Vanderbilt Journal of Transnational Law

Volume 4
Issue 1 *Winter 1970*

Article 5

1970

Jurisdiction--Territorial Waters--Arctic Waters Pollution Prevention Act

Gilbert T. Davis

JURISDICTION--TERRITORIAL WATERS--ARCTIC WATERS POLLUTION PREVENTION ACT EXTENDS LIMITED CANADIAN JURISDICTION OVER NORTHWEST PASSAGE

I. Introduction

On June 17, 1970, Canada passed the Arctic Waters Pollution Prevention Act which asserts jurisdiction over Arctic waters 100 miles off her coasts for the purpose of pollution prevention regulation.[1] The Act proscribes any discharge of waste into Arctic waters,[2] and prohibits navigation in certain "shipping safety control zones" in Arctic waters unless regulations pertaining to structural, equipment, navigational aid, cargo, and personnel qualification standards are met.[3] Given the conflict between the traditional freedom of the seas and the seriousness of the ocean pollution problem, the Canadian action is likely to provoke much controversy.

---

1. Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. 1970), reprinted in 9 INT'L LEGAL MATERIALS 543 (1970) [hereinafter cited as Pollution Prevention Act].

2. Pollution Prevention Act § 4(1). Waste is broadly defined in § 2(h) as any substance which would alter detrimentally the water quality. In the Act, "Arctic waters" refers to the waters within the area enclosed by the 60th parallel of North Latitude, the 141st meridian of West Longitude, and a line measured seaward from the Canadian coasts therein for a distance of 100 nautical miles. The 60th parallel coincides with the border between the Northwest Territories and the western Provinces. The 141st meridian coincides with the Canadian and northern Alaska border. Section 18(1) provides that any person violating § 4(1) is subject to a fine not exceeding $5,000, and any ship in violation is subject to a fine not exceeding $100,000. Section 18(2) makes each day of violation a separate offense.

3. Pollution Prevention Act § 12. Pursuant to § 11(1), The Governor in Council may designate areas of the Arctic waters as "shipping safety control zones" as he deems necessary. Section 12 of the Act also permits the Governor in Council to promulgate regulations. The maximum fine specified in § 19 for failure to comply with the regulations is $25,000.

In March, 1967, the wreck of the Torrey Canyon off the coast of Cornwall, England, dumped 80,000 tons of crude oil into international waters[4] and alerted the world to the ecological dangers posed by oil tankers. This disaster, in combination with the first successful commercial voyage through the Northwest Passage late in the summer of 1969,[5] and the discovery of the vast oil fields at Prudhoe Bay in Alaska,[6] perhaps was responsible for the Canadian legislation. Also responsible were the frequent continental shelf oil drilling disasters, of which the 1968 Santa Barbara Channel oil spill is the most infamous.[7]

Off-shore drilling is covered in the Act by a provision which requires the submission of work plans, specifications, and evidence of financial responsibility.[8] In addition to the accidental pollution of wrecks and spills, deliberate discharges causing pollution, such as bilge pumping, ballast dumping, and tank cleaning operations[9] fall within the Act's proscriptions. Authorities have indicated that the necessity

---

4. See Nanda, The "Torrey Canyon" Disaster: Some Legal Aspects, 44 DENVER L.J. 400 (1967).

5. This voyage was made by the United States ice-breaking tanker S.S. Manhatten. N.Y. Times, Sept. 15, 1969, at 1, col. 3. For a discussion of the Canadian response to the Manhatten's voyage and the Arctic sovereignty question in general see, Note, The Manhatten's Arctic Conquest and Canada's Response in Legal Diplomacy, 3 CORNELL INT'L L.J. 189 (1970).

6. See generally Carter, North Slope: Oil Rush, 166 SCI. 1220 (1969).

7. See Baldwin, The Santa Barbara Oil Spill, 42 COLO. L. REV. 33 (1970). See generally Note, Continental Shelf Oil Disasters: Challenge to International Pollution Control, 55 CORNELL L. REV. 113 (1969).

8. Pollution Prevention Act §§ 8, 10 (financial responsibility may be in the form of insurance or indemnity bonds).

9. Kufe, Water and Air Pollution and the Public Health, INT'L COMM'N OF JURISTS 31 (1970); Nanda, supra note 4, at 402.

for these discharges can be eliminated by better ship design and equipment.[10]

Canada took unilateral action on the ocean pollution problem because she felt international measures were either non-existent or ineffective. The 1958 Geneva Convention on the High Seas provides: "Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject."[11] While this language might appear sufficient, the regulations must be consistent with the principles of the law of the sea set forth in other Geneva conventions.[12] Existing treaty provisions on the subject include the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil,[13] as amended in 1962[14] and 1969.[15] The 1954 and 1962 provisions established zones of 50 and 100 miles, respectively, within which oil could not be discharged from certain sized vessels. The 1969 amendments prohibit oil discharges anywhere on the oceans.[16] The Canadian Act goes further and allows regulation

---

10. Kufe, supra note 9, at 31; Nanda, supra note 4, at 420-21.

11. The Geneva Convention on the High Seas, opened for signature April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as High Seas Convention].

12. These are examined in Part II infra.

13. Opened for signature May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 [hereinafter cited as Oil Pollution Convention].

14. Opened for signature April 11, 1962, [1966] 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

15. The 1969 amendments are annexed to I.M.C.O. Doc. A VI/Res. 175 of Jan. 16, 1970, 9 INT'L LEGAL MATERIALS 1 (1970).

16. INTERNATIONAL CONFERENCE ON OIL POLLUTION OF THE SEA, REPORT OF PROCEEDINGS HELD IN ROME, OCTOBER 1968, at 295 (1969). The convention has proved largely ineffective because the polluting ship itself is solely responsible for reporting violations.

and, if necessary, prevention of passage to stop oil, or any other waste, from being deposited in the 100 mile zone.

Also in 1969, two other conventions were opened for signature: the International Convention on Civil Liability for Oil Pollution Damage[17] and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.[18] The former establishes the general rule that ship owners will be held strictly liable for any oil pollution damage. This liability is assessed on the basis of the tonnage of the ship involved.[19] The latter Convention allows coastal states to take "necessary" measures to limit or prevent damage to their shores following oil pollution casualties. Thus both of these Conventions are remedial in nature, while the Canadian Act contains strong preventive measures.

Additional reasoning for the passage of the instant Act is found in the very nature of the Arctic waters. The Arctic Ocean, in its predominantly frozen state, obviously differs from the other oceans. Pollution is a particularly serious problem in cold climates since the accumulation of oil on the shores persists much longer than in temperate regions. Pack ice covers about ninety per cent of the Artic Ocean with an average thickness of three meters.[20] But the pack is not immobile; there is constant motion both locally and over the entire Arctic.[21] These factors indicate the uniqueness of the Arctic which appears to be in consonance with the uniqueness of the Canadian Act itself.

---

17. Opened for signature Nov. 29, 1969, 9 INT'L LEGAL MATERIALS 45 (1970).

18. Opened for signature Nov. 29, 1969, 9 INT'L LEGAL MATERIALS 25 (1970).

19. Liability is limited to approximately $134 per ton of the ship's gross tonnage for each incident, but the total liability for each incident must not exceed $14,000,000. Additionally, all ships carrying more than 2000 tons of oil must have oil pollution insurance.

20. Pharand, Freedom of Seas in the Arctic Ocean, 19 U. TORONTO L. J. 210 (1969).

21. Id. at 219.

II. The Law of the Sea

Ocean waters may be divided into four categories: internal waters, the territorial sea, the contiguous zone, and the high seas. All ocean waters from the low tide mark landward are considered internal waters.[22] As a general rule, ports, bays, coastal indentations, and "areas near coasts off which islands and rocks are found in close proximity" are internal waters.[23] A baseline connecting the low tide marks of the natural entrance to the bays and coastal indentations form the outer boundary of the waters therein.[24] A nation has the same absolute sovereignty over its internal waters as it does over its land areas.[25]

The territorial sea extends from the internal waters baseline seaward for a distance of from three miles to two hundred miles, depending upon the individual country's predilliction.[26] International law historically has

---

22. Geneva Convention on the Territorial Sea and the Contiguous Zone, arts. 3, 5(1), opened for signature April 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention].

23. M. MC DOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 89 (1962).

24. Territorial Sea Convention, art. 7(3). The baseline cannot exceed 24 miles in length, except for certain "historic" bays and certain coastal island configurations. Territorial Sea Convention, arts. 7(4), 7(6).

25. M. MC DOUGAL & W. BURKE, supra note 23, at 29. But McDougal and Burke feel that even in internal waters "contemporary interdependences in the enjoyment of the oceans are so intense" that coastal state sovereignty should not be absolute, but that there occasionally should be an "appropriate balancing" with the interests of the flag state. M. MC DOUGAL & W. BURKE, supra note 23, at 99.

26. The United States claims a three mile territorial sea. Canada recently extended her claim from three miles to twelve miles by An Act to Amend the Territorial Sea and Fishing Zones Act, 18-19 Eliz. 2, c. 68 (Can. 1970). For a list of the territorial sea claims of the various nations see, Alexander, Offshore Claims of the World, in THE LAW OF THE SEA 72-75 (L. Alexander ed. 1967).

recognized the three mile territorial sea.[27] The two hundred mile claims of a few Latin American countries have failed to win any international acceptance.[28] Limits of from four to twelve miles have recently been respected, but as yet have received no formal international recognization.[29] The coastal state has sovereignty over its territorial sea,[30] subject to the right of innocent passage given to ships of other states.[31] The Geneva Convention on the Territorial Sea and the Contiguous Zone states that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state."[32] Although this 1958 convention was the first formal declaration of the right of innocent passage, such a custom has long been established in international law.[33]

---

27. See Kent, The Historical Origins of the Three Mile Limit, 48 AM.J. INT'L L. 537 (1954).

28. M. MC DOUGAL & W. BURKE, supra note 23, at 500. Professor McDougal criticizes the broad Latin American claims on a policy basis by declaring that they do not represent genuine exclusive interests because they are made with no promise of reciprocity. If other states made the same claims the Latin American countries would show no net gain. McDougal, International Law and the Law of the Sea, in THE LAW OF THE SEA 8-9 (L. Alexander ed. 1967).

29. See M. MC DOUGAL & W. BURKE, supra note 23, at 69-74.

30. Territorial Sea Convention, art. 1(1).

31. Territorial Sea Convention, art. 14(1).

32. Territorial Sea Convention, art. 14(4).

33. Pharand, Innocent Passage in the Arctic, 6 CAN. YB. INT'L L. 3, 4 (1968). There is a difference of opinion as to where the burden of proof is to be placed regarding the innocence of the passage. Professor McDougal holds that the ship has the burden of proving her innocence. McDougal, supra note 28, at 17. Others are of the opinion that the passage is presumed innocent until the coastal state shows otherwise. E.g., Gross, The Geneva Converence on the Law of the Seas and the Right of Innocent Passage Through the Gulf of Aqaba, 53 AM.J. INT'L L. 564, 582 (1959).

The contiguous zone is an area over which the coastal state may not exercise sovereignty. But, according to the Territorial Sea Convention, it is an area over which the state may exercise the control necessary to "(a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) punish infringement of the above regulations commited within its territory or territorial sea."[34] The Convention also provides that "[t]he contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."[35] The Canadian Act appears to be grounded in such a contiguous zone theory.

The remainder of the ocean waters is classified as the high seas, upon which all states have complete equality of access, use, and enjoyment.[36] Ocean space is res communis,

---

34. Territorial Sea Convention, art. 24(1).

35. Territorial Sea Convention, art. 24(2).

36. McDougal, supra note 28, at 19. This statement requires some qualification since the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, opened for signature April 29, 1958 [1966] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285, gave the coastal state the right to demand that states fishing off its coasts agree to conservation measures in accord with the conservation measures of the coastal state. The Geneva Convention on the Continental Shelf, opened for signature April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, gave the coastal state sovereign rights over the continental shelf for the purpose of exploiting its natural resources. The continental shelf is defined loosely in Article 1 as referring "(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. Article 2 of the High Seas Convention, supra note 11, codifies the principle of freedom of the high seas. Article 1 of the Convention

the property of all, as opposed to res nullis, the property of none, and subject to appropration.[37] The rationale for freedom of the seas is found in the very nature of the sea itself which makes it incapable of possession and the necessity of keeping the sea lanes open to facilitate commerce.

III. The Canadian Pollution Prevention Act and the Law of the Sea

The legal status of the Arctic Ocean has long been in dispute. Even Canadian governmental officials have differed in their views of the Arctic. Charles Stewart, Minister of the Interior (1925), L. B. Pearson, then Ambassador to the United States (1946), and Prime Minister St. Laurent (1953) state that Canadian territory extended to the North Pole.[38] These claims were based on a theory of the Arctic as a res nullis and, hence, subject to acquistion by prescription. Such prescription on behalf of Canada is evidenced by three factors: first, British and Canadian exploration; second, Canadian assertion of jurisdiction over criminal offenses; and third, Canadian licensing of whalers and collection of customs duties.[39] Alternatively, Jean Lesage, Minister of the Department of Northern Affairs, said in 1956 that Canada's

---

defines the "high seas" as "all parts of the sea that are not included in the territorial waters or in the internal waters of a state." Thus freedom of the seas prevails in the contiguous zone, subject to the restrictions of that zone. See generally H. GROTIUS, THE FREEDOM OF THE SEAS (Magoffin trans. 1916).

37. Bryne, Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago, 28 FAC. L. REV. 1, 2 (1970).

38. Pharand, supra note 33, at 52-53.

39. Bryne, supra note 37, at 2-3. For a discussion of the now discredited "sector theory" as an alternative to prescription see, Head, Canadian Claims to Territorial Sovereignty in the Arctic, 9 MC GILL L. J. 200, 202-210 (1963). Under the "sector theory" no acts of prescription were needed as a nation claimed sovereignty over a bordering res nullis simply because said nation was the nearest in point of space to the res nullis.

sovereignty did not extend over the Arctic Ocean.[40] Many scholars have supported Lesage's position, contending that freedom of the seas applies in the Arctic Ocean.[41]

There has been some support for classifying the waters of the Canadian archipelago as Canadian internal waters.[42] This argument is contingent on drawing a network of baselines around the islands in the archipelago and enclosing the waters inside the archipelago by the baseline extensions.[43] Proponents of this theory cite the opinion of the International Court of Justice in the Norwegian Fisheries Case.[44] In that case, the Court held that the baseline for determining Norway's territorial sea should not be drawn along the low tide mark as usual, but it should be drawn along the outermost islands. All waters between these islands and the mainland would thereby be internal waters. One of the factors in the Court's decision was the "close relationship existing between certain sea areas and the land formations which divide or surround them."[45] The Territorial Sea Convention dealt with this matter in article 4(1): "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed. . . ."[46] At the convention, proposals supporting the drawing of baselines around island groups such as the Canadian archipelago were submitted but withdrawn before being voted upon.[47] One

---

40. Pharand, supra note 33, at 53. Professor Pharand believes that Lesage's statement is the "best official evidence available" of Canada's position.

41. See, e.g., Head, supra note 39, at 223-24; Pharand, supra note 33, at 3. For a complete list of authorities on both sides of the Canadian Arctic sovereignty question see, Bryne, supra note 37, at 4-5.

42. E.g., Head, supra note 39, at 218. Canadian archipelago is a group of many islands north of the Canadian mainland through which the Northwest Passage routes wind.

43. Bryne, supra note 37, at 6-8.

44. [1951] I.C.J. 116.

45. Norwegian Fisheries Case, [1951] I.C.J. 116, 133.

46. Territorial Sea Convention, art. 4(1).

47. Bryne, supra note 37, at 8.

commentator feels that baselines surrounding the Canadian archipelago do not necessarily violate the provisions of the Territorial Sea Convention or the principles of the Norwegian Fisheries Case.[48] Professor Pharand disagrees; the length of the baselines necessary to surround the archipelago and close off the Northwest Passage would make such a delimitation "contrary to international law."[49] Professor Bryne argues that the Canadian archipelago does not fit within the "deeply indented coastline" and "fringe of islands along the coast" phrasing of article 4(1).[50] Professor Bilder indicates that the extensiveness of the archipelago is inconsistent with the plain meaning of article 4(1).[51] Additionally, Canada's failure to draw baselines around the archipelago at the time she established them around her east and west coasts would make it anomalous for her now to do so.[52]

Whether based on the res nullis argument or the archipelagic argument, Canada may have rendered the sovereignty dispute moot with the passage of the Pollution Prevention Act. In the Act, Canada claims limited jurisdiction--inspection and regulation to prevent pollution--only for 100 miles, not to the North Pole. Consequently, she has implicitly abandoned any claims in excess of those asserted in the Act.[53] Canadian officials, as might be expected, take the position that the assertion of certain sovereign powers today does not mean that powers in excess of those specified in the Act might not be asserted tomorrow. They cite the North Atlantic Fisheries Case[54] in support of this position.[55]

---

48. See Head, supra note 39, at 219.

49. Pharand, supra note 33, at 58. Drawing baselines around the Canadian archipelago would require one nearly 100 miles in length and another of at least 50 miles. The longest baseline in the Norwegian Fisheries Case was only 44 miles.

50. Bryne, supra note 37, at 8.

51. Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 MICH. L. REV. 1, at n. 77 (1970).

52. Bryne, supra note 37, at 8.

53. Bryne, supra note 37, at 15.

54. The North Atlantic Coast Fisheries Case (United States v. United Kingdom), 11 U.N.R.I.A.A. 167 (Perm. Ct. Arb. 1910).

55. Bilder, supra note 41, at n. 21.

Even accepting the validity of the archipelagic argument and considering the waters of the archipelago as Canadian internal waters, these waters remain subject to the right of innocent passage. Generally there is no right of innocent passage in internal waters. However, Article 5(2) of the Territorial Sea Convention provides that the right of innocent passage does exist in internal waters which are created by the straight baseline method of article 4(1). Canada did not ratify the Territorial Sea Convention.[56] Nevertheless, several Canadian officials have admitted that the Convention is evidence of general international law because most of the major maritime powers are signatories.[57] Yet there is some question as to whether the Northwest Passage is an international strait through which innocent passage is guaranteed by Article 16(4) of the Territorial Sea Convention.[58] Although there has been very little traffic through the Northwest Passage,[59] the test, as set forth by the International Court of Justice in the Corfu Channel Case[60] is not the volume of traffic but rather the strait's "geographical situation as connecting the two parts of the high seas and the fact of its being used for international navigation."[61] Hence, there may be a right of innocent passage through the Northwest Passage. Canada, however, has attempted to circumvent the right of innocent passage altogether by characterizing the passage of potential polluters as "noninnocent" per se.[62] It is unknown how effective this approach will be.[63]

The Pollution Prevention Act covers waters beyond those of the archipelago. Therefore, should Canada claim sovereignty

---

56. Pharand, supra note 33, at 58-59.

57. Pharand, supra note 33, at 58-59.

58. Territorial Sea Convention, art. 16(4) states, "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state."

59. See Pharand, supra note 33, at 42-45.

60. Corfu Channel Case, [1949] I.C.J. 222. For a discussion of the Northwest Passage and the international strait problem see Bilder, supra note 51, at 21-22.

61. Corfu Channel Case, [1949] I.C.J. 222, 428.

62. Bilder, supra note 51, at 20-21.

63. See Bilder, supra note 51, at 21.

over the archipelagic waters through the baseline theory, it would not be sufficient to satisfy all of the jurisdictional assertions in the Act. Sovereignty over the archipelagic waters, however, would suffice for regulation of most of the potential shipping routes off Canadian territory, leaving unregulated only a few hundred miles along the northwest coast of the mainland beyond the Amundsen Gulf in the Mackenzie Bay area. Canada's recent twelve mile territorial sea claim off all of her coasts[64] would subject most of the straits in the Northwest Passage to her control; the most notable exception is the Lancaster Sound - Viscount Melville Sound - M'Clure Strait route.

Nonetheless, Canada decided in favor of the Pollution Prevention Act, apparently based upon a contiguous zone theory. No claim of sovereignty, as is inherent in an internal waters or territorial sea assertion, is made by the Act. In fact, the Prime Minister has expressly disclaimed any assertion of sovereignty.[65] As noted previously, the Territorial Sea Convention placed a twelve mile limit on the contiguous zone.[66] The 100 mile Canadian zone claimed in the Act is, therefore, obviously in violation of the Convention. The Convention however has been strongly criticized. Professors McDougal and Burke point to the past and present national practices, particularly British and American, of claiming authority over the high seas in excess of twelve miles for certain special purposes.[67] As early as the eighteenth century, great Britain asserted authority over foreign shipping as far as 300 miles out to sea for the purpose of preventing smuggling, and no other nation complained of this practice.[68] In 1876 the Custom Consolidation Act was passed in England giving authority to seize certain foreign vessels within an "undefined distance of the coast."[69] In Church v. Hubbart[70] the United States

---

64. See note 26 supra.

65. 114 H.C. DEB. 5955 (April 16, 1970), cited in Bilder, supra note 51, at n. 21.

66. Note 35 supra. The 12 miles includes the territorial sea. Thus if a 12 mile territorial sea is claimed, there can be no contiguous zone under the Territorial Sea Convention's provisions.

67. M. MC DOUGAL & W. BURKE, supra note 23, at 585-97.

68. M. MC DOUGAL & W. BURKE, supra note 23, at 585-86.

69. M. MC DOUGAL & W. BURKE, supra note 23, at 586.

70. 6 U.S. (2 Cranch) 187 (1804).

Supreme Court, in an opinion by Chief Justice Marshall, recognized as lawful the Portuguese seizure of American vessels on the high seas in order to protect her commercial interests in Brazil.[71] During the Prohibition era, legislation was passed in the United States authorizing the President to declare "customs enforcement areas" which extended fifty miles out to sea to aid in the apprehension of "rum-runners."[72] The United States has long had "Air Defense Identification Zones" extending far beyond twelve miles, within which planes bound for the United States must file position reports.[73] Given this history of far-reaching contiguous zone assertions and the need for flexibility in meeting future scientific and technological developments, Professor McDougal denounces the Convention's twelve mile limit.[74] The contiguous zone shoul function as a "safety valve from the rigidities of the territorial sea,"[75] and, therefore, should not rigidly restrict itself.

In addition to limiting the extent of the contiguous zone, the Convention limited the purposes for which it may be employed: namely, to protect "custom, fiscal, immigration or sanitary" interests.[76] Pollution control would be included under sanitary interests. McDougal and Burke declare that the listing above "is certainly no accurate summary of the purposes for which states have in the past demanded, and been accorded, an occasional exclusive conpetence in contiguous waters."[77] The most notable ommissions are those interests relating to security and wealth.[78] The International Law

---

71. M. MC DOUGAL & W. BURKE, supra note 23, at 587.
72. M. MC DOUGAL & W. BURKE, supra note 23, at 588.
73. 14 C.F.R. § 99 (1970).
74. "It seems to me utterly incredible that anybody could ever have voted for a twelve mile limit on contiguous zones. We are not living with such a limit; we couldn't live with it!" McDougal, supra note 28, at 20.
75. M. MC DOUGAL & W. BURKE, supra note 23, at 76.
76. Territorial Sea Convention art. 24(1).
77. M. MC DOUGAL & W. BURKE, supra note 23, at 607.
78. M. MC DOUGAL & W. BURKE, supra note 23, at 604-05.

Commission recommended that "the extreme vagueness of the term 'security' would open the way for abuses."[79] Despite the fact that interests relating to wealth were omitted by both the Commission and the contiguous zone provisions of the Territorial Sea Convention, other Geneva conventions provide for exclusive exploitation of the continental shelf[80] and for high seas fisheries conservation by the littoral state.[81] Divorcing the contiguous zone from the continental shelf and fisheries conservation interests has been criticized as "rigid conceptualism" which "denies the fluidity of the general concept and affords opportunity for irrational attempts to foreclose future claims to newly developed uses of the sea."[82] McDougal and Burke would prefer a broad, flexible contiguous zone with the conflicting exclusive interest of the coastal state and inclusive interests of all states in the high seas being resolved by a balancing process using the more common standard of reasonableness.[83] The factors to be used in determining what is reasonable include the impact upon inclusive use of the area affected, the interest sought to be protected in terms of importance for the coastal state, and the possibility of alternative methods of securing the coastal interest.[84]

The reaction to the Canadian Pollution Prevention Act has ranged from highly favorable to highly unfavorable. Professor Bryne, speaking of both the Pollution Prevention Act and the extension of Canada's territorial sea to twelve miles, said that such action "represents a near optimal solution for Canada, in that it will secure for Canada the greatest extent of claims that it is likely to succeed in maintaining."[85]

---

79. M. MC DOUGAL & W. BURKE, supra note 23, at 604. The International Law Commission worked for 8 years prior to the 1958 Geneva Convention on the Law of the Sea preparing recommendations for the Convention, most of which were adopted.

80. Convention on the Continental Shelf, supra note 36, arts. 1, 2(1).

81. Convention on Fishing and Conservation of the Living Resources of the High Seas, supra note 36, art. 6(1).

82. M. MC DOUGAL & W. BURKE, supra note 23, at 77.

83. M. MC DOUGAL & W. BURKE, supra note 23, at 583.

84. M. MC DOUGAL & W. BURKE, supra note 23, at 583.

85. Bryne, supra note 37, at 15.

Professor Bryne appears to put some emphasis on the unique conditions of the Arctic in arriving at his opinion of the legality of the Canadian measure.[86] In an article written before the introduction of the Pollution Prevention Act, a commentator agreed that "states should be permitted a wide zone of protection around their coasts, within which they would be able to take the necessary action to prevent pollution . . . ."[87] Others have also suggested an expansion of the contiguous zone in order to combat pollution.[88] On the other hand, Ambassador Pardo is strongly critical of the Act: "This attitude, which is ultimately self-defeating and appears incomprehensible, is due in part to international political rivalries and in part to the reluctance of states to surrender any of their legal rights under international law to achieve a common beneficial purpose for all unless the imminence of common disaster makes such surrender imperative."[89]

IV. Conclusion

As expected, Canada removed the Pollution Prevention Act from the jurisdiction of the International Court of Justice.[90] This is indicative of the importance Canada attaches to her interests protected in the Act, as well as being yet another example of the congenital weakness of an international law born of sovereign states. Even if the Act were adjudicable, the Court should not declare its jurisdictional assertions illegal, but should recognize the need for a flexible contiguous zone as expressed by McDougal and Burke. More likely, however, the Court would rule against the Act for two probable reasons: first, the Court would rather not overturn the express twelve mile contiguous zone limitation of the Territorial Sea Convention; and second, it would fear a deluge of widening coastal state assertations of authority for reasons, few of which would be as worthy as those of the Canadian Act. It is submitted that the

---

86. Bryne, supra note 37, at 13.
87. Kufe, supra note 9, at 30.
88. E.g., Note, supra note 7, at 126.
89. Pardo, Development of Ocean Space--An International Dilemma, 31 LA. L. REV. 45, 52 (1970).
90. Bilder, supra note 51, at n.3.

twelve mile limitation of the Territorial Sea Convention should be ignored so that each coastal state's assertion of authority may be judged on its own merits. In view of the probable lack of success of the McDougal and Burke contentions in the Court, Canada properly foreclosed an opportunity for the Court to strike them down.

American oil companies, as well as professional internationalists such as Ambassador Pardo, are understandably disturbed by the Act; a bilateral agreement between Canada and the United States would be more agreeable to them. Apparently no United States offer to date has been sufficiently protective of Canadian interests. Those Canadian interests seemingly relate solely to pollution prevention since other theories are readily available for sovereignty claims.

The Pollution Prevention Act does not seem to be unreasonable in its demands, and rather than causing a proliferation of national pollution prevention acts with varying standards, it could well serve as a model act. As always, until there are effictive international measures, individual states must act alone.