forces to contribute to deterrence through alliances and collective security, the Canadian Forces must be prepared for employment in purely national tasks.⁴⁰ Additionally there are other commitments assumed from time to time for United Nations peacekeeping, and assistance to other countries in emergency or assistance capacities. The policy themes of sovereignty and security are accordingly combined in the often re-stated roles of:

1. *Sovereignty*: including surveillance and enforcement, and national development;
2. *Defence of North America*: including peacetime operations and training;
3. *NATO*: including peacetime allocations and operations and training;
4. *Peacekeeping*: including on-going U.N. commitments, particularly in Cyprus and the Middle East, which are largely land forces but which from time to time require naval support.⁴¹

The minimum size of Canada's maritime forces is thus largely determined by the requirements for roles 2 and 3, which include 20 to 24 destroyers, 3 operational support ships and 3 submarines, as well as four squadrons of long range maritime patrol aircraft, and two squadrons of anti-submarine helicopters (for operation from destroyers). Additional units are also maintained for national roles and training purposes. Thus, the CS2F Tracker aircraft, previously carrier operated and subsequently slated for disposal, in the wake of

40. D.N.D. review, *Defence 1976* (Canada: Department of National Defence, 1977) at 5

41. Naval support to Canadian U.N. peacekeeping forces has ranged from sea transport and support, as provided by H.M.C.S. *Bonaventure* (aircraft carrier) in 1956 for U.N. forces during the Anglo-French disengagement in Egypt, to deployment of an operational support ship to Cyprus. Destroyers have been deployed in emergency support/evacuation roles, as in the despatch of destroyers to the Mediterranean in contingency support of Canadian peacekeeping forces being withdrawn from Egypt in 1967, and destroyers which were stationed off Vietnam on an emergency contingency basis in support of Canadian peacekeeping troops supervising the armistice and withdrawal of U.S. forces.

Canada's aircraft carrier, have been retained for the coastal aerial surveillance function over the EEZ. Other ships including some of the previous coastal minesweepers and other similar sized patrol vessels are also retained and used principally for personnel training. However, under roles 2 and 3 the main tasks of the operational units, of the defence of North America from submarine launched missile attack and the defence of the North Atlantic sea lanes, determine the nature of the threats of submarine, surface or air launched missiles and torpedo attacks that they must be prepared to meet and combat. This is the multi-threat environment in which they must be equipped and trained to fight, resulting in the increasing sophistication of ships, such as Canada's DDH280 class of air-defence missile, gun, mortar and torpedo armed destroyers, fitted with a complex electronics suit and operating two large ASW 'Sea King' helicopters. Such warships are inherently multi-purpose instruments of policy.⁴² Their complexity and sophistication, however, enhances their capability to carry out the police functions, and the cost-effectiveness of government expenditures and pursuit of national interests demands that they be so employed in addition to their more traditional functions.⁴³ It may become a fine balance of priorities as to the extent that one commitment does not detract from the effectiveness with which the others can be performed, but in a country which cannot afford the manpower, capital and operating cost of additional patrol vessels and aircraft by the separate government departments solely for their individual policing functions, the support of the other government departments in enforcement in the EEZ is an essential task of Maritime Command.

Maritime Command thus provides Canada with a sanctioning force *par excellence*, a back-up to civilian government agencies providing a tangible symbol of law enforcement authority. The actual military role may have seemed limited but, besides being a reflection of the distinction in Canada between the civilian and military areas of responsibility, it is also a reflection of the success of Canada's extension of jurisdiction and management. The value of the military enforcement effort cannot be measured directly any more than can the value of defence capability in peacetime, but neither can the value of municipal or provincial police forces, or of

42. *Supra*, note 38 at 96

43. Middlemiss, *supra*, note 1 at 331

policemen on the beat. It is a question of the optimum use of the means at the national disposal for national goals and support of national interests. This is not necessarily a universal rule; in the United States there is a traditionalist school which would restrict the military to purely military missions. This may lead to a constitutional question of definition of fisheries protection as a military mission, resolved in Canada by the extension of national policies under sovereignty. However, it may also be considered that a greater use of naval enforcement should not be undertaken without strong military necessity to preclude the possible offence that may be more strongly argued in the United States, where the para-military U.S. Coast Guard is the maritime enforcement agency, but is not so in Britain where the Royal Navy provides a full time Fisheries Protection Squadron, nor in Canada where naval destroyers were authorized for fisheries protection under ICNAF.

IV. Legal Problems in Enforcement Jurisdiction

The Informal Composite Negotiating Text (ICNT)⁴⁴ would extend coastal state jurisdiction over the EEZ to the 200 mile limit for all aspects of the zone.⁴⁵ Canada's present jurisdiction is extended unilaterally as regards fisheries,⁴⁶ while jurisdiction over the sea-bed and its resources is retained under the Continental Shelf doctrine of the 1958 Convention.⁴⁷ While the Canadian jurisdiction over fisheries is recognized by the states concerned, there are problems of defining some of the boundaries. This is particularly so between Canada and the United States, over areas of George's Bank between Nova Scotia and Massachusetts, areas of the Strait of Juan de Fuca and in the Dixon Entrance on the Pacific coast, and in the Beaufort Sea. While the Canadian claim to an area of George's Bank is advanced on the basis of the median line between Canada and the New England coast, denial of the median line doctrine in favour of a land based demarcation by a previous treaty favours Canada in the Dixon Entrance. Thus Canada has always claimed territorial rights to the waters of the Dixon Entrance but has

44. U.N. Document A/CONF. 62 WP 10, Third Conference on the Law of the Sea, July 15, 1977

45. *Id.* at Art. 56

46. *Supra*, note 6

47. *Supra*, note 21

permitted U.S. fishermen to fish in the Hecate Strait and Dixon Entrance.⁴⁸ Mr. Romeo Leblanc, the Canadian Minister of Fisheries has admitted that Canada is in for some hard negotiations with the United States, but the preparedness of both countries to come to a common agreement over fisheries shows that the main problem lies in demarcation of ownership of the resources of the sea-bed, believed to contain commercially exploitable gas and oil deposits. Similar problems are also involved in the dispute between Canada and France over French claims based on the islands of St. Pierre et Miquelon in the Gulf of St. Lawrence off the south coast of Newfoundland.

The Charter of the United Nations requires that disputes be settled by peaceful means.⁴⁹ Therefore, in the event of breakdown of bilateral negotiations the disputes should be resolved either by reference to the International Court of Justice or by arbitration. As Canada has refused to recognize the jurisdiction of the International Court in respect to boundary problems in such cases or in respect to measures taken for protection of the environment, there remain the options of continued negotiations or of arbitration. While Canada's claim on George's Bank is based on an International Court decision,⁵⁰ the conservative approach of the court is unlikely to recognize the more contemporary views or considerations involved in Canadian environmental policies which have not yet gained sufficiently wide acceptance as law in the international community. However, the interim agreements between Canada and the United States, and the declared readiness of Canada to submit to arbitration in the event of failure of negotiations enhance good relations between the countries and the sharing of the fisheries resources of the disputed areas. A report has been approved by both countries recommending a joint fisheries commission and shared hydro-carbon access zones as the basic principles of settlement.⁵¹ Talks having produced little progress in defining the boundaries, joint management and access in as yet undetermined zones may give sufficient protection to national interests to permit definition of the shared zones and boundaries. For the fisheries this would be a workable solution, taking into consideration the fish stocks as a

48. J. G. Castel, *International Law, Chiefly as Interpreted and Applied in Canada* (Toronto: Butterworths, 1976) at 256

49. *The Charter of the United Nations* (1945) at Art. 3

50. *The North Sea Continental Shelf cases*, [1969] I.C.J.R. 1

51. *Halifax Mail-Star*, October 21, 1977

whole and their movements, as well as the boundaries and traditional fishing areas. Hydro-carbons will be a more difficult resource to share. While the accord is apparently based on rights of purchase guaranteeing each country access to half the production, there may still be problems of an agreed developmental time table and of royalties and licensing fees. As negotiations continue it is likely that those details will be resolved either by the final bilateral treaty or a commission established under it.

Jurisdiction over Shipping beyond the Territorial Sea

For the time being Canada lives with the limitation of flag-state jurisdiction over shipping in the EEZ in respect to environmental protection. As to matters of jurisdiction over fisheries, even in the more peripheral matters, flag states have been ready to take any necessary action.⁵² However, in respect to environmental jurisdiction and pollution prevention matters this leaves problems of jurisdiction over ships passing through the EEZ but not calling at Canadian ports, and over vessels supplying or tending oil rigs in the EEZ which are usually foreign registered and often operated out of United States ports. The mutual interests of the United States and Canada coming more closely together in this respect, will probably ensure adequate supervision of oil rig tenders.

Implementation of safety measures under the *Canada Shipping Act* is effective in promoting the safety of vessels calling at Canadian ports, but does not preclude an "Argo Merchant" or "Amoco Cadiz" type of catastrophe, particularly of a deep draught VLCC in shallow off-shore areas such as Scatari Bank. While the coastal state may take action to mitigate or eliminate a grave and imminent danger to its coastline under conventions of 1969⁵³ and 1973,⁵⁴ it is action *post factum*, too late to prevent the accident. The fact that the 1973 *Convention on Prevention of Pollution*⁵⁵ has not

52. In response to a routine mention of a minor accident during the boarding and inspection of a Soviet trawler, in which no injury or damages occurred but in respect to which appropriate safety measures were requested, the Soviet response was immediate and unexpected. Not only were greater safety measures assured, but it was also stated that the master would be punished.

53. 1969 *Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties*

54. *Protocol relating to Intervention on the High Seas in cases of Marine Pollution by substances other than oil* (1973)

55. *International Convention for Prevention of Pollution from Ships*, London, November 2, 1973. For more comprehensive prevention of pollution.

yet had a sufficient number of ratifications to come into effect provides more concern to Canada, and there may yet be a need for further unilateral action should there be evidence of an increased threat, as may be caused by new oil terminals in or near Canadian waters. On the other hand, the 1969 *International Convention on Civil Liability for Oil Pollution Damage* is in force providing liability of the shipowner for pollution damage by oil only, but it is limited to vessels carrying over 2000 tons of oil in bulk as cargo and is limited to 2000 gold francs per ton to a maximum of 210 million gold francs, except where the fault or privity of the owner is proved. This is completely inadequate for the costs and damages in an ‘*Amoco Cadiz*’ scale of disaster. Canadian policy and regulations impose strict liability on the shipowner and the owner of the cargo, for costs of pollution, clean-up and consequential damages. Once again, the international measures are not enough⁵⁶ to make up for the present short-fall of Canadian jurisdiction. In the United States where there was initially strong opposition to Canadian unilateral legislation, legislation under the U.S. *Water Pollution Control Act* goes further than the 1969 *Civil Liability Convention* and consequently the United States did not ratify the convention.⁵⁷

The extent of jurisdiction of the ECAREG Vessel Traffic Management System also remains questionable.⁵⁸ The reporting requirements for an in-bound vessel to give 24 hours notice in her initial report provides information on the movements of inbound vessels well beyond the EEZ. Warning notices or advisory information can then be promulgated, but it does not apply to ships passing through the EEZ between foreign ports. It may be argued that such ships pass sufficiently off-shore to preclude being a hazard but in light of the ‘*Argo Merchant*’⁵⁹ and other possible accidents, such as the ‘*Berge Istra*’⁶⁰ this is debatable. With an effective port régime such as Canada’s, ‘rogue ships’ may soon disappear, as oil companies wishing to use Canadian ports are becoming more scrupulous with respect to the ships they employ and, with the

56. See E. Gold, *Pollution of the Sea and International law: A Canadian Perspective* (1971-72), 3 J.M.L.C. 13 at 39 and 44

57. A. J. Kuffler, *The Water Pollution Control Act — U.S. Response to Water Pollution caused by Ships* [1977] 1 LMCLQ 1

58. *Supra*, note 27

59. The *Argo Merchant* grounded and broke up 27 miles off Nantucket Island, spilling 7.6 million gallons of oil, December, 1976.

60. The *Berge Istra*, a new VLCC, blew up and sank in the Pacific Ocean, January, 1976.

current surplus of tanker shipping, old and inadequately equipped ships will find charters harder to obtain. The “*Berge Istra*”, however, was a new ship, and the problem may switch from the one of old ships to a shortage of sufficiently trained personnel to properly man and operate the newer ones. The dangers of navigation in Canadian waters even beyond the territorial sea are thus likely to become more significant, and the considerations of an oil terminal at Eastport, Maine, requiring entry through Canadian waters in the Bay of Fundy, and of a liquid natural gas terminal at Lorneville, New Brunswick, also on the Bay of Fundy, raise the possibilities of increased dangers in a new focal area already well known for its inherent natural hazards of narrow channels, strong tides and preponderance of fog. The possibility of one VLCC in-bound, with another out-bound crossing with one or more Liquid Natural Gas carriers and conventional merchant shipping, as well as local shipping and fishing vessels does not equate to the denseness of traffic of the English Channel, but has great inherent dangers with possibly disastrous consequences. In such a situation there is a strong case for the compulsory extension of Vessel Traffic Management much further to seaward than present jurisdiction permits. In comparison to civil aviation, shipping has remained unrestricted and uncontrolled, following the old principle of the freedom of the seas and under the influence of shipping states and lobbies.⁶¹ The increase of vessel traffic management schemes reflects the recognized need for greater degrees of shipping control, so that if Canada did act unilaterally in such a situation she would likely gain a great measure of support.

Prosecution also raises problems of jurisdiction in respect to offences beyond the territorial sea and the difficulty of effective flag-state action. In some cases flag-states are conscientious, but prosecution through the flag-state may still be a long and complicated process,⁶² while in some cases it is difficult if not impossible to bring the owners into court,⁶³ and the search may end up in a Panamanian filing cabinet.⁶⁴

61. See R. M. M’Gonigle and M. W. Zacher, *Canadian Foreign Policy and Marine Pollution*, *supra*, note 1 at 101

62. *R. v. Federal Steam Navigation Co. Ltd.*; *R. v. Moran* [1973], 3 All E.R. 849 (C.A.)

63. *The Torrey Canyon*. See Gilmore and Black, *The Law of Admiralty* (2nd ed. New York: The Foundation Press, 1975) at 840-843; Gold, *supra*, note 56 at 21

64. *The Arrow*, the Canadian *Torrey Canyon*, grounded in Chedabucto Bay, N.S. See Gold, *supra*, note 56 at 32-34

Hot Pursuit in the EEZ

Hot pursuit is authorized as a means of extended jurisdiction to effect the arrest of a fleeing vessel detected in violation of the coastal state's laws, providing it is initiated within the territorial sea or contiguous zone,⁶⁵ to permit the arrest of the offending vessel on the high seas. There is, however, debate as to the circumstances in which the doctrine may be extended for the arrest of a vessel for an offence beyond the territorial sea and contiguous zone. By the 1958 Convention it may be initiated for the breach of any of the laws of the coastal state within the territorial sea, but by a literal reading of Article 23 it is limited in the contiguous zone to offences in respect to fiscal, customs, immigration or sanitary offences. This confirms the ruling in the case of *The 'I'm Alone'*,⁶⁶ the Canadian registered schooner detected 10.8 miles off the Louisiana coast while rum-running, which after a lengthy pursuit was sunk by a U.S. Coast Guard Cutter. The Court held that the pursuit was legal and that the United States could use the necessary and reasonable force to effect boarding and seizure. While it may be asked under which heading, fiscal, customs or sanitary rum-running fell, it is noteworthy that the 1958 Convention does not include fishing, and by the then existing law would limit such authority for fisheries to a maximum of 12 miles off-shore or from the baseline of the territorial sea. The law is imprecise as to the extent of the doctrine to offences against laws and regulations respecting the sea-bed and its resources on the continental shelf but, on the other hand, the ICNT would extend the doctrine to offences in respect to the EEZ.⁶⁷ One learned writer⁶⁸ has maintained that under present international law the right does not apply to areas of purely fisheries jurisdiction. State practice, however, has indicated an increasing application of the doctrine for fisheries violations in fisheries zones beyond the territorial sea.

In the case of *The F/V 'Taiyo Maru'*⁶⁹ a Japanese fishing vessel was arrested on the high seas 67.9 miles off-shore after hot pursuit had been initiated on detection of a fishing violation 10.5 miles off

65. 1958 *Geneva Convention on the High Seas* at Art. 23

66. *The I'm Alone (Canada v. United States)* in Hackworth, 2 *Digest of International Law* (Washington: Govt. Printing Office, 1941) at 703-708

67. *Supra*, note 44 at Art. 111

68. N. M. Poulantzas, *The Right of Hot Pursuit in International Law* (Leyden: Sijthoff, 1969) at 186

69. (1975), 395 F. Supp. 413 at 415 (D.Me.)

Monhegan Is. The defence moved for dismissal of the case on the contention that as a signatory to the 1958 *Convention on the High Seas*, the United States had limited its territorial authority to commence hot pursuit from the contiguous zone to the areas prescribed and could not seize a vessel on the high seas for breach of a domestic fisheries law. It was held that being a signatory had not limited U.S. authority, as the language of Article 24 of the Convention did not preclude a state from establishing a contiguous zone for purposes other than those enumerated. Therefore, hot pursuit from an exclusive fisheries zone did not violate the Convention and jurisdiction was not barred. In a similar Canadian case in the same year, the F/V "*Koyo Maru*" No. 2⁷⁰ was detected in breach of Canadian fisheries regulations in Queen Charlotte Sound, tracked by aircraft and arrested by a destroyer on patrol off Vancouver Island. There was a break in the aerial surveillance but the destroyer sighted her just within the fisheries closing line, heading for the high seas. Records did not indicate whether hot pursuit was properly initiated although there is no doubt that it was effective, the "*Koyo Maru*" being arrested some four miles outside the closing line. The defence made a motion for dismissal for lack of jurisdiction which was dismissed on the basis that the right of hot pursuit was properly exercisable from a fisheries zone.

In a commentary on the right of hot pursuit, Eric Allan Sisco⁷¹ similar to Poulantzas⁷² limited the right of hot pursuit under Article 23 of the Convention to an act for which the contiguous zone was established that would have effect on the territory or territorial sea of the coastal state, and that therefore this does not extend to authority for hot pursuit from a fisheries zone, as the United States did not mitigate the territorial limitation of its authority. Mr. Sisco therefore argued that "the court's finding that the United States did not agree to refrain from the initiation of hot pursuit in a contiguous fisheries zone is logically flawed". Apart from the direct national interest which had prompted the declaration of a contiguous fishing zone and passage of domestic fisheries legislation in the first place, a breach of such regulations and depletion of the fisheries resources by unrestricted foreign fishing would certainly have an effect in the territorial sea and within the state. There would be few (or no) fish,

70. *The "Koyo Maru" No. 2, R. v. Itoh* (April 23, 1975), No. 164/75 (B.C.C.A.)

71. E. A. Sisco, *Hot Pursuit from a Contiguous Fisheries Zone* (1976-77), 14 S. Diego L. Rev. 656

72. *Supra*, note 68

and consequential economic effects on the people, which would seem due cause for the preventive action taken and its enforcement. As Lord Reid commented in the House of Lords: "The lifeblood of the law is not logic but common sense".⁷³ Thus, where a contiguous zone is established, be it a 12 or 24 mile contiguous zone or a 200 mile fisheries or exclusive economic zone, in respect to which laws are enacted it is logical and common sense that enforcement stems from the legislation and that hot pursuit is a right arising out of the zone *qua* contiguous even though otherwise an area of the high seas. To give the right to establish such a zone, as being recognized by international laws, but to preclude the right of hot pursuit in its enforcement is neither logical nor common sense.

In implementing such extended right of hot pursuit, however, new complications may arise. For instance, where the hot pursuit of a vessel from the EEZ of one state goes into the adjacent EEZ of that vessel's own state, could government vessels of that state claim jurisdiction to force a cessation of pursuit? In the Canada-United States situation in which agreement on fisheries jurisdiction and easy working relationships tend to prevail this may be an academic question. In cases of lengthy pursuit in which the fleeing vessel reaches the EEZ of her flag state while under hot pursuit from the Canadian (or another distant) EEZ this may indicate ineffectiveness of action by delay and slowness to effect arrest, a maritime laches, but in other cases of shorter distances the factor could be critical if the hot pursuit were broken off on entry into the flag state EEZ. However, under the ICNT the problem is plainly dealt with by the overriding statement that hot pursuit ceases on entry into the territorial sea of the pursued vessel or of a third state,⁷⁴ continuing the present principle of international law.⁷⁵ This development of international law therefore has a basis of previous international law by cases and custom to form the further interpretation of international law should UNCLOS III fail to produce a final treaty.

Legality and Authority for the Use of Force

The arrest of an offending vessel may require the display or the use of some degree of force. The critical issue is what degree of force is justified? In the case of *The 'I'm Alone'*⁷⁶ the Mixed Committee of

73. *R. v. Smith (Roger)*, [1975] A.C. 476, 500

74. *Supra*, note 44 at Art. 111(3)

75. *Supra*, note 65 at Art. 23(2)

76. *Supra*, note 66

Arbitration held that the necessary and reasonable force to effect the boarding, searching, seizing and bringing into port of the suspected vessel might be used, and if sinking should occur incidentally the pursuing vessel might be entirely blameless. However, in the U.K.-Denmark fisheries dispute, the firing of a solid shot without warning by a Danish frigate on the British trawler '*Red Crusader*'⁷⁷ was held to have been an excessive use of force, even though the trawler had escaped from arrest and was making off with the Danish boarding party virtually locked up.⁷⁸ The use of force has also been supported, where deemed necessary, by the U.N. Security Council,⁷⁹ as where the use of force was authorized to prevent the entry into Beira of ships carrying oil for Rhodesia. The extent of force used must clearly consider the consequences, including the loss of human life and the possible damage or injury to third parties. Further, there is the possibility that either the action taken or the arrest will not be upheld in court with liability ensuing for improper arrest and damages. However, in most cases a vessel under hot pursuit is unlikely to continue her flight when pursued by a naval vessel. On the other hand where an action to arrest is unsuccessful, as in the case of the U.S. West Coast fishing vessel boarded by a Canadian fisheries inspector from a small Fisheries boat, which refused to be arrested and made off into U.S. waters with the inspector still onboard, prosecution through the flag state may prove an adequate alternative. That case also showed the lack of back up enforcement capability and the unsatisfactory capability and characteristics of that Fisheries vessel, which was little faster than the fishing boat and was only able to recover the inspector with difficulty and danger.

Canadian authorities in the EEZ are likely to consider all aspects of the situation before authorizing the use of the minimal force necessary. This should not provide encouragement to violators who seek to leave without regard to pursuit and find themselves looking at the wrong end of a gun. The restrained but resolute demonstration of authority will usually achieve the end. Where this is not so, there must be an authoritative decision whether the end justifies the means. While it may be necessary for the credibility of jurisdiction to make an arrest after a flagrant violation or a series of violations, the end may also be achieved by diplomatic means, especially in the

77. *The Red Crusader* (1962), 35 I.L.R. 485

78. *Supra*, note 68 at 236-237

79. *Id.* at 252

case of fisheries by the revocation of licenses and by sanctions. In the Latin-American states, and even the United States, this may be considered too weak an approach, inviting further violations rather than preventing repetition by swift and stringent prosecution. However, in the Canadian EEZ the licensing and quota system provides a useful means of ensuring compliance. The decision as to the use of force is thus basically a ministerial one in the circumstances of the case, though the final decision as to the extent of force or action to be taken may be with the commanding officer of the naval vessel,⁸⁰ as the prerogative and risk of command. In certain situations in which only he can judge, requirements for enforcement of authority or to effect the objective may require some degree, or higher degree, of force in circumstances which give insufficient time for reference to higher authority. This has not been the Canadian experience, but is one which is often discussed in naval seminars on law of the sea and in briefings by naval staffs. Force has not had to be used, although on occasions the quick response and inherent authority of a naval vessel have been sufficient to effect the arrest. This reflects not a display of force but the success of the underlying diplomacy in acceptance of jurisdiction and the policies of management and resource sharing under which the revocation of licenses or quotas may be a most effective weapon.

The use of naval ships in fisheries protection, however, is a tangible symbol of authority and resolve, and experience has shown that governments are usually reluctant to involve themselves or their ships in incidents or challenges to such enforcement. However, should there be a change of diplomatic climate, in which a state would wish to dispute jurisdiction over the EEZ, it is more likely to be a challenge supported by demonstrative superiority rather than by an open use of force. It is unlikely that either side would wish to slide into open warfare,⁸¹ so that the demonstrative force must be suited to the situation and have flexible capability controlled by effective carefully considered rules of engagement. This is particularly so for the enforcing units for whom good surveillance capability and data co-ordination are vital. Canadian naval ships, especially the DDH280 class are unsuitable from several aspects such as light ASW design and construction and thin-skin

80. Discussion with staff of the Commander, Maritime Command

81. D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975) at 183

vulnerability, as well as complexity and cost. On the other hand they are fast, with excellent communications and information co-ordination, while their helicopters can provide surveillance over a wide area. The gun is, however, essential for warning and for the minimal show of force, so what does a naval ship without a gun do in this role? For navies in a possible confrontation area the specialist roles developed for ships, particularly ASW, may thus be detrimental, as is an over-preponderance of missilery. Naval staffs must therefore consider not only the wartime purpose but a general purpose capability in design that will provide flexibility and effectiveness in peacetime or periods of tension. In a small ship, "general purpose" can, by seeking to place too little of too much in too small, frustrate its own ends, but the Soviet Navy has shown the Western maritime nations how a judicious weapon mix can provide the necessary trumps for most surface situations, for example, the "Krivak" class; while their cruisers have developed their blue water ocean capability to range from flag showing and surface gun capability to advanced missilery and ASW. It is the law of the sea that dictates the practicalities of the use of military units in peacetime, related to the area and modes of exercise. Changes in the law as well as changes in political amity or tension bear on the nature of enforcement as well as deterrence.⁸² Naval staffs as well as their ships must be capable of appreciation and reaction to a wide range of situations; however, the role of the diplomat is a vital adjunct in a partnership for extension and acceptance of jurisdiction, as well as its enforcement.

Canadian Success in the EEZ

Canadian success commenced with the early initiatives in UNCLOS III to gain acceptance of the principle of the EEZ, and in the working of the conference and resolution of conflicts and problems by the procedures of consultation and consensus rather than votes. Despite critical differences on some issues and viewpoints, the conference has thus continued to make progress, albeit haltingly, from session to session. While there are those who doubt the final outcome of a treaty and success in UNCLOS III,⁸³ the main elements of the future law of the sea are clear, including:⁸⁴

82. *Id.* at 189

83. *E.g.*, see R. J. Samuelson, *Law of the Sea Treaty-Talk, Talk, Talk and More Talk*, International Report National Journal (August 27, 1977) at 1337

84. Arvid Pardo, *The Emerging Law of the Sea and World Order*, Banquet

1. a 12 mile territorial sea, measured from straight baselines with very flexible criteria, subject to the right of innocent passage under re-defined conditions;
2. some measure of unimpeded passage through straits used for international navigation, subject to certain safeguards for the littoral states;
3. a 24 mile contiguous zone, measured from the baselines of the territorial sea;
4. a 200 mile exclusive economic zone measured from the territorial sea baselines with rights over resources and a comprehensive jurisdiction subject to innocent passage and an undetermined extent of flag state jurisdiction or safeguards;
5. an international régime of some kind for the administration of resources of the deep sea-bed as the common heritage of mankind, with some degree of jurisdiction or benefit sharing over the sea-bed resources beyond 200 miles on the continental margin;
6. recognition of archipelagic principles; and
7. a duty of preservation of the environment which will give some greater recognition of coastal state jurisdiction and possibly port state jurisdiction in respect to pollution by ships.

Many Canadian initiatives and policies will be seen in this and, whether there is a treaty or not, the elements are becoming accepted by a greater number of states and will likely form the basis of a development of law of the sea by custom if not by treaty. It will give Canada much of what she wants and still leave the door open for further negotiations on a regional or bi-lateral level, while the trend towards a greater regulatory rather than advisory role for IMCO in respect to anti-pollution measures may also develop. Canada has been a prime mover in the development of international law in international fora as well as in the national sense by unilateral and bi-lateral actions. The fisheries régime of the EEZ is a unique success of diplomacy, management and enforcement, assuring Canada of protection of her fisheries and of a prime share, albeit at the cost of extensive management, conservation and research efforts. Costs for this will continue to rise in 1978 and, while foreign quotas have been drastically cut, strict conservation measures have also been applied to the Canadian fisheries to make sure that foreign over-fishing is not replaced with Canadian over-fishing. As Romeo Leblanc said:

address, Proceedings of the 10th Annual Conference on the Law of the Sea, University of Rhode Island, 1976, at 403 et seq.

We see 1977 as the bottom of the trough for the groundfish catch. With good management it should be possible within ten years to restore groundfish stocks to their full potential with an annual yield of 1.6 million tons, which is more than double the 1977 total allowable catch.⁸⁵

With such benefits, the Canadian fishing industry can look forward to a re-birth, and already provincial plans for redevelopment of the fisheries in Newfoundland and Nova Scotia are being made.⁸⁶ There have been substantial reductions in foreign quotas of cod, redfish and flatfish off Newfoundland leaving the foreign fleets in 1977 with the bulk of the allowable catches in capelin, roundnose grenadier, silver hake, argentine and squid; types not generally fished by Canada. In 1978 foreign quotas of redfish will be reduced further and the foreign quotas of cod will be limited to the Labrador Sea. Also in 1978 an additional \$4 to \$6 million will be spent in fisheries research, amplified by more detailed reporting by foreign vessels and selected foreign vessels which will carry Canadian scientific observers, and a number of co-operative survey experiments have been initiated with foreign research vessels. In DOE (Fisheries) Regional Operations Centres, FLASH, the Foreign Fishing Vessels Licensing and Surveillance Hierarchical Information computerized data system keeps a constant record of vessels, catches and quotas, including detailed information on each vessel licensed, what she can fish for, where and when, and with what gear. While initially a means of enforcement and control, the system is in fact also a tool for research and rehabilitation of the fisheries, in the long term interests of the foreign fishing vessels themselves.

While Canadian regulations provide for penalties of fines up to \$25,000.00, confiscation of catch, gear or even the vessel, as well as loss of licenses and quotas, or even imprisonment up to two years, the actual penalties invoked have been moderate — fines of \$5,000.00 to \$7,000.00 plus seizure of the catch and gear. This is in marked contrast to a U.S. fine of \$250,000.00, and it is noteworthy that among some 500 foreign fishing vessels licensed in 1977 to fish in the Canadian EEZ over different times, there were only 15

85. Report of the Minister of Fisheries, Ottawa, *The Halifax Mail-Star*, October 18, 1977

86. See *The Halifax Mail-Star*, December 15, 1977: a \$2.5 million provincial subsidy programme for the construction of 20 new 65 foot Nova Scotia inshore trawlers.

foreign violations. While it is quite possible that not all violations have been detected or all catches maintained absolutely within the prescribed quotas, the verification by boarding and surveillance, as against the small number of violations, most of which were minor infractions of area or license dates, would seem to confirm the Minister's report of a smooth and effective transition.⁸⁷

The Future of the Canadian EEZ

The Future of the EEZ in the Law of the Sea

Arvid Pardo commented on the EEZ as one of the main elements of the future law of the sea.⁸⁸ As a principle it has been propounded or accepted by most important areas or states, the early Latin American principles,⁸⁹ the declarations of the African states,⁹⁰ and the unilateral declarations of the two 'super-powers' as well as the major states with interests in shipping, fishing and deep sea-bed technology and research.⁹¹ In the Middle East, Saudi-Arabia, initially aligned with the Third World against the Western nations, now supports the 12 mile territorial sea and a 200 mile economic zone, and has placed reliance on the median line and equidistance principles to resolve disputes over demarcation problems of off-shore boundaries.⁹² As a state with significant resources at its disposal, Saudi-Arabia exerts considerable influence in the Middle East and it is important that in that area, with the exception of the problem of transit through straits, the Saudi position is generally in alignment with the Western position and developments in UNCLOS III. In Canada's case it has gained wide acceptance by the interested states through bilateral treaties. Its effects are causing a general re-deployment of foreign fishing, barred off Iceland, and drastically reduced by the U.S.S.R. which introduced tough quotas in the

87. See Middlemiss, *supra*, note 1 at 336. However, Middlemiss is not correct in the passivity of enforcement techniques. While most of the effort is in surveillance, it is a watchful supervision which is essential to enforcement of the licensing system; while boarding which is actively pursued, goes to supervision of quotas and methods.

88. *Supra*, note 84

89. *Declaration of the Latin American States on the Law of the Sea* (Lima Declaration, August 8, 1970)

90. *African States' Regional Seminar on the Law of the Sea*, Yaoundé, June 20-30, 1972

91. United States, U.S.S.R., European Economic Community, Norway, Denmark, Angola, Argentina, Bangladesh, Costa Rica.

92. J. P. Piscatori, *Saudi-Arabia and the Law of the Sea* (1977), 29 U.S. Naval War College Review 53

Barents Sea for 1978,⁹³ while Soviet fishing in the EEC area has been reduced to quotas in ICNAF areas of mostly low value fish.⁹⁴ Many countries have idle fishing vessels, including Britain and West Germany, the latter with 40 modern stern trawlers with the latest freezing and processing facilities searching for new fishing grounds.⁹⁵

While the generally accepted limit of the EEZ is 200 miles,⁹⁶ this limit has not been unanimously accepted, particularly by Canada, subject to compromise over the benefits of the outer reaches of the continental shelf⁹⁷ and the rights of the coastal state to exploration and exploitation of resources,⁹⁸ even though payments or contribution in kind are called for from the coastal state.⁹⁹ Thus, if there is a treaty some form of control or supervision of exploitation by the coastal state on the continental margin beyond 200 miles will probably be exercised by the International Sea-bed Authority, while the resources of the deep sea-bed would come under that authority. To satisfy what would otherwise possibly be a blocking vote by the land-locked and geographically disadvantaged states, an equitable arrangement of benefits is essential in respect to the areas beyond 200 miles. On the other hand, fisheries stocks beyond the 200 mile limit on the continental margin would be vulnerable to over-fishing, affecting the stocks within the limit, and thus need regional management.

Canadian Jurisdiction and Authority in the EEZ

While the 1958 Conventions are generally passé, the Convention on the Continental Shelf may remain a basis for states claims until it is replaced by a new treaty. In the absence of a new treaty, the principles of the 1958 *Convention on the Territorial Sea* would also continue, though modified by customary acceptance of a breadth of 12 miles, which would remain subject to variations of claims by individual states. Canada's 12 mile territorial sea would be in keeping with international law developed in the past and evolved by custom. The 200 mile EEZ being accepted, there would remain the

93. *The Times*, London, September 28, 1977

94. *The Times*, London, October 1, 1977

95. *The Halifax Mail-Star*, October 18, 1977

96. ICNT, *supra*, note 9 at Art. 57

97. *Id.* at Art. 76

98. *Id.* at Art. 77

99. *Id.* at Art. 82

question of jurisdiction over foreign shipping in the EEZ, in respect of which the right of innocent passage would continue, but the re-definition, although accepted to preclude damage to the environment, would not be re-modified and would be open to interpretation and probably subject to a greater degree of coastal state legislation.

The principle of baselines for measurement of the territorial sea is well established and would continue, though their application would become more liberal. In Canada's case this could result in final closure of the Gulf of St. Lawrence, the Bay of Fundy, Queen Charlotte Sound and the Dixon Entrance by baselines rather than fisheries closure lines, turning those bodies of water into inland waters, but having little effect on Canada's off-shore claim in respect to the EEZ. Management of fisheries would continue in the EEZ, while beyond the 200 mile limit the regional approach would tend to be followed, with a persuasive influence of modifications to quotas inside the EEZ as an alternative. However, in areas of conflict Canada's adeptness at diplomacy may pull her through some further disputes where joint interests are concerned by bi-lateral or multi-lateral conventions. On the other hand, Canadians can take a tough stand, as in a dispute with the Soviet Union before establishment of the EEZ when Canadian ports were closed to Soviet vessels.

Protection of the Environment

Canada has used her jurisdiction in the territorial sea and a tough port régime to impose safety standards on shipping using her ports, and as a basis for vessel traffic management. In return shipping has been handled expeditiously and benefitted through improved services. The 80% voluntary compliance with ECAREG is a good indication that 100% compliance on a compulsory basis will be feasible, and that inspections under the *Canada Shipping Act* will weed out the sub-standard ships. This jurisdiction can continue without a Law of the Sea Treaty but the question remains whether this is enough. In UNCLOS III, at the fifth session it became clear that Canada's extreme stand was not acceptable and her policy may have to be considerably modified.¹⁰⁰ On the other hand the United States is taking an increasingly tougher position herself in respect to

100. See M'Gonigle and Zacher, *supra*, note 61, giving a review of the development of Canadian policy and its progress in international fora.

pollution prevention¹⁰¹ and the movement in IMCO to combat tanker accidents and pollution, and to drop the “consultative” aspect may be the harbinger of acceptance of the Canadian viewpoint. However, in seeking full coastal state jurisdiction over construction, fitment and manning standards Canada faces a broad spectrum of states with shipping interests, including some of the developing countries with maritime ambitions, who together pose too strong an opposition to individual coastal state standards. Such standards may therefore be attained more easily through international regulations, in which IMCO will have the key role. This would be in keeping with the provisions of the ICNT.¹⁰²

In respect to pollution from vessels, the ICNT proposal is based on the development of international rules and standards for the prevention and control of pollution, to be developed through the competent international organization, presumably meaning IMCO. It would then require flag states to enact laws and regulations in respect to their shipping having at least the same effect as the international rules and standards, while permitting coastal states to enact laws and regulations in respect to their EEZ giving effect to the generally accepted international rules and standards. While the intent of this is clearly to set these standards through IMCO, the differences of interest of the flag states and the coastal state may be developed into a double, or higher standard by sub-paragraph 3 of Article 212, permitting states in the exercise of their sovereignty within their territorial sea to establish national laws and regulations for the prevention of pollution from ships, except that such laws should not hamper ships on innocent passage. In recognizing the double standard, the article returns us to the basic problem of who sets what standards where? The collision of two 330,000 ton tankers, reported on 16 December 1977,¹⁰³ 20 miles off the coast of South Africa draws attention to another aspect of the problem of standards. These ships were modern, well fitted sister ships and it is likely the problem lay in personnel standards and training rather than breakdown. Coastal states are justified in questioning the efficiency of international standards and regulations until they see

101. U.S. *Water Pollution Control Act* and the *Ports and Waterways Safety Act* provide legislation under which tough regulations are being developed.

102. ICNT, *supra*, note 44 at Art. 212

103. Halifax *Mail-Star*, December 16, 1977, reporting the collision twenty miles off Port Elizabeth, South Africa, of the two sister super-tankers *VenOil* and *VenPet*.

less opposition from the maritime interests and more concerted efforts by the maritime states to regulate themselves.

Article 212 may provide a further catch-straw for coastal states in sub-paragraph 5, on the grounds that a particular clearly defined area of their EEZ, for technical and ecological reasons, requires the adoption of special mandatory methods. This would seem to cover the *Arctic Waters Pollution Prevention Act*, but is limited by the cliff hanger that the adoption of special measures can only be after consultation through the international organization (IMCO) with any other countries concerned. This may be read to mean other countries concerned with that particular area, or merely any country concerned with those sorts of regulations and standards. Even without specific definition of that, the consultative process is a sure method of delaying and probably in the long run preventing any such regulations unless they are declared unilaterally. Further, the enforcement provisions under Article 221¹⁰⁴ do not provide authority, even in the territorial sea for the enforcement of national laws other than those based on the international standards. Such provisions in the draft do not argue well for the extension or implementation of extended coastal state jurisdiction without a treaty. However, without a treaty the way may still be open for a sufficiently aroused lobby of coastal states, including Canada and the United States, to seek higher standards and stricter action through IMCO, which may then also be the prelude to coastal state legislation of jurisdiction.

So far IMCO has been a consultative organization and as such unsuccessful in implementing sufficiently high standards for pollution control, liability or prevention. In 1973 the administration of the American Environmental Protection Agency proposed the creation of a Maritime Environment Protection Committee within IMCO, to preclude a similar body in UNCLOS III in which developed countries would have less say, and to discourage demands for broad coastal state jurisdiction by providing IMCO with a body to set standards for all the seas, including special areas.¹⁰⁵ Now the United States is pressing IMCO for action on tanker safety¹⁰⁶ and is holding unilateral action as a veiled threat. Among the shipping interests, however, it is noteworthy that the Liberian Shipping Council is urging the Liberian Bureau of

104. ICNT, *supra*, note 44 at Art. 221

105. See M'Gonigle and Zacher, *supra*, note 61 at 135

106. [1977] LMCLQ 609 at 623

Maritime Affairs to implement regulations requiring Liberian registered ships to have six-monthly inspections and spot checks, to eliminate unsatisfactory ships from Liberian registry. Within IMCO the wind of change is also indicated by the proposed change of name, deleting the word "consultative", signifying a move towards a more authoritative and regulatory role, helped by the growth of membership including many coastal states which will diminish the influence of the previously controlling maritime lobby. In this light, the Canadian stand on standards may take on a new leading role in the international organization to achieve generally applicable high standards while recognizing the requirements for coastal state jurisdiction over certain special areas for environmental and ecological reasons, such as the Arctic, and other areas of particular hazards.

With development of a new international standard in respect to shipping safety and the influence of Canadian standards in the Canadian port régime, the greatest danger to the environment in the approaches to port may be adequately controlled. There remains the aspect of the extent of the effects of any disaster off-shore. Canada recognized and acted on this in the Arctic, combatting the threat with stringent regulations,¹⁰⁷ which nevertheless provide additional services without which such shipping operations would be prohibitively hazardous and in the event of serious ice conditions, impossible.¹⁰⁸ However, the possibility of human error causing a grounding or collision off-shore remains and would not be prevented by flag state jurisdiction. It may be debatable whether it would be prevented by coastal state jurisdiction, but in that case the coastal state being aware of the danger would have authority to impose such measures as would be most likely to preclude or minimize the risk, which the flag state perhaps would not appreciate even if it were in a position to do anything about it. However, just as the flag states object to the possibility of multiplicity of standards that might result from coastal state jurisdiction, how can a multiplicity of coastal states take adequate measures for specific dangers or dangerous areas directly off-shore? This is recognized in

107. *Nordreg*, Regulations issued under the *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c.2

108. The s.s. *Manhattan*, even though she was specially reconstructed for operations in the Arctic ice in the attempt to prove a commercial exploitation of the Northwest Passage by tankers for Alaskan oil, was defeated by the ice. Without the help of the C.C.G.S. *John A. MacDonald* she would have been trapped in the ice.

the provisions authorizing coastal state jurisdiction in respect to ice covered areas¹⁰⁹ which, if accepted, will give authority for Canada's unilateral legislation in the *Arctic Waters Pollution Prevention Act*. This was a major success for Canada's stand but was only achieved by unremitting efforts of her diplomats and by the separation of the Arctic as an exception which was of little concern to most maritime states.¹¹⁰ The application of Part XX of the *Canada Shipping Act*¹¹¹, (Pollution), to the Fisheries Zones under the *Territorial Sea and Fishing Zones Act*, albeit in the extension of the territorial sea to 12 miles in 1970, may be a precursor to further pollution control zones in the future. In such event, the reservation precluding the jurisdiction of the International Court of Justice would put the Canadian action beyond legal challenge, subject then to the adequacy of enforcement.

In the event of disaster, when the ship cannot be saved, or is a direct threat, intervention becomes necessary for the protection of the environment rather than the safety of the ship. In the case of the Portuguese trawler "*Vasco del Oro*" in St. John's, Nfld., the ship being within Canadian jurisdiction of the inland waters, was initially towed out to seaward but broke adrift and went on the rocks in the harbour entrance, where she was burnt to preclude any pollution from the oil in her bunkers. This came under the *Canada Shipping Act*¹¹² which also provides for the recovery of costs of such action.¹¹³ Beyond the 12 mile limit Canada might act under the 1969 Convention¹¹⁴ but the limited extent of ratification of this convention and the increasing tanker traffic and continuing casualties point to the requirement for greater coastal state jurisdiction. The general practices of shipping, as bilges are pumped by freighters and tankers clean tanks or discharge ballast notwithstanding "load on top" methods, still cause concern. With the moves to improve the standards of flag state registers,¹¹⁵ the pressures put on sub-standard tanker owners through international measures and operational competitiveness may force them to seek further loopholes in jurisdiction and havens of less particular

109. ICNT, *supra*, note 44 at Art. 235

110. See M'Gonigle and Zacher, *supra*, note 61 at 142

111. S.C. 1971, c. 27, s. 727(2)

112. *Id.* at s. 729: Removal of ships in distress.

113. *Id.* at s.729(2) and s.734(2)

114. *International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties*, Brussels, November 29, 1969

115. *Supra*, note 106

registry to enable them to continue operations. In such cases as are detected, the difficulties of successful flag state prosecution are unlikely to give satisfaction to the coastal state, but Canada would be faced then even in the areas where traffic management systems already exist, with the expense and enforcement efforts necessary. However, the jurisdiction to take police action to arrest a ship and bring her into port for prosecution, and the ability to inflict a high penalty, could provide a more significant deterrent.

In respect to direct control of shipping for safety purposes, the capabilities and limitations of radar and navigational fixing aids from shore will limit the area covered from any one control station. Advisory control would not preclude further human error, but would provide a means of more directly giving ships advice and warnings of the area that they are in. Three degrees of shipping control in the EEZ are therefore possible:

- a. *Direct Control* through Vessel Traffic Management, extending beyond the 12 mile limit to 25 miles or the limitation by radar range off-shore;
- b. *Advisory Control* through Vessel Traffic Management, beyond the area of Direct Control to 50 miles offshore; and
- c. *Interventionary or Police Control*, with the right to
 - (i) enforcement of pollution regulations and
 - (ii) intervention including rights of arrest and prosecution and jurisdiction over casualties to the full limits of the EEZ.

The extension of ECAREG and NORDREG measures, together with the attendant benefits to shipping could provide the means, though the authority may yet have to be created unilaterally. In that event, the extent to which similar standards are developed internationally will be a considerable factor in the readiness of states to accept unilateral enforcement by individual coastal states.

The Continental Shelf

Canada having reserved her rights in respect to the continental shelf to the full extent of the continental margin under the 1958 Convention,¹¹⁶ while being prepared for some form of compromise in respect to the benefits from those resources under the terms of a final treaty is not likely to compromise if there is no treaty. With no accepted document of international law to rescind or modify the 1958 Convention or its principle, Canadian jurisdiction would

116. *Supra*, note 21

continue. The technology to exploit these resources is vested in multi-national corporations which already comply with Canadian jurisdiction. Conflicts may develop with regard to the ownership of particular resources in disputed areas but the success of diplomacy as in the past¹¹⁷ and in the present¹¹⁸ should provide resolution to similar problems in the future.

V. Future Enforcement in the EEZ Fisheries Management

Licensing of foreign vessels and joint ventures will continue to provide for foreign participation in Canadian fisheries resources. To participate, foreign states will continue to accept Canadian jurisdiction and the degree of enforcement effort therefore is unlikely to change in degree or the effort required. However, the policy of the Minister to increase Canadian quotas as Canadian capability increases will, if the growth of resources and the increase of total allowable catches does not increase in proportion, reduce foreign quotas and increase the possibility of violations. It is likely therefore that penalties for violations will become stiffer in respect to individual offenders, and that action in certain cases will include revocation of the licence and quota. Apart from the effect on the individual offenders, the growing demand for fish food and the general re-alignment and relocation of fishing efforts under the general imposition of EEZs, will make such action an effective lever on foreign states. Fines mean loss of foreign currency, while confiscation of gear and a catch is a much heavier penalty than the individual fine may be, although the one may be borne by the state while the other must be borne by the individual skipper. The loss of fish quotas is also a value in currency as well as in loss of that portion of food supply. Foreign fleets are in Canadian waters to make money and will not prejudice this by violations, as evidenced by the importance that countries such as the Soviet Union put on their representative in Halifax.

Also, as experience is gained and techniques of information compilation are improved, there is an increasing fisheries intelligence capability. This is provided not only by surveillance of

117. *Agreement relating to the Delimitation of the Continental Shelf between Greenland and Canada*, done between Denmark and Canada, Ottawa, December 17, 1973

118. Negotiations between Canada and the United States with respect to George's Bank. *Halifax Mail-Star*, October 21, 1977

the fishing vessels and their reports, but by the greatly increased scientific knowledge of the fish. This provides a greater ability to assess the state and movement of the fish stocks and what any individual fishing vessel, operating in a known area with known gear is actually taking. The FLASH system and computer feed enables quick verification of aircraft surveillance sighting reports and spotting of violations. While this is still susceptible to breaks in surveillance in bad weather or fog, after one or two days of reasonable surveillance for verification and up-date, the system and plot are up-dated again. Even in the interim, the computer feed input will provide a reasonably accurate picture of the known movements. Violations and the consequential penalties are therefore just not worth deliberate breach of the regulations.

Prosecutions will remain the prerogative of Canada as the coastal state, with the further follow-up of supplementary action between Canada and the flag state. There is therefore no necessity to depend on the flag state for any action, although such action is likely to be taken by flag states themselves to regulate their own fleets and protect their licences. Port state jurisdiction is not likely to be involved except in areas of joint or regional fisheries management. Such areas would be ones of joint management such as George's Bank, and the outer areas of the Continental Shelf beyond the 200 mile limit. In such cases, the treaty evolved will specify some form of mutual enforcement authority so that either coastal state or port state jurisdiction could apply. However, in the case of multi-national regional management, there may still be considerable opposition to any large extension of coastal state jurisdiction for prosecution, and therefore violations on the outer continental shelf beyond the 200 mile limit may still remain a flag-state prerogative.

Future of Environmental Protection

The port régime for enforcement of safety standards is effective for improving the standards of ships calling at Canadian ports. Similarly, the Vessel Traffic Management Systems are also effective for increasing the safety of ships entering and leaving Canadian ports where such systems are in effect. Beyond the 12 mile limit the jurisdiction is, however, inadequate in respect to both standards and pollution prevention and in respect to enforcement of the existing international standards. The inadequacy of enforcement has also been illustrated by the low proportion of prosecutions and the low

penalties often awarded in successful cases. Considering the large amount of transit shipping which passes through the Canadian EEZ, particularly off the east coast forming the majority of trans-Atlantic shipping between the northeastern seaboard of the United States and northwest Europe, this is inadequate to meet Canadian environmental protection requirements. However, given an extended jurisdiction with degrees of Direct, Advisory and Interventionary Control, with the present level of surveillance and enforcement capability, it becomes a question of priority and the degree to which the capability can be employed for enforcement of the controls and anti-pollution measures.

To control all shipping in the EEZ is out of the question, and contrary to the doctrine of innocent passage, but the necessary enforcement in respect to violations of regulations, be they by international convention or by coastal state legislation, is essential. Thus, in the event of violation it is not sufficient to take the evidence available by report and possibly photographs for transmission to the flag state for action. The standard demanded under the *Canada Shipping Act* and the *Arctic Waters Pollution Prevention Act*, of absolute liability of the shipowner and, if necessary, the cargo owner must be extended to the EEZ. In addition to such liability there are increasing demands for funds to provide for damages which cannot be recovered by direct liability of the owners. Potential polluters would be required to pay into such a fund which will inevitably increase the costs of oil transportation, one forecast being 20% resulting in an increased cost of petrol of 1/2 cent per gallon,¹¹⁹ but the moves of coastal states towards such measures are further steps in the extension of coastal state jurisdiction and establishment of responsibility for pollution. This is already established in Canada¹²⁰ in the Maritime Pollution Claims Fund to which an amount not exceeding fifteen cents per ton of oil is payable for oil shipped into and out of Canada in bulk by ship.¹²¹ However, if the standards are to be maintained at high levels, the penalties must be commensurate to provide an adequate deterrent. While few of the actual offenders may be detected and prosecuted, those that are successfully prosecuted must be awarded penalties which are heavy enough to bring home the consequences of violations to all potential polluters. In respect to ships on passage

119. [1977] 3 LMCLQ 434

120. *Canada Shipping Act*, S.C. 1971, c.27, s.737

121. *Id.* at s.748

through the EEZ, the lack of coastal state jurisdiction, or in fact ability, to arrest offenders further off-shore may be offset by Port State jurisdiction.

Port State Jurisdiction

Port state jurisdiction would be authorized under the ICNT¹²² providing authority for investigation or prosecution of a vessel which has committed a violation in the EEZ of another state on entry into port of a subsequent ‘port state’. This would be at the request of the coastal state or the flag state. However, where there is inadequate coverage by international convention, it is unlikely that such action would be successful in a tri-lateral action involving the laws or regulations of different states. The original Canadian proposal to IMCO in 1972 was not followed through for fear of diversion from coastal state jurisdiction, but was taken up again in 1973. While the proposal has continued in UNCLOS III, the authority provided under Article 219 is a watered down version to carry out investigations on request of a coastal state or flag state but limited to international rules and standards. This is at least partially due to a lack of continued action by Canada,¹²³ but the principle retains considerable support and, with the possibility of renewed initiatives through IMCO, could develop as an effective alternative with less delay and more effective action in respect to violations,¹²⁴ but this will depend upon the effectiveness of communications between states and the administrative and judicial systems of the port state.

Arrest and Prosecution

The rights of hot pursuit being applicable to the EEZ the prime requirement for its exercise is that it must be executed by a naval or government vessel.¹²⁵ However, as Canadian enforcement vessels may be from any one of three or four government departments, does the right pertain to the ships of any department for any type of offence? Clearly the action must be authorized, but to the vessel being arrested, she is a government vessel and thus such authority may be presumed.

122. ICNT, *supra*, note 44 at Art. 219

123. M’Gonigle and Zacher, *supra*, note 61 at 132-33

124. Johnson and Zacher, *supra*, note 1 at 374

125. *Supra*, notes 69, 70, 74 and 75

Having made the arrest, the offender is brought to port either under her own steam or tow, depending on circumstances and the amenity of the master and crew to authority. The duration of her detention for trial and the desirability of her release as soon as possible must then be considered, providing the requirements of the case are met. Thus, on the posting of an appropriate bond to cover the penalty, the ship should be released, although her gear and catch will presumably be landed. On the other hand, there may be considerations *in rem* requiring continued arrest, or there may be considerations of the prosecution of the master and crew members. While the case of the ss "*Lotus*" extended the principle of the state having title to exercise criminal jurisdiction beyond its territory by title through sovereignty limited only by prohibitive rules,¹²⁶ this was limited by Article 11 of the 1958 *Geneva Convention on the High Seas*. If this convention is no longer accepted as immutable in respect to hot pursuit in the EEZ, there could be a basis for limiting the provisions of Article 11 to collision cases but permitting a return to the ss "*Lotus*" principle in respect to offences in the EEZ. The *Brussels Convention on the Arrest of Ships*¹²⁷ established the principle that a ship flying the flag of one of the contracting states may be arrested in the jurisdiction of any such state in respect of any maritime claim. In the context of the present world community of states, the signatories to that convention are now a small minority, but the principle may now be extended to the broader areas of the EEZ and, under maritime claims, include pollution claims and offences. However, two other aspects would preclude prolonged detention, the implications of arrest of the ship on the whole crew and the impairment of their liberty and rights, and the aspect of punishment, usually met by fines, although imprisonment of up to two years is a maximum penalty.

Intervention by Foreign Naval or Para-military Vessels

Warships are often deployed in the national interest to show the flag or to otherwise support national interests or policies by their presence. Distant fishing fleet states such as Japan or the Soviet Union have never combined such presence with their fishing fleets, and Japan since her re-emergence as a maritime power has been at pains to preserve a purely self-defence image for her navy. Even in

126. The s.s. *Lotus* (1927), P.C.I.J., Series A, No. 10 Hudson W.C.R. 23

127. U.S. Publications, A/CN 469

the Soviet Union's case, however, in which her merchant and fishing fleets are direct extensions of maritime policy and her navy has developed into a deep ocean fleet of world capability, her naval and commercial functions have been kept completely separate. France, however, with her interests in St. Pierre et Miquelon and the surrounding fisheries maintains a frigate on station for fisheries protection. The United States, in her adjacent areas, maintains Coast Guard cutters on station for fisheries protection as well as environmental protection and maritime safety.

It is unlikely that such vessels would be deliberately interposed to defeat Canadian jurisdiction and enforcement action. However, should an incident develop between the units of two states, it becomes no longer a matter of sovereign jurisdiction over the private offender but a matter between the states on a sovereign basis, as naval or government vessels are representative of their head of state.¹²⁸ They can only meet as equals and intervention therefore becomes a matter of diplomatic reference and national responsibility in which one cannot assert jurisdiction over the other. On the other hand, where a warship responds to investigate an apparent attack on, or infringement of the rights of, a vessel of her own state, she may do so, although in a situation of hot pursuit it is clearly open to the pursuing vessel to:

- a. inform the other government vessel of the situation and reason, and
- b. by her own manoeuvring attempt to prevent interference while obtaining further instructions from her own authorities. If she is then ordered to break off, the action is converted into one of diplomacy.

Should force be used, or threatened, she has the right of self-defence, to respond to the degree necessary for her defence and commensurate with the situation. However, in the case of *The "Red Crusader"*¹²⁹ a British warship successfully interposed herself between the British trawler and the Danish frigate pursuing her.

As hot pursuit under the present convention¹³⁰ as well as under the INCNT¹³¹ can be continued as far as the territorial sea of the flag state or a third state, such interposition would not have greater

128. C. J. Colombos, *The International Law of the Sea* (6th ed. London: Longmans, 1967) at 259-60

129. (1962), 35 I.L.R. 485

130. 1958 *Convention on the High Seas* at Art. 23

131. ICNT, *supra*, note 44 at Art. III

legality in the EEZ of the flag state which in this respect would be an area of the high seas. However, consideration of the EEZ as a zone *sui generis*¹³² by the flag state might form a basis providing the interposition of its own enforcement authority with a cloak of respectability if not actually authority. Again, co-operation between neighbouring states would preclude such action, and in the Canadian situation such action is unlikely to occur, either by the action of Canadian units or by the units of neighbouring states, even in consideration of a mirror image situation in which a Canadian transgressor from an adjacent EEZ might seek to evade pursuit by protection action of a Canadian fisheries patrol vessel.

VI. The Canadian EEZ as an International Model Different States and Different Settings

Canada, as a developed state with great technological resources and expertise, is in a fortunate position even if limited in the extent of her financial capability to develop the full extent of her resources. Given the necessary capital, the technology is available so that, as a geographically advantaged state she has the area and assets with a growing capability to exploit them on her own terms, by her own means. Added to this is her geographic situation among neighbouring developed states with a sufficient commonality of interests to give a setting in which diplomacy can resolve the problems of jurisdiction to a large degree and provide a continued process of co-operation in management of resources. The world demand for food will keep the fishing nations coming to Canada, with the need being best met by Canadian management under coastal state jurisdiction by which participation and jurisdiction flourish together. Conservation and marine research go hand in hand, on the basis of pooling of information and joint ventures. Research in the sea-bed resources is continued by private enterprise, whether Canadian or foreign corporations, or by government sponsored activity through Petro-Canada.

Similar considerations apply in many of the developed nations, and in such areas as the European Economic Community similar models are developing. On the other hand, some developed states may feel the effects of regional exclusion of previous interests, as in the case of the Soviet Union now excluded from areas of the North Sea, and members of the EEC now excluded from the Barents

132. *Id.* at Art. 55

Sea.¹³³ Even as the principles of the EEZ are being applied, the resources are being developed and used, and where there are off-setting assets or mutual interests, co-operation and negotiation will continue as the means of resolution. Where, however, the boundaries are clearly defined and national policies require the reservation of assets under coastal state authority and exploitation, the principles will prevail and, as the cod wars have shown the futility of attempts to support the untenable by the unconvinced, states are unlikely to attempt or support incursion on the resources within the EEZ of another state in conflict with its jurisdiction or management where it is in accordance with the principles of the EEZ as customary law. In not all areas of developed states is de-limitation of the EEZ an easy or clear-cut issue and in such areas co-ordination and diplomacy may be lofty ideals more easily dispensed with in face to face confrontation or even conflict. The Aegean Sea and the Eastern Mediterranean in the offshore areas of Turkey, Greece and Cyprus are continuing examples, albeit quiescent at present. In the Aegean Sea, however, a direct application of the EEZ on the basis of the Greek islands, or on an archipelagic principle based on the Greek islands and the waters they would enclose would clearly be unacceptable to Turkey. With the history of conflict between those states the prospect of a Canadian model of diplomacy in resolution of the EEZ may seem an idealistic dream. On the other hand, given the risks of conflict and the commonality of interest between those states in the resources of the sea and the possibilities and advantages of good management in the areas of contested jurisdiction, the Canadian model has lessons and advantages of value in application there.

At the further end of the spectrum from the Canadian model is the possibility of power over a vital interest which a major power may resolve to exert in support of its own position or claim even though itself holding to the principles of the EEZ. Certainly the power of a few countries exceeds anything conceived of a generation ago but, even holding such power does not make for invincibility in the community of nations. No world power since 1945 can point to its arsenal and yet deny defeats, ranging from defeat in armed conflict¹³⁴ to confrontation,¹³⁵ while in their diplomatic and

133. *The Times* reports, *supra*, notes 93 and 94

134. United States in Vietnam.

135. U.S.S.R. during the Cuban blockade.

economic relations in the world community the very growth of that community and the emergence of the Third World have predicated against the retention of interests or assets on a basis of power alone. The comity of nations is the foundation of international law.

The EEZ in the Third World

The emergence of the Third World challenged previous domination of the law of the sea by the maritime states, and added maritime aspects to the North-South struggle. In the wake of renunciation of the previous principles and conventions favouring the maritime and technologically-advanced states and support of the principle of the EEZ by the Group of 77, the only resistance comes from the disadvantaged states without coastlines, who consequently see themselves no better off without guarantees of access to the zones of their neighbours, and the maritime states who accept the principle but who still resist any threats to the free movement of their shipping. However, the states of the Third World have a wide disparity among themselves, through geography or technological capability. So given that all declare some form of EEZ, the differences among themselves are unlikely to see uniformity in the application of the principles of the EEZ. Even where there are potential resources to develop, the coastal state will be little better off without the technology or ability to start development, remaining at the mercy of the developed states or the transnational corporations.

Some states may therefore be in the position of extending their jurisdiction but still lacking the benefits. It is to those states that the developed states such as Canada have an additional responsibility, of technical assistance and advice, to give the developing states an investment opportunity in their own resources. A further complication in the demarcation of resources also lies in the basis on which many of the Third World frontiers were drawn by their previous colonial administrations, on a basis of administrative expediency rather than geography and the characteristics of the land and its people. Therefore boundaries are much more likely to be disputed, particularly in regard to assets lying across the seaward extensions of the old colonial boundaries. The lack of a law of the sea Treaty and of an established means of resolution of the problems may result in development of disputes or their resolution on diverging principles based on expediency or on the imposition of assumed

influence by a regional power. International law has traditionally recognized differences in the extent of, or application of principles, but in the acceptance of the EEZ diversity in the resolution of problems may suit local conditions but while creating uncertainty in many areas in which local examples may be used as opposing criteria. In some areas such as the Persian Gulf one state has emerged as a local power bent on keeping its own jurisdiction through a strong self-defence capability and management systems. Iran has used her own profits to develop a strong navy through British expertise, and a Marine Management and Coast Guard harbour and coastal control system with Canadian assistance and expertise. With her own EEZ in order Iran is in a strong position to impose a stabilizing influence in her area, in which local disputes are already being resolved on the principles of the EEZ and median line principles.¹³⁶

Canada as a recently developed nation with vast areas of undeveloped assets remaining has faced, and still has, many of the problems of developing Third World states. She has, however, the advantages of geography, technology and diplomatic position to provide a model for other states to follow. In her leadership in developing the concepts of the EEZ Canada still needs strong support, particularly among the Third World states to counter-balance the interests of maritime states and shipping interests, while at the same time satisfying the geographically disadvantaged and land-locked states as to the equity of guarantees of access and resource sharing which will be granted to them. This is even more important should there be no treaty, in which case the international sea-bed will yet be taken by the surrounding states, as Arvid Pardo compared it to the demise of the Republic of Krakow on Poland's division among her eighteenth-century neighbours.¹³⁷ Canada as one of the geographically advantaged states would also be one with most to gain from such an encroachment on the International Sea-bed, but has a responsibility to show that coastal state authority will be based on equity as well as geographical advantage.

Canada is proving that the management of vast fisheries is possible by the coastal state for international as well as national interests. She is showing that diplomacy and co-operative sharing are a better answer than confrontation over the resources of disputed areas. Resource sharing and services are a factor of jurisdiction and

136. See *supra*, note 92

137. See *supra*, note 87 at 411

assistance. The dangers remain in outmoded concepts of unbridled free use of seas, and in the creation of mid-ocean vacuums which are liable to be filled by the more advanced surrounding states to the detriment of the remainder. Thus based upon principles formulated by the United States' Supreme Court we are now developing a body of such conduct resting on the common consent of civilized communities as affords authoritative evidence of the practice of states,¹³⁸ and which on being established as the usage of nations is the rule of law.¹³⁹ To balance those two American authorities one may further support the principle of the EEZ in international law as "a rule of international law established by its general recognition by coastal nations (including the chief maritime nations) without it being necessary to prove in every instance that all states have invariably accepted the rule as obligatory."¹⁴⁰

VII. Conclusion

Diplomacy in Action

Canada has taken a leading role in the development of the doctrine of the Exclusive Economic Zone through diplomacy and by unilateral actions. While asserting strong coastal state jurisdiction for management of resources and the protection of the environment, Canada has demonstrated that such jurisdiction can be effected by co-operation for the general benefit of the states concerned, and that jurisdiction overcoming flag state prerogatives with respect to shipping in special areas is a means of benefit to users as well as protection of the environment. There are, however, continuing problems of the extent of jurisdiction in the EEZ for supervision and control of shipping, and for measures to prevent pollution beyond the territorial sea, be it accidental or breach of regulations. With the doctrine of hot pursuit and the legality of the use of force at the minimum level commensurate with the situation requiring arrest extended to the EEZ, Canada has shown that jurisdiction can be a joint participatory process, more readily accepted when it is clearly beneficial. Thus, in the future management of the EEZ, there should be increasing efficiency of management, with enforcement

138. *The Scotia* (1871), 14 Wall 170 per Strong J. as quoted by Colombos, *supra*, note 128 at 10

139. *United States v. Percheman* (1833), 7 Peters 51 per Marshall C. J. quoted by Colombos, *id.* at 7

140. J. L. Brierly, *The Law of Nations* (6th ed. Oxford: Clarendon Press, 1965) at 62

concentrating on surveillance and verification. Greater difficulties exist in the protection of the environment, but a trend to development of higher international regulations and port state jurisdiction may off-set the requirement for complete coastal state jurisdiction. However, arrest and prosecution of offenders will require heavier penalties and the implementation of Pollution Claims funds as well as higher liability against the ship-owners and the cargo owners.

The Canadian model, however, demonstrates:

- a. the efficacy of diplomacy in the development of the law and settlement of disputes;
- b. the acceptability of beneficial unilateral action;
- c. the efficacy of management and resource sharing for acceptance of jurisdiction;
- d. the success of a strong port régime to increase coastal anti-pollution measures and safety of shipping;
- e. the possibility of a stronger coastal state environmental jurisdiction without undue usurpation of flag state jurisdiction to establish the further minimal extension of controls necessary; and
- f. the efficacy of a supplementary jurisdiction through port states as a method of enforcement.

Canadian experience and policies of aid to the developing countries make the Canadian model a useful blueprint for the developing countries who can also benefit in establishing their jurisdictional and management systems by assistance from Canada. However, it also goes towards developing a régime which can be recognized as equitable by the disadvantaged and land-locked states, who have yet to see any benefit accruing to them from the acquisitory extensions of jurisdiction.

Whether there is a final Treaty or not, the success of the development of a new law of the sea will be measured on its acceptability and the minimal enforcement required, as well as its equity in the development of the world order. The Canadian model shows that this is attainable and that the doctrine of the Exclusive Economic Zone will continue as the keystone of the law of the sea, whether there is a treaty or not. The Canadian success, however, is based on diplomacy, management and resource sharing, thus obtaining other states co-operation and acceptance of Canadian jurisdiction. The Canadian trump-cards of licenses and quota allocations reduce enforcement to manageable surveillance and policing, while the participation of other states in the use of resources also brings benefits to Canada. The pen may not be mightier than the sword in all respects, but with proper use of the pen the sword may be kept sheathed, even though sharp.