

CANADA AND THE LAW OF THE SEA CONVENTION

INTRODUCTION

One of the cornerstones of Canadian foreign policy throughout the 1970s and the early 1980s was the Canadian government's support of the Third United Nations Conference on the Law of the Sea (UNCLOS III). Canadian involvement was extensive and was generally credited with being successful in terms of achieving immediate Canadian objectives and in providing support for a more equitable and progressive international order. In many ways, Canada's action of enlightened self-interest was viewed as a sterling example of its policies towards international order and multilateralism. However, while Canada readily signed the completed Convention in 1982, it has yet to ratify it even though the Convention has been in legal force since November 16, 1994! Although concerns had been voiced by some industrial states over the mining component of the Convention in the late 1980s and the early 1990s, the offending articles have since been amended to the satisfaction of these states. Thus, the question which arises, is why has Canada not ratified the Convention?

Canadian indecision concerning the issue of ratification carries with it wider implications for Canadian foreign policy. Why is it that Canada, one of the major benefactors of the Convention, should not ratify it? What insights does Canadian action and inaction provide to current Canadian foreign policy behaviour?

In order to assess these issues this paper will address three topics. First, what is the current status of the Law of the Sea Convention? What issues have arisen and how have they been addressed since the Convention was opened for signature in 1982? Second, what has been the Canadian position in the period between the final drafting of the agreement and the current situation? Third, what are the factors behind the Canadian actions and what do these actions (or lack thereof) say about Canadian foreign policy?

CANADA AND MULTILATERALISM

Before, considering Canadian policy towards the Convention, it is necessary to consider the Canadian commitment to multilateralism. It has been an article of faith that the twin pillars of Canadian foreign policy since the end of the Second World War have been the American-Canadian relationship and the commitment to multilateralism.¹ Most Canadian foreign policy analysts have argued that Canada's self-proclaimed role as a "middle-power" has been the central guiding principle for much of its post-war foreign policy,

The reasons for the Canadian commitment to multilateralism have been well-documented

¹ For the most recent and arguably most thorough examination of the role of multilateralism in Canadian foreign policy see Tom Keating Canada and World Order: The Multilateralist Tradition in Canadian Foreign Policy (Toronto: McClelland and Stewart, 1993).

elsewhere, and need not be examined in detail here. Sufficient to say there are three main sets of explanations. First, Canadian officials have found that the multi-lateral negotiating sphere is one in which Canadian talents are well suited. Numerous accounts by both researchers and practitioners have documented the success of Canadian negotiators in the immediate post-war international forums.² It was therefore only logical that Canadian officials continued to build on such success.

Second, Canadians and Canadian decision-makers have tended to attach a significant normative element to the conduct of multilateralism. The image of Canada as the "helpful fixer", willing to assist the international community in whatever manner necessary, has become an enduring, if not an entirely accurate, element of Canadian self-perceptions.³ There is a pride among Canadians in their role as the "boy scouts" of the world.

The third, and arguably most important explanation of Canadian support of multilateralism has been the assessment that it has been important to Canadian self-interests. For example, there is no doubt that Canada's support of international peace-keeping is partly due to the fact that normatively it is the "good" thing to do, but it also makes sense from a purely self-interested perspective. The farther away international conflict can be contained and resolved from Canadian borders, the more secure is Canada.

Canadian participation in multilateral trade forums has been advantageous to the continued economic prosperity of the country. While Canada has had one of the most developed and prosperous economies in the world, its relatively small size has made participation in multilateral trade negotiations a requirement if that prosperity is to be maintained. Only through such forums has Canada found it possible to promote its policy of trade liberalization.⁴

Another component of Canada's self-interest that was served through multilateralism was in regards to its relationship with the US. Historically, Canadian officials found that one of the most effective methods of curtailing American power was to engage the Americans in a multi-lateral forum rather than on a bilateral basis. It is well documented that one of the driving forces for Canadian promotion of the creation of NATO was to provide for counterweights to the US with regards to defence cooperation and, for that matter, military operations.⁵

² See for example see James Eayrs, In Defence of Canada: Peacekeeping and Deterrence (Toronto: University of Toronto Press, 1972); and Escott Reid, Time of Fear and Hope: The Making of the North Atlantic Treaty, 1947-1949 (Toronto: McClelland and Stewart, 1977).

³ For examples of the value placed on such policies see John Holmes The Better Part of Valour (Toronto: McClelland and Stewart, 1976); and Keating, Canada and World Order, pp.20-23.

⁴ Keating, Canada and World Order, pp.48-73.

⁵ A good example of such behaviour was documented by Denis Stairs in his The Diplomacy

The net effect of these factors has been a strong adherence to the principles and practices of multilateralism. This has been manifested through Canadian promotion of, and commitment to, a wide body of international organizations, including NATO, the G-7, and most importantly the United Nations. Canadian participation in the United Nations stands as the hallmark of Canadian support of multilateralism. From peacekeeping, to peacemaking, to development assistance to the support of UN sponsored treaties and conventions, Canada has always been a major supporter of the organization.

However, some analysts have begun to question whether the Canadian commitment to multilateralism in the 1990s remains as strong as it has previously been. Starting with the decision to enter into free trade discussions with the United States, some have argued that Canadian foreign policy has begun to tilt away from multilateralism towards a stronger continentalist focus.⁶ Others have suggested that the new economic realities of the 1990s have forced Canada to be more selective in choosing the multilateral initiatives that it is now able to participate in.⁷ Alternatively, some analysts charge that the Conservative Government under Brian Mulroney was directly responsible for the reduced emphasis on multilateralism because of its ideological position.⁸ A fourth explanation for this perceived shift is the argument that Canadian support for multilateralism has for the most part been overstated, and to a certain degree mythicized. While Canadian officials may have claimed to be developing policies that supported multilateralism, the actual policies implemented did not do so.⁹

Regardless of the differences between these four explanations, each sustains the position that Canadian support of multilateralism is undergoing a transformation in the 1990s. Since Canada's participation in the Third UN Law of the Sea of the Conference has always been regarded as one of the best example of Canadian support of multilateralism, an examination of the shifts of Canadian policy towards the Convention presents the opportunity to empirically examine Canadian commitment to multilateralism in the 1990s.

PART I: THE CONVENTION IN THE 1990s

of Constraint: Canada, the Korean War and the United States (Toronto: University of Toronto Press, 1972).

⁶ Robert Chodos, Rae Murphy and Eric Hamovitch, Canada and the Global Economy: Alternatives to the Corporate Strategy for Globalization (Toronto: James Lorimer & Company, 1993), pp.1-9.

⁷ Andrew Cooper, "In Search of Niches: Saying "Yes" and Saying "No" in Canada's International Relations," Canadian Foreign Policy III, no.3 (1995).

⁸ Arthur Andrew, The Rise and Fall of a Middle Power: Canadian Diplomacy from King to Mulroney (Toronto: James Lorimer & Company, 1993).

⁹ Ernie Keenes, "The Myth of Multilateralism in Canadian International Economic Relations," International Journal no.4, L (1995).

The 1980s

The United Nations Convention on the Law of the Sea has been referred to as the global "Constitution of the Oceans".¹⁰ It represents one of the most comprehensive and extensive agreements ever reached in international diplomacy. The Convention began as an effort to codify the international legal system governing the use of ocean resources. But as negotiations progressed, new concepts of international law were developed. The negotiations for the Convention took place over a nine year period beginning in 1973 and ending in 1982 and included all of the existing members of the United Nations.¹¹ It was opened for signatures on December 10, 1982 and remained open until December 9, 1984, at which time 159 states and other entities had signed. At that time, this was the highest number of signatories of any multilateral treaty.¹² The Convention provided for not only the codification of existing international maritime law, but also for a blueprint for the future management of ocean resources.¹³

The scope of issues covered by the Convention is extensive. It includes sections on the utilization of both living and nonliving resources, the protection of the marine environment, delimitation of ocean boundaries, navigation rights and responsibilities and the conduct of marine research, to name but a few.¹⁴ The Convention instituted several significant innovations to international law such as the establishment of limited national sovereignty through the creation of the concept of the Exclusive Economic Zone (EEZ).¹⁵

On November 16, 1993, Guyana became the 60th state to deposit its instrument of ratification

¹⁰ Tommy Koh, "A Constitution for the Oceans," in United Nations, The Law of the Sea: Official Text of the United Nations Convention of the Law of the Sea with Annexes and Index (New York: United Nations, 1983), pp. xxxiii-xxxvii.

¹¹ United Nations, The Law of the Sea, United Nations Convention on the Law of the Sea (New York: UN, 1983), p. xxi.

¹² UN General Assembly, Law of the Sea, Report of Secretary-General November 5, 1992, A/47/512, p.25.

¹³ Elisabeth Mann Borgese, "Analysis of the United Nations Convention on the Law of the Sea," in IOI, "Reading Materials Volume 1: Exclusive Economic Zone Management: Implementation and Development of Agenda 21" (Halifax: IOI, 1994), pp.135-152.

¹⁴ For one of the most comprehensive, albeit legalistic, reviews of each major component of the Convention, see Robin Churchill and A.V. Lowe, The Law of the Sea (Manchester: Manchester University Press, 1983). An equally good and more current examination is provided by James Wang, Handbook on Ocean Politics and Law (New York: Greenwood Press, 1992).

¹⁵ S.P. Jagota, Maritime Boundary (Dordrecht: Martinus Nijhoff, 1985).

with the UN.¹⁶ In accordance with the terms of the Convention (Article 308), it came into effect exactly one year later on November 16, 1994. However, prior to its coming into effect, a series of new negotiations altered some elements of the 1982 agreement.

Prior to the final set of negotiations, the newly elected American Government of Ronald Reagan announced that it had reversed its policy on the Convention and refused to sign it. While there were several reasons for this policy change, the main one concerned the articles regarding Deep-Sea Bed Mining contained in Part XI. The United States viewed the international exploitation of these resources as incompatible with its adherence to the principles of free enterprise and market principles.¹⁷ The American refusal to sign the Convention had a strong braking effect on the overall acceptance of the Convention, with major states such as Germany, the UK and Japan also re-evaluating their positions. Germany and the UK withheld their signature and refused to ratify, while Japan signed but refused to move towards ratification.

While the ratification process did proceed, Iceland and what was then Yugoslavia were the only western states to ratify it. All other industrialized states, including Canada, preferred to wait to see what the United States, Germany and Japan were going to do. The Preparatory Commission (Prep Comm) met annually in Jamaica in an effort to prepare for deep seabed mining. But without the willing participation of the main industrialized states, progress on several key areas of conflict proved impossible to overcome.¹⁸ In addition, the economic crisis that occurred in the 1980s, combined with the decline in mineral prices, meant that the costs associated with deep seabed mining were prohibitively expensive. While some experts had suggested in the 1970s that deep seabed mining would occur in the 1980s, most now believe that it will not occur until well into the next century.

The 1990s

Although events surrounding the Law of the Sea Convention had slowed to a glacial pace in the late 1980s, this situation quickly changed in the early 1990s, due to several reasons. First, the number of countries ratifying the Convention was slowly increasing towards the sixty required to bring it into force. Second, and partly in response to this, there has been a renewed effort on the part of the UN Secretary-General and several industrialized states (notably the United States, the UK and Australia) to alter Part XI so that they would then find the Convention acceptable.

Secretary-General Javier Perez de Cuellar became concerned about the industrialized states' lack

¹⁶ UN, General Assembly, Law of the Sea: Report of the Secretary-General November 10 1993, A/48/527, p.7.

¹⁷ Jon M. Van Dyke, ed. Consensus and Confrontation: The United States and the Law of the Sea Convention (Honolulu: The Law of the Sea Institute, 1985).

¹⁸ UN Convention on the Law of the Sea, Preparatory Commission for the International Seabed Authority, "Statement of the Chairman of the Preparatory Commission," March 31 1993, LOS/PCN/L.113.

of involvement in the ratification process. On his own initiative, he gathered together a select number of representatives from both the developed and the developing world. He hoped that a compromise could be reached where the industrialized states would overcome their objection to the seabed mining section of the Convention and would make ratification universal.¹⁹ Initially the sessions were chaired by Undersecretary-General Satya Nandan, the Secretary-General's Special Representative for the Law of the Sea. When Boutros Boutros-Ghali took over as Secretary-General of the United Nations, he abolished Nandan's office as part of his rationalization plan in the first part of his mandate. The Law of the Sea Division was placed into the Legal Department of the United Nations, headed by the Legal Council, Carl-August Fleischhauer. It was Fleischhauer who, from 1992 to 1994, chaired the consultations. The consultations were concluded under the chairpersonship of Hans Correll, when Fleischhauer was elected as a Judge of the International Court of Justice.

Following the first sets of meetings in 1990, Fleischhauer opened the consultations from a select audience of hand-picked states to include any UN delegations that wished to attend.²⁰ Some progress was made and interviews with officials involved suggest that there was some optimism among participants that a solution could be found. While four alternative solutions were explored, Fleischhauer was perceived as favouring the option in which an interim regime was to be established until mining became economically feasible. Only then would there be a conference to address the problems associated with Part XI.²¹

However, Fleischhauer's position was effectively undermined in August of 1993 when a draft document, now known as the "Boat Paper", began to circulate.²² While the paper was officially anonymous, it was the result of the work of delegates from the US, the UK, Australia and Fiji whose delegation was led by Nandan following his removal from his position within the UN Secretariat.

The Boat Paper contained a complete re-writing of Part XI. Among other changes, it limited the power and role of the Authority to oversee deep seabed mining; it eliminated the mandatory

¹⁹ UN, Secretariat, "Information Note - Concerning the Secretary-General's Informal Consultations on the Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea," April 8, 1993.

²⁰ Annick De Marffy-Mantuano, "The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea," American Journal of International Law 89 (1995), p.816.

²¹ Ibid, pp.159-161.

²² It gained its name as a result of a computer generated graphic of a boat on its cover. To see the text of the agreement see annex to Gerald J. Mangone, "Negotiations on the 1982 LOSC Given Extra Urgency by 60th Ratification," International Journal of Marine and Coastal Law Journal 57 (1994).

transfer of technology; and it eliminated all preferential treatment of deep seabed mining for the Enterprise (which was the operational body that would engage in deep seabed mining). In short, deep seabed mining was to be run on market principles and not on the Common Heritage of Mankind as planned in the original Part XI.

The Common Heritage of Mankind principle was introduced to the UN by Maltese delegate Arvid Pardo in 1967.²³ It called for the equitable sharing of the benefits of the ocean resources amongst all states of the world. Based on the assumption that no one owned the oceans, it called for the development of a management and exploitation system based on sharing rather than on economic competition. This approach was not supported by most developed states, although it was not until the election of Ronald Reagan that it was directly challenged. The Reagan Administration argued that any exploitation of the resources of the high seas should only be done through the free enterprise system, which discounted any notion of sharing. Therefore, the Boat Paper's introduction of such a system, was favoured by the industrialized states. With the collapse of Communism, most developing states found it difficult to oppose the industrialized world. Thus, little dissent was offered by the developing states. Given the support of the draft paper, Secretary-General Boutros-Ghali believed that he had little choice but to back the initiative. This in effect transferred the efforts to reach a compromise on Part XI, from Fleischhauer to Nandan.

The "Boat Paper" has since evolved into what is now known as the "Implementation Agreement."²⁴ The Implementation Agreement has refined and elaborated the main points of the "Boat Paper". It also developed a procedure by which the new Part XI of the Convention was amended before the Convention itself comes into force.

On July 28, 1994, several months before the Convention was to come into force, the UN General Assembly passed a resolution adopting the Implementation Agreement. While the passage of the agreement allowed several western states such as Germany, Italy and Australia to now ratify the Convention, it is still not known whether the United States Senate will ratify the Convention. Some American observers have suggested that despite the changes, the Convention will remain unacceptable to the Republicans in the Senate who can block its passage.²⁵

²³ UN, General Assembly, Official Record of the General Assembly, 22nd Session, Annexes agenda item 92, A/6695.

²⁴ Its official title is "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982" and it was passed as a UN General Assembly Resolution on July 28, 1994 A/48/263. For two very opposing views of the agreement see E.D. Brown, "The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to University?" Marine Policy (19) no.1, (1995) and Elisabeth Mann Borgese, Ocean Governance and the United Nations (Halifax: Centre for Foreign Policy Studies, 1995).

²⁵ William Safire is the best known American writer to take this position. See his article

PART II: CANADA AND THE CONVENTION

Canadian support for the Convention was extremely strong throughout the entire period in which it was negotiated. Pierre Trudeau has recently written on the importance he attached to the Convention both in terms of protecting Canadian ocean interests and as an instrument of international cooperation.²⁶ Furthermore, comments made by Alan Beesley, head of the Canadian delegation during the negotiations for the Convention, indicate the importance that the government attached to it.²⁷

Other authors have also shown the strength of Canadian support when the Convention was being negotiated.²⁸ Not surprisingly, Canada has also been identified as one of the biggest beneficiaries of the Convention.²⁹ Yet, in spite of all of this, there was no move towards ratification. Following the election of the Mulroney government in 1984, it became clear that the new government did not have the same regard for the Convention as had the previous Trudeau administration.

The diminishing Canadian interest in the Law of the Sea was made evident by the shrinking size and composition of its delegation to the Prep Comm throughout the 1980s. As mentioned earlier, until the beginning of the Secretary-General Consultation in 1990, the Prep Comm was the only active component of the Convention system in the post-1982 period. By examining the structure and rank of the Canadian delegation, a clear trend emerges. For the first Prep Comm meeting in

"Lost at Sea," New York Times, March 31, 1994, sec. A, p.21. For another critical review of the Convention in the American Press see also Doug Bandow "Deep-Six the Law of the Sea," Wall Street Journal, July 28, 1994, sec. A, p.12. A more positive assessment of the Convention was offered by Elliot Richardson, "Treasure Beneath the Sea," New York Times, July 30, 1994, sec. A, p. 19.

²⁶ Ivan Head and Pierre Trudeau, The Canadian Way: Shaping Canada's Foreign Policy, 1968-1984 (Toronto: McClelland & Stewart Inc., 1985), pp.61-63, 208.

²⁷ Allan Beesley, "The Law of the Sea Conference: Factors behind Canada's Stance," International Perspective (July/August 1972). Also see External Affairs, Canada and the Law of the Sea: Resource Information (Ottawa: Minister of Supply and Services, 1978).

²⁸ Hage, Robert E., "The 3rd UN Conference on the Law of the Sea: A Canadian Retrospective," Behind the Headlines 40 (1983); Hage, Robert E., "Canada and the Law of the Sea," Marine Policy 8 (January 1984); and Riddell-Dixon, Elizabeth, Canada and the International Seabed: Domestic Interests and External Constraints (Kingston, Montreal: McGill-Queen's University Press, 1989), (arguably the best examination on the issue).

²⁹ For a complete listing of the Canadian gains see: Sanger, Clyde, Ordering the Oceans: The Making of the Law of the Sea (Toronto: University of Toronto Press, 1987).

1983, Canada sent a large (8 members) multi-departmental team that was led by Ambassador Alan Beesley.³⁰ By October of 1983, this delegation was reduced to seven members and was led by T.C. Bacon.³¹ The Canadian delegation was further reduced to three in 1988.³²

The membership of the delegation also provides a means to determine departmental support for the Convention. In 1983, the delegation was comprised mainly of External Affairs officials (four members) but also included one representative from each of the Departments of Energy, Mines and Resources, Finance, Justice and the Canada Oil and Gas Lands Administration. By 1984, the Justice Department no longer sent a representative; this was followed by the elimination of the delegate from the Canada Oil and Gas Lands Administration in 1986; and this in turn was followed by the Department of Finance in 1988. In 1994, the delegation was comprised of only one representative from Foreign Affairs and one from the Department of Energy, Mines and Resources.

Nevertheless, while small and relatively inactive, the Canadian delegation did provide some input into the resolution of some disputes addressed at the Prep Comm. For example, Canadian officials have taken some credit for the resolution of the problem of overlapping claims to mining sites on the deep sea-bed between the former Soviet Union and the private sea-bed mining consortia in 1987.³³ However, its overall position was distant from its activist role during the Convention's negotiations.

In the late 1980s, Canada's overall position remained that of waiting to see what action, if any, would be taken by the other industrialized states. However, External Affairs officials monitoring the situation noted that the number of states that had ratified the Convention was approaching the 60 required to bring the Convention into force. The same officials decided to begin a review of Canadian legislation that would change if Canada was to ratify. The Justice Department assumed the lead role in this review, in conjunction with External Affairs, National Defence, Fisheries and Oceans and Natural Resources.

While the results of this review were not made public, the main focus was to determine what legislation would have to be altered in order to conform to the provisions of the Convention.

³⁰ UN, Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea, Delegation List, April 27, 1983, LOS/PCN/INF.1, p.5.

³¹ LOS/PCN/INF/3, October 7, 1993, p.4.

³² LOS/PCN/INF/15, August 31, 1988.

³³ Edward G. Lee and Douglas Fraser, "The Rationale and Future Directions of Canada's Oceans Policy: International Dimensions," in Canada's Oceans Policy: National Strategies and the New Law of the Sea edited by Donald McRae and Gordon Munro, (Vancouver: UBC Press, 1989), p.240.

For example, officials found that it would be necessary to establish an EEZ. Currently, Canadian legislation allows for only a 200-mile fishing zone and a 100-mile pollution protection zone in the Arctic.³⁴ Canada would also have to consider changing some of the environmental protection laws. One official suggested that it may be necessary for Canada to reduce its current standards in order to harmonize them with the international standards created by the Convention.³⁵ The Canadian Shipping Act and the Fisheries Act would require the greatest modifications.³⁶ In both instances, Canadian standards would have to be adjusted to conform to international standards.

Canada was not an original participant in the Secretary-General Consultations which had begun in 1990. Nor was it involved in the initial development of the Boat Paper. However, interviews with officials make it clear that the modifications made to Part XI were, for the most part, viewed favourably. In particular, Canadian officials stated that they approved of the changes for governing the actions of the Enterprise.³⁷ They viewed the elimination of its special status, which included the right to free capital, as a more equitable arrangement for commercial companies. Canadian officials also agreed with the abolishment of compulsory technology transfers. The Enterprise will now have to acquire the technology on a commercial basis. According to one official, these changes have the effect of "creat[ing] a bit of that level playing field for which we always sought for both seabed miners and landbased miners."³⁸

The 1993 federal election saw the Liberals return to power. During the election campaign leading up to their victory, the Liberals had made it clear that they favoured the ratification of the Convention. In what became known as the "Red Book", they made two references to the Convention. In the section on Sustainable Development (Chapter 4), the Liberals stated that "[w]e will ratify the Law of the Sea Convention."³⁹ No mention is made of any modifications.

However, when the Liberals discussed its foreign policy objectives, they took a slightly different approach. They stated that they would attempt to assist in the creation of new multilateral regimes to address the "many emerging global issues" by fostering "the development of such

³⁴ Territorial Sea and Fishing Zone Act R.S.C. 1985 (1st Supp.) c. 2, (1st Supp.) s.1.; and Arctic Waters Pollution Prevention Act R.S.C. 1985, c. t-8..

³⁵ Canadian Environmental Protection Act R.S.C. 1985, c. 16.

³⁶ Canadian Shipping Act R.S.C. 1985 c. S-9 as am. R.S.C. 1985 (3rd Supp.). c. 6. and Fisheries Act R.S.C. 1985 c. F-14.

³⁷ Under the original Part XI, the Enterprise was the international body that would oversee and participate in the mining of deep sea-bed minerals.

³⁸ Confidential Interview with Government official.

³⁹ Liberal Party, Creating Opportunity: The Liberal Plan for Canada (Ottawa: Liberal Party of Canada, September 1993), p.70.

multilateral forums and agreement, *including an improved Law of the Sea.*⁴⁰ (emphasis added) On this basis, it is unclear if the Liberals accepted the Convention as it was drafted in 1982, or if they favoured a new draft with a rewrite of Part XI.

A speech made by Foreign Affairs Minister Andre Ouellet seemed to suggest that they do accept the Convention without reservation. On March 15, 1994, in one of his first speeches on Canadian foreign policy, Ouellet began his speech by declaring that Canada will ratify the Convention.⁴¹ He did not qualify his statement with any mention for the need to revise it to gain the acceptance of other industrialized states. Officials within Foreign Affairs have admitted that his speech could be perceived as being slightly at odds with efforts to change Part XI. On July 28, 1994, Canada voted in favour of the Implementation Agreement.

Canada has also tabled Bill C-98, the Oceans Act, for first reading on June 14, 1995.⁴² In the proposed legislation, Canadian maritime boundaries are harmonized with the requirements of the Convention. If the Bill is passed, Canada will establish an EEZ.⁴³ However, it is important to note that the Bill does not call for the ratification of the Convention. Interviews with officials at the Department of Foreign Affairs indicate that separate legislation is now being considered to allow for ratification and that Cabinet gave its approval to proceed in February 1995.⁴⁴ But it is apparent that ratification does not have a high priority and it is doubtful that it will occur any time soon. In fact, an official conceded that even though it has been well over a year since Cabinet, they are still preparing the draft as of July 1996.⁴⁵

PART III: EXPLANATIONS OF CANADIAN POLICY

Part II of this paper has made it clear that there has been a considerable shift in the Canadian position regarding the Convention since its completion in 1982. Canada had been a major

⁴⁰ Ibid, p.109.

⁴¹ Canada, Department of Foreign Affairs, Speeches and Statement "Address by the Honourable Andre Ouellet," March 15, 1994.

⁴² Canada, Minister of Fisheries and Oceans, Bill C-98, Oceans Act, first session, 35th Parliament, 1st reading June 14, 1995.

⁴³ The passage of the Bill has been delayed because of opposition by the Bloc Quebecois. Members of the Bloc are opposing the Bill because it will allow the federal government to "fix fees" for icebreaking and other services provided to the commercial shipping industry. Bloc contends that this will hurt the economy of Montreal. Leslie Beckman, "Don't Toss the Oceans Act Overboard," Globe and Mail, June 20, 1996.

⁴⁴ Phone interview with Foreign Affairs official, November 29, 1995.

⁴⁵ Phone Interview with Foreign Affairs official, July 11 1996.

supporter of the Convention yet, thirteen years later, it is still not ratified and Canada shows very little inclination to do so.

Officially, the position is that there has been no change in the Canadian position. In 1991, in one of the few public statements that have been made concerning the Canadian position, Robert Rochon, then Director of Legal Operations in the Department of External Affairs, stated that

I must emphasize at the outset that Canada's interest and goals have not altered a fraction since the signing of the Convention in Montego Bay in 1982. We still believe, and are working hard to ensure, that the LOS Convention provides a solid legal basis for the management of all activities affecting the World's Oceans.⁴⁶

Rochon stated that there were two primary reasons why Canada had not yet ratified the Convention at that point in time:

First, we consider that the future of the Convention is better served through our efforts to make it universally acceptable, rather than force unacceptable provisions on a reluctant and therefore non-compliant international community. Second, we believe that it would be irresponsible for the Government to commit Canada to an international seabed mining regime the costs of which are still unclear.⁴⁷

In short, because several industrialized states, most notably the United States, opposed the Convention, Canada considered it prudent not to ratify. Rochon went on to point out that Iceland was the only western state that had ratified the Convention. Thus, if Canada was to ratify, it would be required to pay the majority of the administrative costs of the Authority.

Another reason for the lack of Canadian ratification was the increasing awareness that the commencement of deep seabed mining was increasingly moving off into the future. As new land-based sources of minerals were discovered and commodity prices remained low, it became clear that seabed mining was not going to occur in the immediate future. This created a more cautionary approach in most governments and Canadian officials have indicated that Canada was no different. Since no one knew when or how the mining was to occur, state officials were reluctant to commit to a regime negotiated in the 1970s.

A fourth factor not mentioned in official explanations but of equal importance was the change in Canadian government in the fall of 1984. The main foreign policy platform of the Conservative party under the leadership of Brian Mulroney was to improve relations with the United States. Following electoral success, Mulroney did undertake both symbolic and substantial steps to

⁴⁶ Robert Rochon, "The Law of the Sea Convention Today and in the 1990s: A Canadian Perspective," in Canada and the Law of the Sea: Into the 1990s, edited by Rob Huebert and Shabnam Datta, (Halifax: International Insights, forthcoming), p.1.

⁴⁷ Ibid, pp.7-8.

improve continental relations.⁴⁸ It is probable that given the Canadian government's agenda, Ottawa was unwilling to antagonize the Reagan administration over an issue that it did not consider important. What is not known is whether or not the American government actively discouraged Ottawa from ratifying. No evidence exists to indicate any efforts on the part of the Americans to influence the Canadian government.

The Canadian position in favour of commercial interests is not surprising given its large domestic mining industry. While it is impossible to measure the influence that industry representatives have on the Canadian position, one government official acknowledged that the industry has closely monitored the efforts to revise Part XI. Obviously, the immediate interests of Canadian industry would be best served by the revisions now being proposed for Part XI. There are continual informal consultations between the main mining companies, the provinces with strong mining interests (Manitoba and Ontario) and the main mining unions and the Canadian delegations. It is likely that these interests have encouraged the Canadian government to accept the revisions.

All of these factors explain why Canada did not ratify before agreement was reached on the changes to Part XI. Yet it is now over a year since this agreement was reached and there is no indication that the Canadian government has made any progress towards ratification. Furthermore, the election of the Chretien government would seemingly have cleared the way for ratification considering the statements made in the Liberal Red Book. How then, is the lack of movement towards ratification in the current period to be explained?

There are three elements to the explanations. First, and most significant, the focus on the Convention has been eclipsed by the ongoing East Coast fishery crisis. There is little doubt that when the federal government concerns itself with ocean related matters, its attention is squarely on the issue of fisheries and has been so since at least 1989.⁴⁹ Canadian efforts to react to the fishing crisis have been a combination of unilateral and international cooperative actions.⁵⁰ Overall, Canadian actions have been quite successful in achieving their immediate objectives. Yet many of these actions have resulted in direct and indirect harm to the Canadian position on the Convention. First and most harmful was the Canadian amendment of the Coastal Fisheries

⁴⁸ For a good review of the steps taken see Clarkson, Stephen, Canada and the Reagan Challenge: Crisis and Adjustment, 1981-85 (Toronto: John Lorimer and Company, 1985).

⁴⁹ For a good discussion on the development of the crisis see William Schrank, "Extended Fisheries Jurisdiction: Origins of the Current Crisis in Atlantic Canada's Fisheries," Marine Policy 19 no.4 (July 1995), and Claude Emery, "Overfishing Outside the 200-Mile Limit: Atlantic Coast," Current Issue Review Library of Parliament Research Branch 90-6E, October 10, 1990 revised May 30, 1994.

⁵⁰ For a good description of these actions see Ted McDorman, "Canada's Aggressive Fisheries Actions: Will They improve the Climate for International Agreement?" Canadian Foreign Policy 2 no.3 (Winter 1994).

Protection Act.⁵¹ This was the basis for Canadian action against foreign fishermen operating in the Nose and Tail of the Grand Banks. The main problem created concerning the Convention was the unilateral extension of Canadian jurisdiction over fisheries beyond the 200-mile EEZ limits. Such action was in contradiction to the provisions of the Convention, which does not allow states to take such unilateral action.

As most observers are aware, despite the intensity of the opposition of some distance fishing states such as Spain and Portugal, international discussions on the problem were ultimately held. In turn, these lead to an agreement reached in New York in August 1995 on the issue of Straddling Stock and Highly Migratory Fish Stocks. As such, Canada now has a multilaterally accepted means for the protection of its fish stock beyond the 200-mile limit.⁵² It is expected that Canada will soon rescind what it had termed a temporary emergency action to respond to the virtual disappearance of the cod stock.

There is also a second, albeit more indirect cost regarding Canada's focus on the fishing issue. Every time that a fishing crisis occurs, an increasingly short-staffed Foreign Affairs department is forced to divert staff and resources necessary to prepare the legislation leading to ratification of the Convention. Staff have repeatedly voiced the opinion that they are overburdened by the work created by the ongoing fisheries crisis and are unable to properly focus on the Convention. Furthermore, since there are no crises driving the need for ratification, it is easy to relegate it to the bottom of the priority list. It is possible, therefore, that the current inability of Canada to ratify may in part be due to the lack of personnel at the Department of Foreign Affairs.

A third reason for the current lack of progress can be found in the shift of attitudes towards international cooperation. There is little doubt that the entire international system has become much more oriented towards market concerns, and for Canada this has been clearly manifested in both the Free Trade Agreement and the North American Free Trade Agreement.⁵³ Thus, an international agreement such as the Convention, with its foundation in the principle of the Common Heritage of Mankind, does not hold the same value for a government much more concerned with market efficiency. While it is possible to cite a recent quote of Trudeau that the Convention's original section on deep sea-bed mining was "enlightened," no such comment can

⁵¹ For an explanation of the legislation see Douglas Day, "Tending the Achilles' Heel of NAFO: Canada acts to Protect the Nose and Tail of the Grand Banks," Marine Policy 19 no.4 (July 1995), pp.263-265.

⁵² Chad Carpenter, Lewis Clifton, Emily Gardner and Patrick Moran, "Summary of the Fifth Substantive Session of the UN Conference on Straddling Stocks and Highly Migratory Fish Stock," Earth Negotiations Bulletin 7 no.54 (August 7, 1995).

⁵³ Bruce Wilkinson, "Trade Liberalization, the Market Ideology, and Morality: Have We a Sustainable System?" in The Political Economy of North American Free Trade, edited by Ricardo Grinspun and Maxwell Cameron, (Ottawa: Canadian Centre for Policy Alternatives, 1993).

be attributed to a current government member.⁵⁴

CONCLUSION

A tremendous amount of effort by, and benefit to, Canada was lost when the United States made the decision to actively oppose the Convention in 1982. Canada could have continued to push on and ratify in the face of American pressure, but this would have been detrimental to the Canadian policy to improve economic links with the US. It is of course impossible to know for certain the severity of such costs, but it seems safe to speculate that it is doubtful that Reagan would have been quite as willing to support Free Trade had Canada publicly defied the US with regards to the Convention. On the other hand, Canada has not suffered unduly in the face of its refusal to follow the American lead on its policy towards Cuba. It is possible that had Canada moved quickly to ratify, other industrialized states would have been emboldened and may have followed in turn.

Regardless of such speculation, by the time the other industrialized states were willing to ratify the Convention, it had become apparent that Canadian interest had shifted elsewhere regarding the oceans. Canada shows little inclination towards making the effort to ratify. The question that arises is whether Canada should ratify.

Most elements of the Convention are now accepted as customary international law. Canada is moving ahead in its plans to establish all of the maritime boundaries allowed by the Convention. Why then bind itself to a Convention whose benefits it can enjoy without the responsibilities?

The most significant reason is the fact that non-ratification only serves to ultimately destabilize the international ocean order. Canada has an interest in a stable maritime environment in which the rule of law operates. While recent unilateral action would seem to indicate otherwise, much of the danger that arose during Canada's recent confrontation with Spain regarding fishing rights could have been avoided if both parties had previously bound themselves to the dispute settlement articles of the Convention. Both Spain and Canada, through the Maastricht Treaty and NAFTA respectively, have indicated that they are willing to accept some form of international mandatory dispute settlement arrangements. There is no reason not to believe that had they both previously ratified the Convention, similar adherence would have been forthcoming.

The examination of one specific issue area limits the applicability of any findings regarding the conduct of Canadian foreign policy in general. Nevertheless, given the importance of the Law of the Sea Convention to Canada in the 1970s and early 1980s, and its subsequent near abandonment in the 1990s, some generalizations can be made. The Canadian position on the Convention provides some important insights with regards to Canada's commitment to multilateralism. It is apparent that the level of willingness of any federal government in the 1990s to support a multilateral action has decreased with regards to the oceans. While both the

⁵⁴ Head and Trudeau, The Canadian Way, p.213.

former Conservative Government and the current Liberal Government have repeatedly stated their verbal support for the Convention, no corresponding real action has been taken. Instead, Canadian governments have only been willing to wait and see what the Americans, Japanese and Western Europeans plan to do. This is substantially different from the previous willingness of Canada to act as a leader in the 1970s. Now, concern over American reaction and a much more narrower definition of self-interest and a decreased importance attached to multilateralism have all combined to make Canada much less willing to conduct its international relations in a multilateral manner.

Canada was a leader in the negotiations of the Law of the Sea Convention. Important material benefits were derived from its involvement and also provided Canada with a leadership role in the international system. To a large degree, these benefits have been ignored by the policy adopted in the 1980s. Canada now has the opportunity to regain the benefits of these earlier positions only if it can once again look beyond the scope of narrow self-interest and is willing to accept the necessary costs of such actions.