

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND CANADA

INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) was passed in **1982 “dealing with all matters relating to the law of the sea” as it had originally** been charged to do by a General Assembly mandate of 1973. The text was adopted by 130 votes in favour to 4 against. The Convention came into force November 16, 1994 and was ratified by Canada on November 7, 2003.

1. This article intends to highlight the relevant provisions of UNCLOS which impact Canadian positions, legislation and / or actions in relation to: the sovereignty of Canadian waters in general; the sovereignty of the Canadian Arctic Archipelago, including the Northwest Passage; Canadian **boundary disputes in the Arctic Ocean; and Canada’s claim to an** extended continental shelf in the north.

- I. A) Canadian Legislation – The Arctic Waters Pollution Prevention Act (1970)¹

This legislation was passed to discourage the unauthorized deposit of waste materials in a specially created offshore zone out to 100 nautical miles and to prevent ships which do not conform to specified safety standards from passing through the zone.

The Act applies to Arctic waters which are “adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles”.²

- B) UNCLOS Authority

Article 234 permits the coastal state to adopt and enforce non-discriminatory laws to prevent, reduce or control marine pollution from vessels in ice-covered areas within the Exclusive Economic Zone.

- II. A) Canadian Legislation – Territorial Sea and Fishing Zone Act (1970)

Canada claims a territorial sea of 12 nautical miles breadth, around the coast, and around Canadian islands.³ The breadth of the territorial sea is measured from baselines, which normally correspond to the low water mark.

The territorial sea is subject to the sovereignty of the nation State and the right of innocent passage which accords the vessels of other coastal nations the right to sail through the territorial sea.

B) UNCLOS Authority – Limits of Control of the Coastal State of its Territorial Sea

Article 3 – **Section 2 “Limits of the Territorial Sea”** establishes the boundary to not exceed 12 nautical miles measured from baselines.

Article 17 – ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18 (1) – passage means navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such port facility.

(2) – Passage shall be continuous and expeditious. However passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ship or aircraft in danger or distress.

Article 19 (1) – **defines the meaning of “innocent passage”**.

(2) – Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
(a) – (l).

Article 21 – The coastal State may adopt laws and regulations, in relation to innocent passage through the territorial sea, in respect to the following areas: (a) – (h).

Article 22 – The coastal State, when necessary can establish sea lanes and traffic separation schemes for the safety of navigation in exercising the right of innocent passage through its territorial sea.

III. A) Canadian Legislation – Fishing Zones (1977)

Canada, by legislation, claimed a 200 nautical mile exclusive fishing zone.⁴ The zone in Northern waters was created by the Fishing Zones of Canada (Zone 6) Order, C.R.C. 1978, c. 1549.

B) UNCLOS Authority

- Article 56(1)(a) notes that the rights of the coastal state includes the management, conservation and exploration of natural resources.
- **Article 57 states that the breadth of the zone “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.**

IV. A) Canadian Archipelagic Islands – (1986)

An Order-in-Council established straight baselines around the outer perimeter of the Canadian Arctic archipelago, coming into effect on January 1, 1986.

These baselines define the outer limit of Canada’s historic internal waters.⁵

B) UNCLOS Authority

- Article 8 defines the term **“Internal Waters”**.
- **Article 47 states that “an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs”.**

V. A) Canadian Legislation – Oceans Act (1997)⁶

The Oceans Act which came into force January 31, 1997, states in the preamble:

**“Whereas Canada recognizes that the three oceans: the Arctic, the Pacific and the Atlantic, are the common heritage of all Canadians; and
Whereas, Parliament wishes to affirm in Canadian domestic law Canada’s sovereign rights, jurisdiction and responsibilities in the exclusive economic zone of Canada.”**

The Act consists of the following three areas:

Part 1 – recognizes Canada’s jurisdiction over its ocean areas through the declaration of an Exclusive Economic Zone and other maritime zones described in the 1982 LOSC, as well as incorporating provisions of the Canadian Laws Offshore Application Act and the Territorial Sea and Fishing Zones Act.⁷

Part II – provides for the development and implementation of a National Oceans Management Strategy based on the sustainable development and integrated management of oceans and coastal activities and resources, and

Part III – outlines federal responsibilities for the managing of **Canada’s oceans and defines the power and functions of the Minister**.

B) UNCLOS Authority

Part XI provisions under the heading “The Area”. For example, Article 142 discusses the “Rights and legitimate interests of coastal states”.

2. The Legal Status of Canada’s Northwest Passage

- I. As noted earlier, in 1986 by Order-in-Council Canada joined the outermost limits of the islands of our Arctic archipelago, in which based on Article 47 of UNCLOS, Canada takes the position that these waters are **“internal” and subject to the domestic laws of this country**.
- II. Limits of Control in Archipelagic Waters - UNCLOS
 - Article 52(1) – **Ships of all states enjoy the right of “innocent passage”, as defined in Article 19, through archipelagic waters;**
 - Article 52(2) – An archipelagic state may only suspend temporarily in specified areas, the innocent passage of ships **if such suspension is “essential for the protection of security”;**
 - Article 53 – An archipelagic state may designate sea lanes and air routes through and above these waters;
 - Article 234 - Coastal states have the right to enforce laws and regulations for the prevention and reduction and control of marine pollution from vessels in ice-covered areas within the EEZ.

- III. Many countries, including the US, consider the Northwest Passage as an **“international strait” for maritime strategic reasons for the USN.**⁸ In order to be considered an international strait, international law relies on two fundamental tests: geography and usage.

Geographically, to be a strait, a waterway must join one area of high seas to another. An argument could be made that the various sea routes linking the Davis Strait to the Beaufort Sea meets such a test.

The other test is usage. In other words the more ship traffic transiting these waters, the argument goes that such traffic validates decisions of the International Court which supported the argument that increased ship traffic leads to confirmation that such waters should be considered as an international strait.⁹

- IV. Limits of Control if the Northwest Passage is determined to be an International Strait.

- Article 37 – An international strait is to be used for international navigation between one part of the high seas to another;
- Article 38(1) – In an international strait, all ships are entitled **to the right of “transit passage”**;
- Article 38(2) – **“Transit passage” means the freedom of navigation and over flight solely for the purpose of continuous and expeditious transit**;
- Article 39(1) – Duties of ships and aircraft during **“transit passage” shall:**
 - (a) proceed without delay through or over the strait;
 - (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait;
 - (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.
- Article 39(2) – Ships in transit shall:
 - (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea; and
 - (b) comply with generally accepted international regulations, procedures and practices for the

prevention reduction and control of pollution from ships.

- Article 39(3) describes the obligation of aircraft while in transit passage;
- Article 40 states that during transit passage, foreign ships, **including marine “scientific research and hydrographic survey ships,** may not carry out any research or survey activities without the prior authorization of the States bordering the straits”;
- Articles 41/42 refer to States bordering the straits may establish laws and regulations relating to:
 - (a) sea lanes and traffic separation schemes;
 - (b) safety of navigation and regulation of maritime traffic;
 - (c) prevention, reduction and control of pollution; and
 - (d) customs, immigration, sanitary measures.
- Article 44 – States bordering straits shall not hamper transit passage within or over the strait. There shall be no suspension of transit passage.

3. Outstanding Boundary Disputes in the Arctic Ocean between Canada and:

- (a) Denmark – Hans Island in the Nares Strait between Greenland and Ellesmere Island;
- (b) US – the offshore boundary area extending off the Yukon/Alaska border out into the Beaufort Sea.

4. Canada’s Continental Shelf’s Outer Limit

Part VI of the UNCLOS describes the general provisions for the continental shelf. Article 76(1) defines the definition of the term as follows:

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

Article 76(3) states that:

“The continental margin comprises the submerged prolongation of the land mass of the coastal State, and

consists of the sea-bed and subsoil of the shelf, the slope **and the rise.**”

Article 76(5) notes that:

“The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.”

The alternative, as directed by UNCLOS, means that in determining the outer limits of the continental shelf beyond 200 nautical miles, a coastal State can determine in evidence that its continental slope can reach 350 nautical miles or 100 nautical miles from the 2,500 metre isobath approaching the sea-bed, as per Article 76(a).

Article 76(8) – **“Information on the limits of the continental shelf** beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf (CLCS). The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be **final and binding.**”

Article 76(9) states that the coastal State “shall deposit with the Secretary-General of the UN charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf”.

Pursuant to Articles 76(8) and (9), Canada has already submitted its data regarding the outer limit of the continental shelf as regards to the Atlantic Ocean to the CLCS.

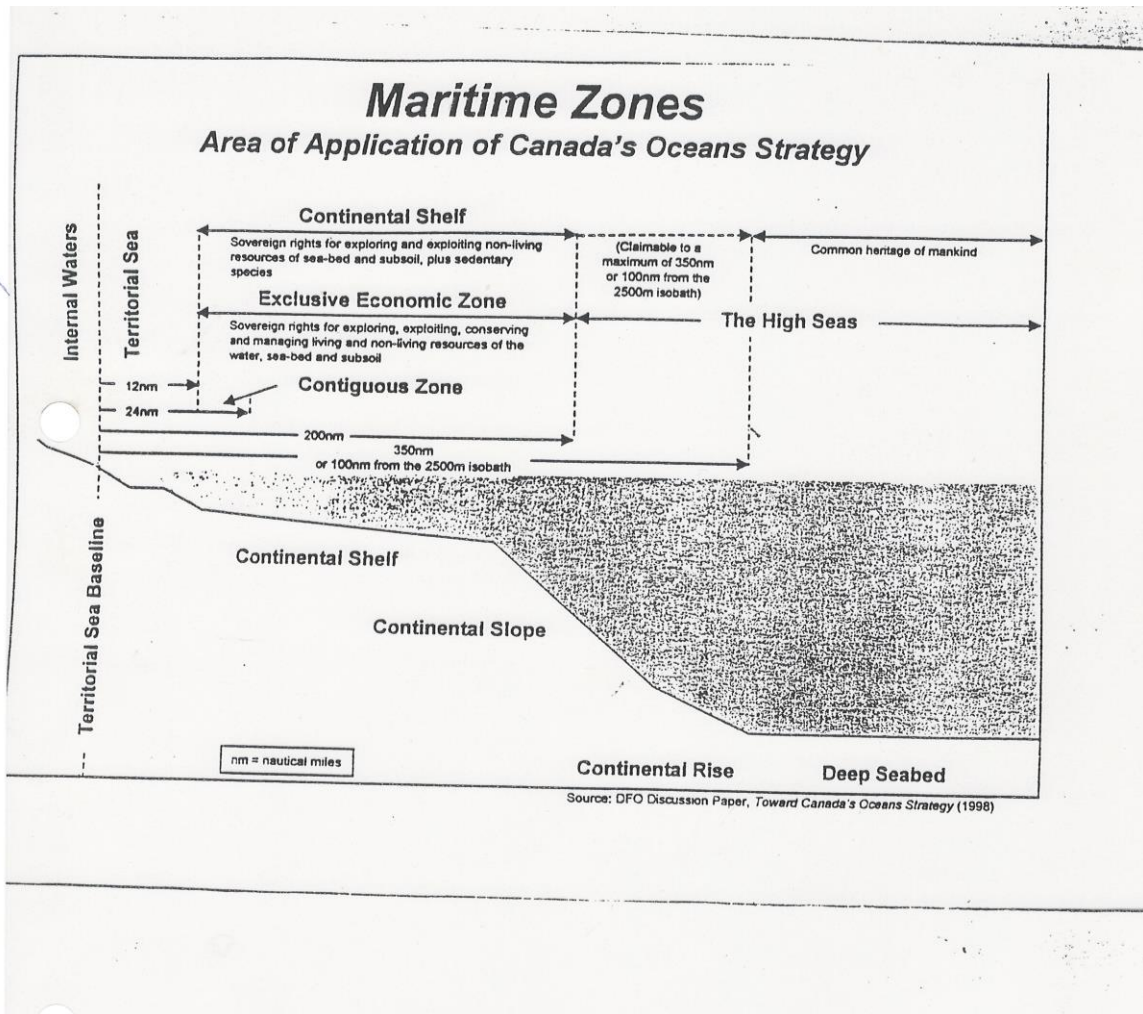
For the past several years, Canada has collected data in the Arctic Ocean along the Lomonosov Ridge in an attempt to show our continental shelf extends beyond the 200 nautical mile limit. It is likely there will be competing submissions from Russia, Denmark, Norway and the US, resulting in overlapping claims between the various countries. Russia and Denmark have already filed their submissions respecting their outer limits of their respective shelf

areas in the Arctic Ocean. Canada will be analyzing the data collected and will be forwarding such information to the Commission as per Article 4 of Annex II of the Convention at a later date.

It is clear the CLCS has no mandate or role to play with regards to the determination of maritime boundaries where overlapping claims exist between the competing countries.¹⁰ It is likely that Russia and Denmark are prepared to resolve such disputes by peaceful negotiation.¹¹ The US may agree to utilize third-party adjudication to resolve such disputes, as it did in resolving the claim with Canada in the Gulf of Maine, as long as both parties agree to resolving the dispute in this manner.¹²

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FOOTNOTES

¹ RSC 1970 (1st Supp.), C-2

² ss. 3(1), 3(2)

³ An Act to Amend the Territorial Sea and Fishing Zone Act, S.C. 1969-70, c.68

⁴ Effective January 1, 1977

⁵ Standing Order 85 – 872, September 10 1985

⁶ S.C. 1996, c.31

⁷ The Canadian Laws Offshore Application Act (S.C. 1990, c. C – 18.5) was repealed by the Oceans Act (S.C. 1996, c.31)

⁸ The US has to date still not ratified UNCLOS. An interesting article from the US **perspective on UNCLOS can be found in “The Other Law of the Sea”** by Commander A. J. Norris US Coast Guard, the Naval War College Review, Summer 2011, Vol. 64, Number 3, p. 78

⁹ Corfu Channel Case, 1949, I – C.J. Reports p. 4

¹⁰ Professor Ted L. McDorman, Professor of Law, University of Victoria

¹¹ The recent Russian – Norway 2010 Agreement is a good example in the negotiation of offshore maritime boundaries

¹² Canadian – US Maritime Boundary Case: The Gulf of Maine (1984), ICJ Reports 1984, 252-5