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Canadian Foreign Policy and the Law of the Sea By Barbara Johnson & Mark w. Zacher, eds.

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treaty law may wish to contrast Lauterpacht's approach with that which ultimately found expression in the Vienna Convention on Treaties of 1969 and will be aided in doing so by the editor's inclusion, at appropriate points, of the text of the relevant Article of that Convention.

In their tribute to Sir Hersch, Jessup and Baxter — each of whom was later elected to the World Court — wrote:

> The measure of the regard in which he is held is the great deference which is accorded to his views throughout a major proportion of the world.[16]

The deference remains and, if anything, the proportion grows with the publication of each succeeding volume of his collected papers. Together the four volumes are no less than indispensable reading for international lawyers who are serious about their identification with international law.

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16. Jessup & Baxter, *supra* note 2, at 97.

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CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA. EDITED BY BARBARA JOHNSON AND MARK W. ZACHER. (Vancouver, British Columbia: University of British Columbia Press, 1977), xx and 407 pages, indexed. $19.00, cloth; $6.50, paper.

Although not uniquely so among major industrialized states, Canada's ocean policy concerns are impressive. First, Canada has one of the world's longest coastlines, touching Atlantic, Pacific and Arctic waters. That coastline is shared by all but two of Canada's provinces, making ocean policy a matter of importance for nearly all Canadians. Second, Canada also has one of the world's largest continental margins, embracing about two million square miles and, in the North Atlantic, extending about 650 miles from the coast. Canada has been actively engaged in searching for and producing off-shore oil both from its continental shelf and from its continental slope and continental rise areas several hundred miles from shore. Third, Canada is a major fishing state in areas both off its Atlantic and off its Pacific coasts; in recent years Canada has been one of the top three exporters of fish and fishery products.

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The Canadian fishing industry is not large in terms of Canada's gross national product, but fisheries are the economic mainstay of coastal regions and fishermen are a major factor in Canadian politics. Finally, although the Canadian merchant shipping fleet no longer ranks high among merchant shipping countries, Canada remains heavily dependent upon merchant shipping for imports and exports, ranking among the major ocean trading nations of the world.

The general Canadian interest in its coastal areas, in its continental shelf, in coastal fisheries and in ocean shipping would be enough to guarantee intense Canadian concern in United Nations law of the sea negotiations. Canadian concern is made greater by special Canadian interests in several related areas. First, as to fishing, although the major Canadian interest is in coastal fisheries, Canada is also one of the few countries whose rivers provide spawning grounds for oceanranging salmon. Canada, therefore, needs international rules governing high seas fishing for salmon that hatch and are nurtured in Canada, but spend their adult lives in waters beyond Canadian national jurisdiction. Second, Canada has a special interest in the developing law of international straits. Due to its general interest in ocean transport, Canada supports freedom of transit through international straits, but in the Canadian Arctic Canada's larger interest is in control over the Northwest Passage, which Canada considers as Canadian waters not subject to international straits standards. Third, Canada is not heavily involved in seabed mining as distinct from continental shelf oil recovery, but Canada is a leading exporter of nickel and is therefore intensely concerned about prospects for nickel production from seabed manganese nodules. Canada thus cannot be neutral on issues raised by proposed international regimes governing exploitation of the deep seabed beyond national jurisdiction.

The development, convergence and discord among these Canadian interests are brought out nicely in *Canadian Foreign Policy and the Law of the Sea* edited by Barbara Johnson and Mark W. Zacher of the University of British Columbia. The book includes detailed discussions of Canadian viewpoints on the seabed, on fisheries, on marine pollution, on coastal state enforcement jurisdiction, on international straits, on military uses of the seabed, and on the Third United Nations Conference on the Law of the Sea. Each chapter is copiously footnoted to original sources, including Canadian executive and legislative documents, and the records of United Nations conference sessions. Since chapters have been contributed by several authors each addressing a special subject, there is some duplication and overlap; in some cases the same event is described in several chapters. The duplication is not burdensome, however, and may help the reader to relate each subject to the whole. The period covered in the book reaches to early 1977, just short of the sixth session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) held at New York, May 23 to July 15, 1977. Consequently, references are

to the 1975 Single Negotiating Text (SNT)[1] and to the 1976 Revised Single Negotiating Text (RSNT),[2] and not to the 1977 Informal Composite Negotiating Text (ICNT).[3] The latter has continued to serve as the basis for UNCLOS III negotiations in 1978 and is expected to be used as the basis for drafting a comprehensive United Nations Convention on the Law of the Sea when the Conference reconvenes in 1979.

A major virtue of the book for the American reader is its generally concise and accurate tracing of the development of major law of the sea issues. Although this is done from the Canadian perspective, the discussion usually fully draws on the actions and views of others, giving the reader a framework within which to evaluate both the Canadian actions and the general development of the issue. Such a treatment could not be given to the participation of most states. It is possible here because Canada has been so deeply involved in so many of the major law of the sea issues raised at UNCLOS III and elsewhere.

One example is the developing law of marine pollution. In March 1967, the *Torrey Canyon,* a Liberian tanker, ran aground off the coast of England spilling 120,000 tons of heavy crude oil. Clean-up costs and shore-line damages in England and France amounted to over twenty million dollars. In October 1968, following the discovery of oil in the Alaskan North Slope, United States oil shipping interests announced a voyage by the tanker *Manhattan* to demonstrate the feasibility of transporting Alaskan oil to the northeastern United States by way of Canada's Northwest Passage. In June 1969, fears were expressed in the Canadian Parliament that an oil spill on such a route would do incredible damage to the ecology of Arctic waters. Prime Minister Trudeau responded through a policy statement in October 1969 that pointed to possibilities for economic development in Arctic Ocean regions and observed:

> Much of this development will undoubtedly occur on the islands of the Canadian archipelago, or in the adjoining continental shelf whose resources, under international law, we have the exclusive right to explore and exploit. With resource development, and the benefits it entails, may come grave danger to the balance of plant and animal life on land and in the sea, which is particularly precarious in the harsh polar regions. While encouraging such development, we must fulfill our responsibility to preserve those areas, as yet undespoiled and essentially in a state of nature. The Government will introduce legislation setting out the measures necessary to prevent pollution in the Arctic Seas.[4]

1. UN Doc. A/CONF.62/WP.8 (1975).
2. UN Doc. A/CONF.62/WP.8/Rev.1 (1976).
3. UN Doc. A/CONF.62/WP.10 (1977).
4. Quoted from B. JOHNSON & M. ZACHER, CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 111 (1977) [hereinafter cited as JOHNSON & ZACHER].

In November 1969, Canada sent a high-level delegation to the International Legal Conference on Marine Pollution Damage convened at Brussels by IMCO, the Intergovernmental Maritime Consultative Organization. Canada asked at the conference that the shipping industry be made to bear the full costs of oil spill damage, replacing the traditional limited liability based on fault with unlimited strict liability for both shoreline and water column oil spill damage. The result was the 1969 International Convention on Civil Liability for Oil Pollution Damage[5] which imposed strict liability on the shipowner, but limited that liability to a maximum of fourteen million dollars unless the spill had resulted from the "actual fault or privity" of the shipowner.[6] Canada rejected the 1969 IMCO Convention as inadequate, and, in April 1970, proposed its own national legislation, the "Arctic Waters Pollution Prevention Act."[7]

The Canadian Arctic Waters Act asserted Canadian jurisdiction to control ship construction, equipment, manning and navigation for all shipping within 100 miles of Canadian territory in the Arctic. The Act authorized the government to make and enforce regulations applicable to all vessels in the 100-mile pollution control zone, and to exclude vessels that did not meet the Canadian standards. Discharge of waste in any form was prohibited in Arctic waters, and liability for pollution damage was made absolute with limits, if any, to be set by the regulations.[8]

Adoption of the Arctic Waters Act both served and injured Canadian interests. As a state interested in preserving the delicate balance of life in the Arctic, the legislation appeared urgent in view of the inadequacy of existing and proposed international controls. As a state interested in maritime transport, however, the legislation appeared an unhealthy precedent in unilateral coastal state control. The United States, for example, responded immediately that the United States "does not recognize any exercise of coastal state jurisdiction over [American] vessels in the high seas." The United States Department of State said:

> We are concerned that this action by Canada if not opposed by us, would be taken as a precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada has

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5. The United States has not ratified the 1969 International Convention on Civil Liability for Oil Pollution Damage; the text of the convention appears at 9 INT'L LEGAL MAT'LS 45 (1970).

6. *Id.*, art. V, at 48. In 1976, an IMCO "Conference to Revise the Unit of Account Provisions in the International Convention on Civil Liability for Oil Pollution Damage, 1969," amended Article V to substitute International Monetary Fund "Special Drawing Rights" for the gold franc used as the unit of account in the 1969 Convention. The text of the 1976 Protocol appears at 16 INT'L LEGAL MAT'LS 617 (1977).

7. 18-19 Eliz.2, ch. 47 (Statutes of Canada, 1970); *see also* 9 INT'L LEGAL MAT'LS 543 (1970).

8. Regulations adopted pursuant to the Canadian Arctic Waters Act have generally stopped short of the full powers granted by the Act. *See* JOHNSON & ZACHER, *supra* note 4, at 121-23.

> the right to claim and exercise exclusive pollution and resource jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law.[9]

Perhaps sensitive to criticisms like those of the United States, Canada explained its role as "being that of 'custodian' of the world's environmental interests." A Canadian spokesman said:

> Canada regards herself as responsible to all mankind for the peculiar ecological balance that now exists so precariously in the . . . Arctic Archipelago. . . . We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of the environment from pollution.[10]

Canada was not willing to put the Arctic Waters Act to a judicial test, however. At the same time that it proposed the Arctic Waters Act, the Canadian government amended its acceptance of the compulsory jurisdiction of the International Court to exclude from that jurisdiction controversies over the validity of the Canadian Act.[11]

The balance between these competing interests is explored in a chapter on "Canadian Foreign Policy and the Control of Marine Pollution," written by R. Michael McGonigle and the editor, Mark W. Zacher.[12] That chapter traces developments in coastal state pollution control jurisdiction from the Canadian Arctic Waters Act and its regulations through the 1972 Stockholm Conference on the Environment and several years of discussions at UNCLOS III. Throughout this period the Canadian objective was to secure what came to be termed an "Arctic exception" to restrictions on coastal state jurisdiction to control vessel-source marine pollution. Early formulations sought "special authority" for coastal states where "functional controls" were necessary to prevent pollution; the "special authority" would be "deemed to be delegated to [the coastal state] by the world community on behalf of humanity as a whole." Later formulations referred to a need for pollution control measures "necessary in the light of local geographical and ecological characteristics."[13] The "Arctic exception" now appears in Article 235 of the ICNT, which provides as follows:

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9. U.S. Dep't of State, Press Release No. 121 (April 15, 1970), 9 INT'L LEGAL MAT'LS 605 (1970).

10. Quoted from JOHNSON & ZACHER, *supra* note 4, at 119.

11. The Canadian declaration was broadly framed, excluding from the Canadian acceptance of the Court's compulsory jurisdiction "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." 9 INT'L LEGAL MAT'LS 598, 599 (1970).

12. JOHNSON & ZACHER, *supra* note 4, at 100-57.

13. *See id.* at 126-30.

> Coastal States have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice-covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection of the marine environment based on the best available scientific evidence.[14]

In contrast to the "Arctic exception," the ICNT provides in Article 21, para. 1(f), that coastal states may make laws and regulations to preserve the environment, and to prevent, reduce and control pollution in the territorial sea, but also provides in para. 2 of the same article that:

> Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted rules or standards.[15]

In the economic zone the basic provision also calls for the adoption by international organizations, presumably chiefly IMCO, of international pollution control standards, to be enforced through laws and regulations adopted by coastal states and by flag states. Article 212 of the ICNT, relating to pollution from vessels, includes a limited authority for independent coastal state rule-making. That article provides in para. 5 that where international standards are "inadequate to meet special circumstances," and that:

> where coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones in an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources, and the particular character of its traffic, the adoption of special mandatory methods for the prevention of pollution from vessels is required, coastal States, after appropriate consultations through the competent international organization with any other countries concerned, may for that area, direct a communication to the competent international organization, submitting scientific and technical evidence in support, and information on necessary reception facilities.[16]

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14. UN Doc. A/CONF.62/WP.10, at 126 (1977).

15. *Id.* at 27. Canada, together with other coastal states, would prefer language permitting coastal states to regulate "design, construction, manning or equipment of foreign ships . . . in conformity with generally accepted international rules *where such rules exist.*" See UNCLOS III Doc. MP/8 (1978) (proposed amendment to ICNT Art. 212, para. 3, emphasis supplied).

16. UN Doc. A/CONF.62/WP.10, at 115 (1977).

If the "competent international organization" agrees that the special protective measures should be taken, the coastal state may adopt and enforce the proposed special standard for the area involved.

One final dimension of coastal state jurisdiction to control vessel source pollution within the framework contemplated by the ICNT lies in the so-called "port state" enforcement jurisdiction. Article 219, para. 1, provides as follows:

> When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where warranted by the evidence of the case, cause proceedings to be taken in respect of any discharge from that vessel in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference, outside the internal waters, territorial sea, or exclusive economic zone of that State.[17]

The editors comment that Canada's success in obtaining the "Arctic exception" is "tempered" by the restricted environmental jurisdiction in other coastal regions. While this may be true in certain areas neighboring the United States, for most of Canada's coastal regions it would seem that "port state" jurisdiction should eventually provide adequate protection for Canadian interests. Since most traffic off Canadian shores is headed for Canadian ports, the limiting factor is not the scope of jurisdiction as to vessels present in Canadian waters; it is the adequacy, or inadequacy, of international regulations. It is here that Canada, and other coastal states, must concentrate their efforts for the future. Although one may agree that vessel source pollution standards should be international, and that maritime transport should not be subjected to varying and perhaps conflicting national legislation, maritime transport has no proper claim to a low international standard. Marine pollution is a risk that should be borne by maritime shipping, not by coastal states.

The editors' treatment of the marine pollution area suggests these dimensions, and more. In other areas as well, though the contributors speak from a Canadian perspective, their work can be read with profit by those more interested in the substance of the policy issues than in the particular history of Canadian participation. Both are well presented in this work.

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17. *Id.* at 119.