THE LEGAL CONTINENTAL SHELF: THE SURPRISING CANADIAN PRACTICE REGARDING OIL AND GAS DEVELOPMENT IN THE ATLANTIC COAST CONTINENTAL SHELF

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Actions of the Government of Canada and the governments of Nova Scotia and Newfoundland and Labrador, such as interprovincial delimitation of the continental shelf, exclusive exploitation of continental shelf resources, and exclusion of all or part of the revenues generated by these resources from equalization calculations, create the impression of provincial ownership of the continental shelf. This is not the case. In fact, contrary to widely held views, the continental shelf belongs to no one. International law does not grant coastal states sovereignty over the continental shelf. Instead, it grants sovereign rights to explore and exploit the continental shelf. These rights, born of a process of political compromise, belong to the federal government. Consequently, the most common argument for excluding non-renewable resources from equalization calculations (namely, that they belong to the provinces) cannot apply to continental shelf resources. The Canadian practice regarding oil and gas development in the Atlantic coast continental shelf is, from both a legal and political standpoint, all the more surprising given that the Canadian federation is said to be held together by the principle of equalization.

De par leur comportement, la délimitation interprovinciale du plateau continental, l'exploitation des ressources du plateau continental uniquement par les provinces de la Nouvelle-Écosse et de Terre-Neuve-et-Labrador, l'exclusion d'une part ou de la totalité des revenus découlant de ces ressources du calcul de la péréquation, le gouvernement fédéral canadien et les gouvernements de la Nouvelle-Écosse et de Terre-Neuve-et-Labrador donnent l'impression que le plateau continental appartient à ces deux provinces. Cependant, il n'en est rien. En fait, contrairement à une perception répandue, le plateau continental n'appartient à personne. Le droit international n'accorde pas de souveraineté sur le plateau continental aux États côtiers, mais plutôt des droits souverains sur l'exploration et l'exploitation des ressources naturelles du plateau continental. Ces droits, résultat d'un processus marqué par la recherche de compromis politiques, sont reconnus au gouvernement fédéral. Ainsi, l'argument le plus souvent invoqué afin de légitimer l'exclusion des ressources naturelles non renouvelables du calcul de la péréquation, c'est-à-dire que ces ressources appartiennent aux des provinces, ne peut s'appliquer aux ressources du plateau continental. La pratique canadienne concernant l'exploitation des hydrocarbures sur le plateau continental de la côte Atlantique est, tant d'un point de vue juridique que politique, d'autant plus surprenante qu'on dit la fédération canadienne cimentée par le principe de la péréquation.

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"Tout gouvernement arbitraire est mauvais;
je n'en excepte pas le gouvernement arbitraire
d'un maître bon, ferme, juste et éclairé."

"The arbitrary rule of a just and enlightened
prince is always bad."

Diderot (1713-1784)

I. INTRODUCTION

In Canada, the main argument for excluding non-renewable natural resource revenues from equalization calculations has consistently been that, under section 92(5) of the *Constitution Act, 1867*,[1] these resources belong to the provinces. However, a review of the law reveals that natural resources in the continental shelf do not belong to the provinces. International law recognizes a coastal state's sovereign rights to explore and exploit the natural resources in its continental shelf. These settled and exclusive rights to the resources belong to the federal government — a fact that has been confirmed in Canadian case law. The Supreme Court of Canada has not once, but twice, held that the federal government, under international law, has jurisdiction over the continental shelf. It is, therefore, hard to understand how one might justify excluding from the equalization calculations all or part of the revenues generated by a province's exploitation of continental shelf natural resources. Nonetheless, as it stands, Nova Scotia and Newfoundland and Labrador benefit from such an exclusion for natural resources developed in the continental shelf of the Canadian Atlantic coast. In addition, there is a peculiar delimitation of a maritime zone between the two provinces that encompasses the continental shelf and for which there seems to be no explanation other than political aberration. In light of all of this, it would appear that a principle said to be the glue holding the Canadian federation together is coming unstuck.

[1] (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

II. THE CONTINENTAL SHELF

To understand why coastal states are granted only sovereign rights and not full sovereignty over the continental shelves adjacent to their coasts, it is useful to briefly review the legal creation of the continental shelf.

The continental shelf is primarily a geological phenomenon. In 1871, on the recommendation of the Royal Society, the British government undertook the large-scale *Challenger* expedition to explore the physical structures of the ocean floor. Our knowledge of ocean floor structures is based on that oceanographic expedition, as well as subsequent ones.[2] Despite this scientific work, information on the continental shelf remains relatively scant. According to Arbour and Parent, "[b]eyond stating that the continental shelf is an area between the shoreline and the first major seaward shelf-slope break, any additional details seem questionable, at least strictly as regards oceanic relief."[3] With this caveat in mind, it is generally said that all continents rest on an underwater base (the continental margin), comprising the continental shelf, continental slope, and continental rise. The continental shelf, a submerged prolongation of the land mass, is generally characterized by a gentle declivity, but features highly diverse topography.[4] It is virtually nonexistent in some areas, while in others it can extend as far as 600 nautical miles, as in the case of Atlantic Canada's continental shelf. At the edge of the continental shelf, at a marked break in the angle of descent, begins the continental slope, followed by the continental rise, which runs down a gentle gradient to meet the oceanic zone. On the basis of these known geological facts, the continental shelf began to be politicized through various types of claims in the middle of the last century.[5] The landmark claim was the Truman Proclamation of 28 September 1945, in which the United States declared that it "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to jurisdiction and control."[6] The US government had already been

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2 Laurent Lucchini & Michel Vœlckel, *Droit de la mer*, vol 1 (Paris: A Pedone, 1990) at 233.

3 J Maurice Arbour & Geneviève Parent, *Droit international public*, 5th ed (Cowansville: Yvon Blais, 2006) at 364 [translation]. Note, however, that the author refers to a study by Bourcart dating back to 1949 and that knowledge of the continental shelf has evolved since then. See Jacques Bourcart, *Géographie du fond des mers: Étude du relief des océans* (Paris: Payot, 1949).

4 Philip A Symonds et al, "Characteristics of Continental Margins" in Peter J Cook & Chris M Carleton, eds, *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford: Oxford University Press, 2000) 25 at 25.

5 Some examples include the Truman Proclamation of September 28, 1945; Argentinian Presidential Decree of 11 October 1946; Chilean Presidential Declaration of 23 June 1947; Peruvian Presidential Decree of 1 August 1947; Costa Rican Declaration of 27 July 1948; British Orders in Council concerning the continental shelves of the Bahamas and Jamaica of 26 November 1948; Mexican Presidential Decree of 25 February 1949; Royal Proclamation of 28 May 1949, made by the King of Saudi Arabia; proclamations issued that same year by Arab principalities of the Persian Gulf; Amendment to the Honduran Constitution of 7 March 1950; Pakistan Declaration of the Governor-General of 9 March 1950; El Salvador Political Constitution of 7 September 1950; Brazilian Decree of 18 November 1950; United Kingdom Order in Council concerning the Falkland Islands of 21 December 1950; Congressional Decree Ecuador of February 21, 1951 (non-exhaustive list compiled by Lucchini & Vœlckel, *supra* note 2 at 236-37). See also Richard Young, "Recent Developments with Respect to the Continental Shelf" (1948) 42 Am J Int'l L 849; H Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 Brit YB Int'l L 376.

6 US, *Policy of the United States with Respect to the National Resources of the Subsoil and Sea bed of the Continental Shelf*, 10 Fed Reg 12305 (1945) [Truman Proclamation]. The importance of these first official records, the "first express, general declaration made by a State for the purpose of claiming sovereign rights over the entire continental shelf adjacent to its coasts" (Jean-Paul Pancracio, *Droit international des espaces* (Paris: Armand Colin, 1997) at 152 [translation]), was underscored by the ICJ in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands*), [1969] ICJ Rep 3 [*North Sea Cases*]. The Court affirmed that "[t]he Truman

considering the Truman Proclamation for several years; as early as 1937, President F. Roosevelt had notified the US Department of State of the drafting of a presidential statement on the continental shelf. The Truman Proclamation is described by Lucchini and Vœlckel as the "systematization of the concept"[7] of the continental shelf , and by Pancracio as the first "attempt to create a legal concept of the continental shelf."[8] According to the claims of the US, a coastal state's right to exercise control and jurisdiction over the natural resources of the continental shelf is based on the premise that the shelf is a prolongation of the land mass of the state and that the resources found therein have the same origin as the adjacent onshore deposit (unity of deposit).[9] The inference is that a coastal state is entitled to exercise control and jurisdiction over the natural resources of a continental shelf that appears to belong to it naturally.[10] Beyond the deduction that a coastal state's right over the continental shelf is inherent in the fact that the shelf is a natural extension of the state, it should be noted that the absence of occupation of the continental shelf makes it difficult to establish the legal basis of such a claim. Indeed, its absence precludes consideration of such doctrines as those of continuity, contiguity, or accession, given that occupation is an essential element in these doctrines.[11] The doctrine introduced by the Truman Proclamation is, therefore, somewhat problematic. Relying on a finding of the *Challenger* expedition, which was later confirmed by Bourcart in 1948,[12] the US based its claim on a natural occurrence — the prolongation of the coastal state's land mass — thus paving the way for the theory of paramount rights.[13] One might have thought that this legal reasoning, introduced by the world's greatest power and later adopted by several other states, would have served as the basis for the legal construct of the continental shelf, subject to the geological definition (and this was, in fact, the approach taken by the participants in the Geneva *Convention on the Continental Shelf*[14]); however, part of the definition of the continental shelf ultimately adopted under international law disregards this approach, instead granting coastal states a continental shelf of at least 200 nautical miles, regardless of geological reality.[15] This was

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Proclamation … came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others" (*ibid* at para 47). See also Zdenek J Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law* (The Hague: Martinus Nijhoff, 1968); Ann L Hollick, "U.S. Oceans Policy: The Truman Proclamations" (1976) 17:1 Va J Int'l L 23.

7 Lucchini & Vœlckel, *supra* note 2 at 236 [translation].

8 Pancracio, *supra* note 6 at 152 [translation].

9 Jean-Pierre Beurier, *Droits maritimes*, 2d ed (Paris: Dalloz, 2008) at 100.

10 Janusz Symonides, "The Continental Shelf" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Paris: UNESCO, 1991) 871 at 871.

11 Beurier, *supra* note 9 at 100. However, some states believed early on that the Truman Proclamation could be supported by the theory of occupation: "When the Truman Proclamation was made, the reaction of the British Foreign Office was that it would be supported on the theory of occupation of the seabed as *res nullius*. That view was founded on Hurst's famous article of 1923, and it was regularly advanced until the inherency doctrine came to prevail in the 1950s" (DP O'Connell, *The International Law of the Sea*, by IA Shearer, vol 1 (Oxford: Clarendon Press, 1982) at 456, citing Cecil JB Hurst, "Whose is the Bed of the Sea? Sedentary Fisheries Outside the Three-Mile Limit" (1923-24) 4 Brit YB Int'l L 34 [footnotes omitted]).

12 See Beurier, *supra* note 9 at 99-100 [translation]:"This phenomenon [the continental margin], well known to sailors, was described by Murray (1874) and, more importantly, by Martonne (1909): 'The influence of the land is felt there in a thousand ways; it is indeed a prolongation of the continents.' … It was not until 1948 that Bourcart provided proof that the continental margin was a marine transgression zone following the last glaciation."

13 *Ibid* at 100.

14 29 April 1958, 499 UNTS 311.

15 In the *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18 at para 41 [*Tunisia/Libya Case*], the ICJ states that "the 'continental shelf' is an institution of international law which, while it remains linked to a physical fact, is not to be identified with the phenomenon designated by the same term — 'continental shelf' — in other disciplines."

done partly because of the physical variations in continental shelves.[16] Upon the creation and adoption of continental shelf law, states needed to remedy the "injustices" of Mother Nature by taking into account both the interests of coastal states that seemed to have claims over the high seas and those of less fortunate coastal states. Unfortunately, it is not easy to correct natural inequities, especially when they are not limited to the breadth of the continental shelves. These inequities result not only from variations in the breadth of different coastal states' continental shelves, but also from the presence or absence of natural resources within the continental shelves. Having a continental shelf does not always ensure access to riches. Some contain high concentrations of oil and gas, while others contain little or none. Consequently, when the concept of the continental shelf was created and adopted under international law, its impact varied from one state to another. Introduced and supported by coastal states whose continental shelves afforded exciting opportunities for the development of oil and gas resources, the concept of the continental shelf received a lukewarm reponse from states with no continental shelves, or continental shelves whose subsoil was seemingly devoid of oil, gas, or mineral resources. Many would see the arrival of this new concept as a breach of the principle of freedom of the seas. This dynamic is the reason why coastal states are granted sovereign rights within a legal framework that encompasses both the rights to exploit the continental shelf and freedom of the seas.[17] The formulation and adoption of continental shelf law, with regard to both its regime and delimitation, were driven largely by political compromise.[18]

A. THE GENEVA *CONVENTION ON THE CONTINENTAL SHELF*

At the first United Nations Conference on the Law of the Sea, held in Geneva in March-April 1958, the interests of coastal states wishing to extend their national jurisdiction over part of the sea clashed with those of other states fearing that this new jurisdiction would obstruct freedom of navigation, all of which complicated the development of a legal definition of the continental shelf. After initially proposing a criterion based on exploitability in 1951, and then one based on bathymetry in 1953, the International Law Commission finally proposed a definition that combined the two.[19] According to article 1 of the *Convention on the Continental Shelf*,

> the term "continental shelf" is used 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 metres or, beyond that limit, to where

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16 It should also be noted that, as a legal basis, the concept of natural prolongation is difficult to apply.

17 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397, arts 77-78 [*UNCLOS*]. See O'Connell, *supra* note 11 at 478-80.

18 See Denis Roy, *Compromis politique dans la délimitation du plateau continental juridique : Étude du Canada et de la France* (PhD Thesis, Université de Nantes, Faculty of Law and Political Science, Centre de Droit Maritime et Océanique, 2008) at 67-111 [unpublished].

19 See Lucchini & Vœlckel, *supra* note 2 at 244 [translation]:

> As part of its preparatory work for the future Codification Conference, the International Law Commission was responsible for defining the concept. The successive reports reflect the difficulties that it encountered, both in arriving at a coherent definition and in making it acceptable to the States. Its 1951 project was limited to a single criterion: exploitability. The 1953 project kept to a single criterion but changed it: exploitability was replaced by the 200-metre isobath. Finally, in 1956, the influence of the Ciudad Trujillo Conference (during which the Latino-American States considered it inappropriate to adopt a single criterion), together with the impact of advances (both real and potential) in petroleum drilling techniques, led to the adoption of the alternative criterion of exploitability or depth. In short, this erratic evolution was due in part to both the uncertainty of geographic or scientific data and the observations made by the States.

> 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.[20]

Thus, unlike the geological continental shelf, the legal continental shelf begins at the territorial sea boundary and its seaward limit is based on two legal criteria that have nothing in common: the bathymetric criterion of 200 metres (fixed criterion) and the exploitability criterion (variable criterion).[21] For many, these criteria were unsatisfactory. The bathymetric criterion (according to which submarine areas that are adjacent to coasts, beyond the territorial sea, and up to a depth of 200 metres are part of the continental shelf) is arbitrary because it does not correspond to the physical reality.[22] In fact, at the time, a study showed that the average depth was actually 133 metres,[23] leading to the conclusion that the 200-metre limit fixed in 1958 was more of an approximation than an average.[24] As for the exploitability criterion, it has been criticized for its uncertainty and lack of uniformity.[25] Many have expressed the opinion that the exploitability criterion is not a true criterion because it allows coastal states to exploit the natural resources of the soil and subsoil according to their technological advances,[26] thereby destroying "the usefulness of the first criterion by encouraging states to advance as far as possible in this new treasure hunt."[27] The self-destructive effect of the exploitability criterion was described ironically by the Guatemalan delegate at the 1958 Convention on the Law of the Sea, as he likened the legal definition of the continental shelf proposed at that time to "a traffic regulation that sets the maximum speed limit for vehicles at 100 km/h, except for those that can go faster!"[28] Those opposed to the definition adopted by the *Convention on the Continental Shelf* would likely have preferred a legal definition of the continental shelf that corresponded to the geographic reality. They feared that the exploitability criterion would allow coastal states to divide up the entire ocean floor,[29] a phenomenon referred to by some as the "'creeping boundary' theory."[30] In the words of Lucchini and Vœlckel, the exploitability criterion as set out in Resolution 2749 (XXV) of 17 December 1970,[31] was "an underhanded weapon that, in the absence of a new standard, enabled the most developed states to appropriate the seabed while at the same time crushing the nascent idea of an international zone, common heritage of humanity."[32]

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20 *Supra* note 14.

21 Beurier, *supra* note 9 at 101.

22 The idea that the edge of the continental margin was normally located around the 200-metre isobath proved to be inaccurate. See O'Connell, *supra* note 11 at 489.

23 MW Mouton, *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf*, UN Doc A/CONF.13/25 [mimeo] [on file with author].

24 Arbour & Parent, *supra* note 3 at 364-65.

25 United Nations Conference on the Law of the Sea, UNOR, 1958, UN Doc A/CONF.13/42 at 2.

26 Beurier, *supra* note 9 at 101.

27 Arbour & Parent, *supra* note 3 at 365 [translation].

28 Pancracio, *supra* note 6 at 155 [translation].

29 Jean-Pierre Beurier & Patrick Cadenat, "Les positions de la France a l'égard du droit de la mer" (1975) 79:2 RGDIP 1028, at 1039.

30 O'Connell, *supra* note 11 at 493.

31 *Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*, GA Res 2749 (XXV), UNGAOR, 25th Sess, Supp No 28, UN Doc A/Res/25/2749, (1970) [Resolution 2749 (XXV)].

32 Lucchini & Vœlckel, *supra* note 2 at 248 [translation]. In 1967, at the United Nations General Assembly, the Maltese Ambassador to the United Nations, Arvid Pardo, called for the deep seabed and its resources to be designated as being in the"interests of mankind." See UNGAOR, 22d Sess, 1515th Mtg, UN Doc A/C.1/PV.1515 (1967) at para 3.

Advocates of the exploitability criterion (mainly states with extensive continental shelves) responded to opponents by arguing that it was important not to stand in the way of scientific and technological progress, and that the exploitability criterion would, in fact, limit the claims of states with extensive continental shelves. Although this argument may not seem very convincing today, it should be noted that, in light of the methods available at the time, exploitation of the seabed beyond the 200-metre isobath appeared to be highly hypothetical and feasible only in the very long term:

> It is true that, in the 1950s, it was not yet conceivable that the exploitability criterion could harbour the danger of a continuous, indefinite extension of the seabed zone subject to the sovereign rights of States. The exploitation of the ocean floor beyond the 200-metre isobath was still in the realm of very long-term possibilities. The technology to exploit the seabed at great depths was acquired no doubt faster than had been anticipated. From that moment on, the definition in the Geneva Convention, which, it had been thought, would limit States' claims over seabeds adjacent to their coasts, proved to be dangerous.[33]

Some 20 years would pass before the emergence of an awareness of the problem posed by the exploitability criterion. One year before Resolution 2749 (XXV), the UN General Assembly had passed Resolution 2574 (XXIV), noting that "developing technology is making the entire sea-bed and ocean floor progressively accessible and exploitable for scientific, economic, military and other purposes" and highlighting "the urgent necessity of preserving this area from encroachment, or appropriation by any State, inconsistent with the common interest of mankind."[34]

Canada was a newcomer on the international scene when the legal concept of the continental shelf began to emerge. At the start of the first Geneva Convention, on the topic of the bathymetry criterion, Canada merely submitted that the limit should be based on the 500-metre isobath. Later, however, it endorsed the definition adopted by the *Convention on the Continental Shelf*.[35] Studies were already pointing to the great potential for developing oil and gas resources in the three oceans surrounding Canada. As one of the states seemingly favoured by the exploitability criterion, Canada was entirely open to the concept. Accordingly, it challenged the criticism of the criteria adopted by the *Convention on the Continental Shelf* and was quite comfortable with the definition adopted. In fact, Canada would have liked an even more generous approach toward coastal states.[36]

The *Convention on the Continental Shelf* was ratified by 56 states, most of them maritime powers, and came into force on 10 June 1966.[37] Though certain regional declarations at that time continued to refer to the exploitability criterion, criticism of the continental shelf definition adopted by the *Convention on the Continental Shelf*, and more specifically of the

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33 Pancracio, *supra* note 6 at 155 [translation].

34 *Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind*, GA Res 2574 (XXIV), UNGAOR, 24th Sess, Supp No 30, UN Doc A/Res/2574(XXIV)A 10 at 10.

35 Francis Rigaldies, "L'influence du Canada sur l'évolution du droit de la mer contemporain" (1997) 11 Espaces et ressources maritimes 35 at 43.

36 *Ibid*.

37 By that time, the continental shelf definition had acquired a customary status. See Slouka, *supra* note 6.

exploitability criterion, would only intensify over the next few years.[38] With the advent of the reforms spurred on by new and developing states, a new legal definition of the continental shelf became necessary.[39]

B. *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*

The growing chorus of criticism, directed mainly at the exploitability criterion, provoked a second attempt to formulate a legal definition of the continental shelf. As with the first Convention on the Law of the Sea, the formulation and adoption of the legal framework of the continental shelf during the third Convention of the Law of the Sea (Third UNCLOS) were complicated by the need to reconcile the expansionist claims of coastal states over the continental shelf with the concerns of states wishing to uphold the concept of freedom of the seas.[40] Nonetheless, the view that coastal states did have some jurisdiction over the continental shelf gained ground, and this time discussions focused mainly on the search for a compromise between coastal states with extensive continental shelves and those with limited continental shelves. A polarization of positions ensued, with the result being that both the distance and natural prolongation criteria were included in the definition that was ultimately adopted in *UNCLOS*.[41] As Lucchini and Vœlckel note, "because of these States' natural annexationist tendency, the challenge then was to specify how far over the continental margin a coastal State could extend its jurisdiction to exercise its rights."[42] After lengthy negotiations, the solution came in the form of a compromise proposed by the Chairman of negotiating group 6, A. Aguilar of Venezuela, who advocated the adoption of both the distance and natural prolongation criteria.[43] The resulting new legal definition of the continental shelf is found in the first paragraph of article 76(1) of *UNCLOS*:

> 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.[44]

The distance criterion was adopted to satisfy coastal states with a limited continental margin. By providing for a distance of 200 nautical miles from baselines where the outer edge of the continental margin does not extend up to that distance, this criterion addressed

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38 Lucchini & Vœlckel, *supra* note 2 at 248.

39 *Ibid*.

40 Myron H Nordquist et al, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijoff, 1993) vol 2 at 844-48 [*Virginia Commentaries*].

41 Symonides, *supra* note 10 at 875-76 notes: "Attempts at the compromise had been undertaken from two extreme standpoints — the one, postulating the adoption of a 200-mile limit and, the other, extending the limit to — as it had been so pictorially described — 'the last grain of sand, that is, the last traces of sedimentary rocks on the continental sea-bed rise.'"

42 Lucchini & Vœlckel, *supra* note 2 at 250 [translation].

43 Compromise proposals presented on 26 April 1979 by the Chairman of negotiating group 6: *Compromise suggestions by the Chairman of negotiating group 6*, UNCLOSOR, 1979, UN Doc A/Conf.62/L.37 at 100. After the determination of outer limits of the continental shelf had been identified as one of the problems on which participants at the Third UNCLOS should focus, a negotiating group was formed (group 6). See the records of the meetings of the Second Committee: UNCLOSOR, 1977, 50th Mtg, UN Doc A/Conf.62/C.2/SR.50; UNCLOSOR, 1977, 51st Mtg, UN Doc A/Conf.62/C.2/SR.51.

44 *Supra* note 17.

the concerns of those coastal states that "separate regimes would be established for the soil of their future Exclusive Economic Zones [EEZs] and the limits of their continental shelves."[45] However, the distance criterion gave rise to a further issue going to the very essence of the continental shelf. The creation of a 200-nautical-mile EEZ, the legal regime of which would include the waters and the seabed, had already been brought up during discussions of the Seabed Committee. The question arises that, with such a zone, what would be the relevance of the legal continental shelf? The EEZ offered the possibility of a single zone that would include the continental shelf, thereby jeopardizing the survival of the legal continental shelf. Thus, at the Third UNCLOS, two opposing factions debated whether the EEZ and the continental shelf should be one and the same or distinct entities.[46] For proponents of incorporating the continental shelf into the EEZ, a group that included most African countries, unity stood out for its simplicity (since it allowed for a precise and universal delimitation, one legal regime for the entire zone, etc.). Those advocating for the legal autonomy of the continental shelf relied on the differences with regard to geology (since the continental shelf is the underwater prolongation of the state's land territory) and the differences with regard to the resources in the two zones (since, unlike the living resources of the EEZ, the mineral resources of the continental shelf are not renewable). The autonomy-based arguments prevailed. Keeping the continental shelf distinct from the EEZ led to certain ambiguities, which were examined by Judge Oda in his dissenting opinion in the *Tunisia/Libya Case*.[47] It is true, as Lucchini and Vœlckel explain, that the dualistic approach adopted by the participants at the Third UNCLOS "did not preclude the admission of a distance of 200 miles for both institutions"[48] and merely underscored the correlation between the continental shelf and the EEZ, since the distance criterion did not pose a problem.[49]

The 20 or so states, including Canada, with a geological continental shelf extending well beyond 200 nautical miles found it unacceptable to be limited by the distance criterion. As they had done when defending the autonomy of the legal regime of the continental shelf, the proponents of a broad definition argued that the geographical and resource-based differences between the two zones had to be taken into consideration. They insisted that, since the continental shelf was the natural prolongation of the state's land territory, it was legitimate to extend that territory beyond the EEZ where the geological continental shelf exceeded the 200-mile limit.[50] This faction relied on both the Truman Proclamation and the judgment rendered by the International Court of Justice (ICJ) in the *North Sea Cases*, which held that the natural prolongation of territory justified a coastal state's continental shelf rights, which therefore exist *ipso facto* and *ab initio*.[51] Invoking Georges Scelle's theory of role-splitting ("dédoublement fonctionnel"), Canada argued that coastal states are in the best position to handle certain matters, such as fisheries management and the protection of the coastal

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45 Beurier, *supra* note 9 at 102 [translation].

46 See especially Jean-François Pulvenis, "Zone économique et plateau continental: Unité ou dualité" (1978) 11-12 Revue iranienne des relations internationales 103.

47 *Supra* note 15 at paras 126-30.

48 Lucchini & Vœlckel, *supra* note 2 at 248 [translation].

49 *Ibid* at 250.

50 *Ibid* at 239-40.

51 *Supra* note 6 at para 39.

environment, and that consequently the international community must grant them broad powers in those areas.[52]

Those opposing a broad definition of the continental shelf maintained that extending the outer limits beyond 200 nautical miles called into question the concept of "adjacency" found in the *Convention on the Continental Shelf*, and already referred to by the ICJ.[53] This was because the concept "did not envisage claims to the continental margin and, moreover, to apply contiguity to areas hundreds of miles away from the coasts would be rather artificial."[54] Moreover, opponents believed that the idea of an international zone, being the common heritage of humanity, was again being threatened. Since the natural prolongation criterion would allow coastal states to exercise sovereign rights over vast portions of the continental margin, as well as the continental slope, they argued "that the continental shelf, by its very name, was a shelf appertaining to all States of a given continent and thus their interests would be best secured if the whole sea-bed outside 200 nautical miles would be recognized as the common heritage of mankind."[55]

The arguments advanced by the proponents of the broad definition seem to be reflected in the compromise proposed by Aguilar, endorsing the natural prolongation criterion. This fact led some to suggest that the delimitation adopted by *UNCLOS* was more consistent with the geological realities of the continental shelf[56] and rendered the legal basis of natural prolongation meaningful. But as Beurier observes:

> UNCLOS does not follow its logic to the end because, to avoid claims that may seem excessive, in both cases it imposes a limit to the coastal States' claim (which is inconsistent with the concept of the outer edge of the continental margin). This limit is set at 350 miles from the baselines or, where it is more favourable to the coastal State concerned, to 100 miles beyond the 2,500-metre isobath. This is surprising because few States are affected and, if, indisputably, the foot of the slope is generally located at a depth of 2,500 metres, it is hard to see the logic, other than that of compromise, in the numbers chosen.[57]

In Canada, section 17(1) of the *Oceans Act*[58] defines "continental shelf" in accordance with international law:

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52 Rigaldies, *supra* note 35 at 37. According to some observers, during the UNCLOS preparatory work Canada adopted an "aggressive" approach. See Ted L McDorman, "Canadian Offshore Oil and Gas: Jurisdiction and Management Issues in the 1980s and Beyond" in Donald McRae & Gordon Munro, eds, *Canadian Oceans Policy: National Strategies and the New Law of the Sea* (Vancouver: University of British Columbia Press, 1989) 39 at 45. With a geological continental shelf of up to 600 nautical miles from the Atlantic coast, Canada was eager to extend its sovereignty over this zone, which had an estimated surface area equivalent to the three Canadian prairie provinces (Alberta, Saskatchewan, and Manitoba) combined. See Ron Macnab, ed, *Canada and Article 76 of the Law of the Sea: Defining the Limits of Canadian Resource Jurisdiction Beyond 200 Nautical Miles in the Atlantic and Arctic Oceans* (Dartmouth: NS Geological Survey of Canada, 1994). When UNCLOS began its preparatory work in 1973, Canada's prospects for developing oil and gas in its continental shelf were already confirmed. At the time, and even before it became a party to the *Convention on the Continental Shelf*, Canada had issued petroleum exploration licences for the 50 million acres located beyond the 200-nautical mile limit (up to 400 nautical miles from its coasts), thereby exercising a certain jurisdiction over the area. Clearly, Canada wanted to acquire vested rights.

53 *Convention on the Continental Shelf*, *supra* note 14, art 1.

54 Symonides, *supra* note 10 at 875.

55 *Ibid*.

56 Arbour & Parent, *supra* note 3 at 365.

57 Beurier, *supra* note 9 at 103 [translation].

58 SC 1996, c 31.

> The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada
>
> (*a*) subject to paragraphs (*b*) and (*c*), to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;
>
> (*b*) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance.

With respect to the legal regime of the continental shelf, as early as 1951 the International Law Commission had considered the legal continental shelf to be subject to the control and jurisdiction of the coastal state, adopting a formula similar to the one used in the Truman Proclamation. In 1956, under article 68 of its final draft on the law of the sea, the Commission noted that "the coastal state exercises over the continental shelf sovereign rights."[59] From that time on, the concept of "sovereign rights" held sway.[60] It was the concept adopted by the *Convention on the Continental Shelf*,[61] taken up again by *UNCLOS* at article 77, and under which coastal states were granted settled,[62] exclusive rights:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

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59 Lucchini & Vœlckel, *supra* note 2 at 259.

60 *Ibid*.

61 *Supra* note 14, art 2:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

62 As discussed above, interest in the continental shelf is sparked mainly by the presence of hydrocarbons. It can be argued, in the words of Lucchini & Vœlckel, *supra* note 2 at 260, that "the legal concept of the continental shelf was developed to permit the exploration and exploitation of mineral resources" [translation].

> 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[63]

This formula is not without its critics. In particular, it is criticized for its vagueness. At the Caracas session in 1974, certain Latin American states, including Argentina and Peru, tried to introduce the concept of "exercise of sovereignty" in place of "exercise of jurisdiciton and control" over the continental shelf, an attempt that failed for lack of support.[64]

The controversial introduction of the continental shelf concept in international law appears to have set the tone for the formula adopted for its legal regime. While this formula did not create any major controversy, the denial of full sovereignty over the continental shelf reflected a certain reticence toward this new addition. Indeed, in light of the Court's reasoning in the *North Sea Cases*,[65] how can one reconcile the argument that the continental shelf is the underwater extension of land territory over which a state has sovereignty with the fact that the state exercises not full sovereignty, but only sovereign rights over this continental shelf, other than by attempting to reconcile a coastal state's continental shelf rights with freedom of navigation?[66] Thus, as the Supreme Court of Canada stated in the *Reference Re Newfoundland Continental Shelf*,

> [international law] does not grant "sovereignty" over the continental shelf but rather "sovereign rights to explore and exploit".… But in the ordinary meaning of the term, the continental shelf is not part of a coastal State's territory. The coastal State cannot "own" the continental shelf as it can "own" its land territory. The regulation by international law of the uses to which the continental shelf may be put is simply too extensive to consider the shelf to be part of the State's territory. International law concedes dominion to the State in its land territory, subject to certain definite restrictions. By contrast, in the continental shelf the limited rights that international law accords are the sum total of the coastal State's rights.… In other words, we are concerned with extraterritorial rights.[67]

After having considered the matter, Professor O'Connell came to the following conclusion:

> [T]wo things may be suggested: "sovereign rights" was a compromise expression to gain agreement so that work would proceed, but that some states accepted it because it was, in their view, tantamount to sovereignty; and, secondly, the compromise was reached only because there was a minority which was fearful that sovereignty would blur the distinction between the seabed and superjacent waters; there was no intention to limit the coastal State's power of government in respect of the submerged land, only in respect of the sea.[68]

Yet one cannot help thinking that such findings are refuted by article 82 of *UNCLOS*, which establishes a form of "servitude" on the outer continental shelf. Indeed, the compromise arrived at between supporters and opponents of a broad definition of the

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63 *UNCLOS*, *supra* note 17. The exclusive nature of these rights is reinforced by article 81 of *UNCLOS*, concerning the authorization and regulation of drilling on the continental shelf.
64 Symonides, *supra* note 10 at 873.
65 *Supra* note 6 at para 85.
66 Lucchini & Vœlckel, *supra* note 2 at 258-65.
67 [1984] 1 SCR 86 at 95-97 [*Reference Re Newfoundland*].
68 O'Connell, *supra* note 11 at 480.

continental shelf recalls another compromise, as was recently noted in a study prepared for the International Seabed Authority:

> Several land-locked and geographically disadvantaged States were not in favour of the extension of the continental shelf beyond 200 nautical miles as they perceived it to be an exclusive benefit for coastal States. When the objection could not be pursued further, they alternatively lobbied for equitable compensation or for rights of access to continental shelf mineral resources. Other States recognized that coastal States were entitled to the full extent of the continental shelf, but that "they should share with the international community a portion of the natural resources of their continental shelves lying beyond 200 miles." However, there were also yet other States that considered sharing as a form of encroachment on coastal State property rights.
>
> This divergence of views would lead the United States to propose, during the Second Session, that coastal State jurisdiction over the continental margin should be accompanied by a revenue-sharing scheme. The foundations for the future Article 82 were laid in an informal working paper in August 1974. A revised version of the working paper produced an alternative that did not yet focus exclusively on the OCS [Outer Continental Shelf].[69]

Thus, on the basis of the idea that the exploitation of the ocean floor beyond the 200-mile limit must serve to increase the wealth of all states, not just that of industrialized countries,[70] states with extensive continental shelves were required to share the revenue derived from the exploitation of non-living resources in that zone.[71]

Under paragraph 82(2),

> [t]he payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter.[72]

These contributions were made through the International Seabed Authority, which was to distribute them to those states party to *UNCLOS*, on the basis of equitable sharing criteria.[73] Under paragraph 82(3) of *UNCLOS*, "[a] developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource."[74]

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69 International Seabed Authority, *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*: *Technical Study: No. 4* (Kingston, Jamaica: International Seabed Authority, 2009) at 15, online: International Seabead Authority <http://www.isa.org.jm/files/documents/EN/Pubs/Article82.pdf> [*Technical Study: No. 4*] [footnotes omitted].

70 Pancracio, *supra* note 6 at 162.

71 For a diplomatic history of article 82, see *Virginia Commentaries*, *supra* note 40 at 930-47; René-Jean Dupuy & Daniel Vignes, eds, *A Handbook on the New Law of the Sea* (Dordrecht: Martinus Nijhoff, 1991) vol 1 at 375-81; Aldo Chircop & Bruce A Marchand, "International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore" (2003) 26:2 Dal L J 273 at 283-93.

72 *UNCLOS*, *supra* note 17.

73 *Ibid* at 82(4).

74 Regarding Canada's stand, Ted McDorman notes that, "[a]lthough one of the original supporters of the revenue sharing concept for resources exploited from the margin beyond the 200 nautical mile limit, Canada expressed reservations concerning the formula contained in article 82 and claimed that 'the suggest rate could make it uneconomic for Canada to explore and exploit its continental margin'" in Ted L McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the

The impact of article 82, which set out an international royalty on an activity within national jurisdiction (namely, the exploitation of non-living resources of the outer continental shelf), will soon be felt:

> Although Article 82 has been dormant since the adoption of the Convention, there are coastal States, in particular Canada (which is a State Party to the Convention) and the United States (which is not yet), that have granted prospecting and/or exploration licences or leases on their OCS. Typically, offshore petroleum and mineral development operates on a timeframe that can span decades. Today's prospecting and exploration licence may become a development and production licence within perhaps 10–20 years of initial activity. However, it is possible that Article 82 revenues will come due as soon as 2015. Either way, Article 82 will soon awaken.[75]

Just as it incorporates the legal definition of the continental shelf, Canadian legislation also conforms to the "sovereign rights" regime prescribed by international law. Section 18 of the *Oceans Act* provides as follows:

> Canada has sovereign rights over the continental shelf of Canada for the purpose of exploring it and exploiting the mineral and other non-living natural resources of the seabed and subsoil of the continental shelf of Canada, together with living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed of the continental shelf of Canada or are unable to move except in constant physical contact with the seabed or the subsoil of the continental shelf of Canada.[76]

With regard to the implications of article 82, Canadian legislation does include provisions and mechanisms for implementing article 82, as will be discussed below.

III. THE CANADIAN PRACTICE

The Supreme Court of Canada has, on two occasions and using compelling legal reasoning, granted the federal government the authority to exercise the rights recognized by international law over the Canadian continental shelf. However, this did not prevent Nova Scotia and Newfoundland and Labrador from exerting ever greater control over the Atlantic coast continental shelf through effective political pressure and public campaigns. The notion that these provinces own this continental shelf is so ingrained in the minds of Canadians that few were surprised by the idea of delimiting a maritime zone encompassing the continental shelf between the two provinces. Moreover, Nova Scotia and Newfoundland and Labrador are permitted to exclude from the equalization calculation a portion of their revenues derived from the exploitation of natural resources in the Canadian Atlantic coast continental shelf, while at the same time challenging the basis of this exclusion, which links non-renewable natural resources to provincial ownership.

Continental Shelf" (1983) 14 J Mar L & Com 195 at 203, citing *Statement by the delegation of Canada dated 2 April 1980*, UNCLOSOR, 1980, UN Doc A/Conf.62/WS/4 at 102.

75 *Technical Study: No. 4*, *supra* note 69 at xi.

76 *Supra* note 59.

A. THE 1967 *REFERENCE RE OFFSHORE MINERAL RIGHTS*

The issue of determining which of the governments, federal or provincial, had jurisdiction to exercise coastal states' rights under international law over their continental shelves was addressed for the first time in the 1967 *Reference Re Offshore Mineral Rights*.[77] Failed negotiations between the federal government of Canada and the provincial government of British Columbia brought the parties before the Supreme Court of Canada. Five questions were submitted to the Court. Two of these concerned resources located beyond the limit of the territorial sea, while the other three concerned resources found within this limit.[78] The Court was asked to determine whether it was the federal government or the Government of British Columbia that had the right to explore and exploit those resources.[79] The issue of jurisdiction was, therefore, at the heart of the dispute. The Court answered all five questions in favour of the federal government, and ascribed to it ownership of the natural resources found in the continental shelf offshore of British Columbia.[80] In this reference, the Supreme Court's analysis dealt primarily with the issue of ownership of the territorial sea. The Court held, on its analysis of *R v. Keyn*,[81] among other authorities, that at common law the realm ends at the low-water mark, such that, beyond that mark no property rights are granted unless expressly claimed. There being no such claim by British Columbia before 1871, and no alteration of boundaries since 1871, the Supreme Court decided that the territorial sea was outside British Columbia. British Columbia, therefore, had no legislative jurisdiction over the matter. It was the federal government that was in the position to acquire property in the territorial sea recognized by international law.

Having made this finding, the Court did not feel the need to undertake a separate, detailed analysis of the continental shelf, since Canada's property and legislative jurisdiction in its territorial sea confer upon it the right to explore and exploit in the continental shelf. The Supreme Court put it in the following terms:

> As with the territorial sea, so with the continental shelf. There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:
>
> (1) The continental shelf is outside the boundaries of British Columbia, and
>
> (2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.
>
> There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.[82]

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77 [1967] SCR 792 [*1967 Reference*].
78 *Ibid* at 796.
79 *Ibid*.
80 *Ibid* at 792.
81 (1876), 2 Ex D 63.
82 *1967 Reference*, *supra* note 77 at 821, cited in *Reference Re Newfoundland*, *supra* note 67 at 94.

Thus, according to the Court, when British Columbia joined Canada in 1871, its territory ended at its shoreline.[83] Since then, international law has conferred upon the Canadian federal government sovereign jurisdiction over the territorial sea and exclusive rights over the continental shelf adjacent to British Columbia.[84] British Columbia, for its part, had acquired no new rights over maritime areas adjacent to its inland waters.[85] The federal government, having legislative jurisdiction under section 91(1A) of the *Constitution Act, 1867*,[86] or under its residual power, exercised sovereign rights over the territorial seabed and the continental shelf beyond.

B. THE 1977–1978 FAILED NEGOTIATIONS

In 1977, there was a failed attempt by the federal government and the provincial governments of New Brunswick, Nova Scotia, and Prince Edward Island to come to an agreement respecting the sharing of revenues from the development of these three provinces' offshore oil and gas resources. The working document around which negotiations were structured provided that the parties would put aside their claims concerning jurisdiction over the continental shelf and set up an administrative infrastructure to jointly manage the resources.[87] This document also provided for a division of the continental shelf among the provinces based on demarcation lines already negotiated in 1964.[88] The zone extending five kilometres from the low-water mark was to be under provincial jurisdiction, while the zone beyond that was to be administered by the Maritime Offshore Resources Board, consisting of three federal government representatives and one representative from each province.[89] The anticipated revenue-sharing formula was 25 percent for the federal government and 75 percent for the provincial governments.[90] According to the working document, Nova Scotia was to be granted all of the revenues from the development of Sable Island.[91] Despite

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83 *1967 Reference*, *ibid* at 808.

84 *Ibid* at 817.

85 Note that in 1984, another dispute between the federal government and the Government of British Columbia came before the Supreme Court of Canada. Both parties considered the bed of the Georgia Strait to be inland waters and not covered by the *1967 Reference*, which dealt with the territorial sea and the continental shelf. Thus, it was in *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, that the Supreme Court focused on the issue of the jurisdiction of a zone that includes the Strait of Georgia, the Strait of Juan de Fuca, and other areas located between Vancouver Island and the coast adjacent to British Columbia. After examining the 1866 *Imperial Act* (*An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia*, 1866 (UK), 29-30 Vict, c 67), which defines the boundaries of the colony, the Supreme Court ruled this time in favour of British Columbia. According to the Court, as the *Imperial Act* describes the maritime boundary of British Columbia as being the "Pacific Ocean," the province's territory includes the Georgia Strait.

86 *Supra* note 1:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … The Public Debt and Property.

87 *Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces*, signed on 1 February 1977, online: RiverRun Digital Repository <http://dspace.hil.unb.ca:8080/bitstream/handle/1882/950/PhaseI_NS_Annexes_Vol2_Annex67.pdf?sequence=70> [*Memorandum of Understanding*].

88 *Ibid* at 3.

89 *Ibid*.

90 *Ibid* at 11.

91 *Ibid* at 12.

progress in the negotiations, the expected agreement failed to materialize. The determining factor was Nova Scotia's withdrawal after the province's Conservative Party came to power in 1978 under the leadership of John Buchanan.[92] The new Nova Scotia government was of the opinion that the agreement was not in the province's best interests and refused to pursue negotiations, reiterating its traditional position that the province retained exclusive rights over the mineral resources in the continental shelf adjacent to its coasts.

C. THE *NOVA SCOTIA ACCORD*

During the 1978 constitutional reform discussions, Newfoundland asked that title to its continental shelf be confirmed in the new constitution.[93] The then minority Conservative federal government, under Joe Clark, promised to grant almost total control of offshore resources to the coastal provinces.[94] However, before this promise could be fulfilled, the Liberal Party, led by Pierre Elliott Trudeau, returned to power. On the issue of sharing continental shelf resources, the new federal government announced that it was ready to co-operate with the provinces, but denied them complete jurisdiction over those resources.[95] In the 1980s, given the bright economic prospects heralded by the exploration of Hibernia and Venture (at the time of its discovery, Hibernia was considered to be one of the four or five most significant oil discoveries in the world over the past decade), the need to establish title to the natural resources in the Atlantic coast continental shelf became increasingly urgent.[96] In 1981, the federal government adopted the National Energy Program, in which it stated that the continental shelf was under federal jurisdiction.[97] Given the outcry from the Nova Scotia and Newfoundland governments in reaction to this program, the federal government opted for a co-operative approach.[98] On 2 March 1982, Ottawa and Nova Scotia reached a bilateral agreement in which both parties agreed to put aside the issue of jurisdiction over the continental shelf and move forward with the exploration and exploitation of oil and gas resources.[99] To some observers, the federal government had come to the conclusion that an agreement with Newfoundland was impossible, while the Nova Scotia government was viewing this partnership as an opportunity to accelerate the exploitation of its continental shelf, thereby strengthening its position in relation to its economic competitors.[100] It should also be noted that Nova Scotia, unlike Newfoundland, did not have the necessary facilities to handle several important aspects of offshore oil and gas development.[101] The agreement that was reached did not change the parties' respective positions regarding jurisdiction over the continental shelf at issue.[102] As had also been provided in the 1977 *Memorandum of*

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92 Alastair R Lucas & Constance D Hunt, *Oil and Gas Law in Canada* (Toronto: Carswell, 1990) at 74.

93 G Bruce Doern & Glen Toner, *The Politics of Energy: The Development and Implementation of the NEP* (Toronto: Methuen, 1985) at 113, 160.

94 Rowland J Harrison, "Jurisdiction Over the Canadian Offshore: A Sea of Confusion" (1979) 17:3 Osgoode Hall LJ 469 at 471.

95 Leo Barry, "Offshore Petroleum Agreements: An Analysis of the Nova Scotian and Newfoundland Experience" in J Owen Saunders, ed, *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto: Carswell, 1986) 177 at 177-78.

96 *Ibid* at 179.

97 Doern & Toner, *supra* note 93 at 283.

98 *Ibid* at 283-84.

99 *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (2 March 1982) [*Nova Scotia Accord*], formalized by the *Canada-Nova Scotia Oil and Gas Agreement Act*, SC 1984, c 29.

100 McDorman, *supra* note 52 at 52.

101 *Ibid*.

102 *Nova Scotia Accord*, *supra* note 98 at 1.

Understanding, the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB) was established. The CNSOPB was in charge of decisions related to the development of offshore oil and gas projects and the sharing of revenues generated by these projects. Three representatives from the federal government and two from the Nova Scotia government sit on the CNSOPB, which reports to the Canada Oil and Gas Lands Administration. The CNSOPB was delegated certain authorities, including the issuance of operating licences. In addition to holding a majority of seats, the federal government has a veto power that allows it to vary — and even make — decisions unilaterally. Under the *Nova Scotia Accord*, approximately two thirds of the revenue goes to Nova Scotia and one third to the federal government.

D. *REFERENCE RE NEWFOUNDLAND CONTINENTAL SHELF*

For its part, the Newfoundland government was of the view that the revenue sharing provided for under the Nova Scotia agreement was inadequate and that the decision-making process gave the federal government too much power.[103] Nevertheless, negotiations were attempted but failed, and Newfoundland subsequently brought its case before the courts.[104] As the *1967 Reference* gave weight to the federal government's claims over its entire continental shelf, Newfoundland sought to distinguish its case by arguing that the province's historical background made its situation unique in the country. As is well known, Newfoundland entered the Canadian Federation in 1949, at a time when the legal institution of the continental shelf was beginning to be recognized. Moreover, Newfoundland argued that it had joined Canada not as a colony, but as a sovereign state with the full capacity to acquire continental shelf rights. The province maintained that it had retained those rights when it became a province of Canada.[105] Once again, in the *Reference Re Newfoundland*, the Supreme Court of Canada had to rule on whether it was the federal government or the provincial government that had the right to explore and exploit the natural resources of the continental shelf. In a decision rendered one year earlier, when called on to decide a similar issue, the Newfoundland Court of Appeal adopted the approach advocated by the Supreme Court in the *1967 Reference*. It held that, after entry into the Canadian Federation in 1949, Newfoundland did not acquire any continental shelf rights. According to the Court of Appeal, the Canadian federal government had jurisdiction over the continental shelf adjacent to Newfoundland.[106] In *Reference Re Newfoundland*, the Supreme Court reached the same conclusion, but by a different route. Instead of trying to determine whether the continental shelf belonged to Newfoundland in 1949, the Court focused on the concept of "capacity" and asked whether Newfoundland had the capacity to exercise extraterritorial jurisdiction over the continental shelf in 1949. The Court found that it had not. According to the Supreme

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103 See Government of Newfoundland and Labrador, Petroleum Directorate, *An Analysis of the Impact of a Nova Scotia Type Offshore Agreement on Newfoundland* (St. John's: Government of Newfoundland and Labrador, Petroleum Directorate, 1982).

104 Barry, *supra* note 95 at 179.

105 See Cabot Martin, "Newfoundland's Case on Offshore Minierals: A Brief Outline" (1975) 7:1 Ottawa L Rev 34; George Steven Swan, "The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law" (1976) 22:4 McGill LJ 541; Colin Douglas, "Conflicting Claims to Oil and Natural Gas Resources off the Eastern Coast of Canada" (1980) 18:1 Alta L Rev 54; Edward C Foley, "Nova Scotia's Case for Coastal and Offshore Resources" (1981) 13:2 Ottawa L Rev 281; Noela J Inions, "Newfoundland Offshore Claims" (1981) 19:3 Alta L Rev 461; ML Jewett, "The Evolution of the Legal Regime of the Continental Shelf" (1984) Can YB Int'l Law 153.

106 See *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 DLR (3d) 9 (Nfld CA).

Court, Newfoundland could not be recognized as having had, at any time in its history, an independent status similar to that which had been conceded to Canada, Australia, and New Zealand.[107] The independence of these three countries dated back to 1926, when the dominions of the British Empire were recognized as independent by the *Balfour Declaration*, which was integrated into English law by the *Statute of Westminster* in 1931.[108] As for Newfoundland, it was forced to declare bankruptcy in 1934 and was placed under a form of guardianship known as the Commission of Government, which remained in force until the province entered the Canadian Federation.[109] According to the Court, this meant that Newfoundland's sovereignty was suspended when it entered the Canadian Federation:

> The Attorney General of Newfoundland stresses that the Commission of Government was voluntarily submitted to by Newfoundland, and that self-government was only suspended. We accept both propositions, but they do not alter the situation that during the period of suspension Newfoundland did not even have internal sovereignty, much less external sovereignty. We think that the suspension of self-government necessarily suspended the external sovereignty of Newfoundland recognized in the *Balfour Declaration.* Any continental shelf rights available at international law between 1934 and 1949 therefore accrued to the Crown in right of the United Kingdom, not the Crown in right of Newfoundland.[110]

In other words, whatever Newfoundland's international status was in the 1930s, it no longer existed when the concept of a legal continental shelf began to emerge. The Court added that, assuming Newfoundland had held title to the continental shelf adjacent to its coasts in 1949, it would have lost this title to the federal government when the province joined Canada.[111] Finally, according to the Court, even if Newfoundland had acquired the capacity to exercise extraterritorial jurisdiction over the continental shelf before 1949, the continental shelf was not governed by international law at that time.[112] For the Supreme Court of Canada, international law was not sufficiently developed in 1949 regarding the legal status of the continental shelf so as to support the inference that a coastal state's right to explore and exploit the continental shelf existed *ipso jure*:

> We conclude that international law had not sufficiently developed by 1949 to confer, *ipso jure*, the right of the coastal State to explore and exploit the continental shelf. We think that in 1949 State practice was neither sufficiently widespread to constitute a general practice nor sufficiently consistent to constitute settled law. Furthermore, several of the early State claims exceeded that which international law subsequently recognized in the 1958 Geneva Convention. International law on the continental shelf developed relatively quickly, but it had not attained concrete form by 1949.[113]

The Court ruled that the rights recognized by international law over the Canadian continental shelf accrued to the federal government. It was, therefore, the federal government that had the right to explore and exploit the continental shelf off Newfoundland.[114]

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107 *Reference Re Newfoundland*, *supra* note 67 at 105.
108 *Ibid* at 103-105.
109 *Ibid* at 106-107.
110 *Ibid* at 110.
111 *Ibid* at 112.
112 *Ibid* at 116-24.
113 *Ibid* at 124.
114 *Ibid* at 127-28.

E. THE *ATLANTIC ACCORD*

The *Reference Re Newfoundland* apparently put an end to the ambiguities concerning the holder of the rights to explore and exploit resources in the Canadian continental shelf. However, a promise made by Conservative Party leader Brian Mulroney before he came to power in Ottawa put the issue back into the forefront. Mulroney promised to negotiate a new system of managing Newfoundland's offshore resources. Thus, after the 1984 elections, despite the case law in its favour on the issue of jurisdiction over its continental shelf, the Canadian government chose to co-operate with the provinces on this matter. On 11 February 1985, the federal government and Newfoundland signed the *Canada-Newfoundland Atlantic Accord Implementation Act*,[115] which provided for joint management of the resources in the continental shelf adjacent to Newfoundland. The *Atlantic Accord* contained guarantees to Newfoundland concerning this development. It was also different in several respects from the one concluded with Nova Scotia in 1982. Section 3 of the *Atlantic Accord* establishes the Canada-Newfoundland Offshore Petroleum Board (CNOPB). The CNOPB consists of seven members: three appointed by the federal government, three appointed by the provincial government, and a chairperson jointly appointed by both levels of government. An arbitration process is provided for where there is a failure to agree on the appointment of the chairperson. The CNOPB's decisions are made by consensus, and it submits a budget and an annual report to both levels of government. The ministers for each government may jointly issue directives to the CNOPB. A development plan must be submitted to the CNOPB prior to an exploration program. Both levels of government are consulted about development plans, but it is up to the CNOPB to decide whether or not to accept a plan, unless the ministers issue a written directive on that subject, in which case the directive must be taken into account. The Canadian federal government made a $225-million loan to establish a fund to help cover the socio-economic costs of offshore petroleum development and exploitation. Section 64 of the *Atlantic Accord* provides for the possibility of incorporating it into the Canadian Constitution if Newfoundland obtains the support of the other Canadian provinces. However, this procedure is both politically and legally complex, and no action has been taken to that end.[116] The *Atlantic Accord* was integrated into federal and provincial legislation. At the federal level, the *Atlantic Accord* is divided into eight parts. Part VIII contains transitionals provisions, Part VI establishes the Offshore Development Fund, and Part V discusses equalization. Part I establishes the CNOPB and Part IV addresses the sharing of revenues from the exploitation of resources in the continental shelf adjacent to Newfoundland. The provincial *Act*[117] is similar to the federal version, but without touching on the issues already dealt with in the federal provisions.

Since the terms of the *Atlantic Accord* were more favourable to Newfoundland than those of the 1982 *Nova Scotia Accord* were to Nova Scotia, the latter was amended in

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115 SC 1987, c 3 [*Atlantic Accord*]. Although the *Atlantic Accord* came into force on that date, it would not be enforced until the 1999–2000 fiscal year.

116 L Alan Willis, "Legal Regimes of the Continental Shelf and the EEZ: Canadian Perspective" in Donat Pharand & Umberto Leanza, eds, *The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime/Le plateau continental et la zone économique exclusive: Délimitation et régime juridique* (Dordrecht: Martinus Nijhoff, 1993) 233 at 244.

117 *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2.

August 1986[118] to extend similar treatment to the two provinces.[119] The *Nova Scotia Accord*, therefore, now resembles the *Atlantic Accord*. The difference is that the *Nova Scotia Accord* kept provisions from the 1982 agreement that satisfied both parties. The two accords also differ owing to the historical, geographical, and legal differences between the two provinces. Finally, no doubt as a result of the 1985 experience, the amended *Nova Scotia Accord* is more detailed than the *Atlantic Accord*.

F. THE INTERPROVINCIAL BOUNDARY OF THE CONTINENTAL SHELF

As has been seen, the Canadian provinces have no authority over the continental shelf. In both the *1967 Reference* and *Reference Re Newfoundland*, the Supreme Court of Canada, addressing the issue from several legal angles, granted the federal government the sovereign rights recognized by international law over the natural resources of the Canadian continental shelf. The considerable influence exerted by Nova Scotia and Newfoundland and Labrador over the continental shelf stems from the federal government's recognition of these provinces' political weight. It is important to emphasize that what the provinces actually hold is political influence over the central government, rather than a power that encompasses the capacity to impose obligations (in other words, legal jurisdiction). In fact, as regards the continental shelf, the influence of Nova Scotia and Newfoundland and Labrador over the central government is such that, to satisfy their claims, a federal tribunal has ruled that their maritime zone includes the continental shelf, which inevitably raises questions about the form and substance of that process.

Under section 6(2) of the *Atlantic Accord*,[120] in the event of a dispute between Newfoundland and any other province that is party to a maritime delimitation accord, the federal government may refer the case to an impartial arbitrator. Section 48 of the *Canada-Nova Scotia Implementation Act*, 1988[121] provides for the same dispute resolution process. On the basis of these provisions, then Minister of Natural Resources Canada Ralph Goodale, with the parties' consent, established an arbitration tribunal on 31 March 2000, to resolve a 40-year-old dispute between Nova Scotia and the province to be named "Newfoundland and Labrador" as of 6 December 2001. The dispute concerned the maritime boundary dividing the two provinces. The tribunal was composed of Gérard V. La Forest, Leonard H. Legault, and James R. Crawford. In this case, the province of Nova Scotia first sought to convince the tribunal that the four Atlantic provinces had reached an agreement on their respective maritime boundaries at the Atlantic Premiers Conference on 30 September 1964. Newfoundland and Labrador disagreed, maintaining that the text adopted at the Conference had merely set out the broad terms of a proposal. After reviewing the 1964 text and the parties' subsequent practice, the tribunal concluded that the maritime delimitation between Newfoundland and Labrador and Nova Scotia had not been determined by agreement. Therefore, in accordance with its mandate and under section 6 of the *Atlantic*

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118 Although the amendment came into effect at that time, it was not enforced until the 1993–1994 fiscal year.

119 *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28 [*Canada-Nova Scotia Implementation Act*, 1988].

120 *Supra* note 115.

121 *Supra* note 119.

Accord and section 48 of the *Canada-Nova Scotia Implementation Act*, 1988, the tribunal had to establish the delimitation of the maritime boundary between the two provinces.

Nova Scotia and Newfoundland and Labrador both argued that international law was inapplicable. In their opinion, the *Convention on the Continental Shelf* did not apply in that case because the *Nova Scotia Accord* and the *Atlantic Accord* did not cover the same rights, resources, use, and seabed zone as the *Convention on the Continental Shelf*.[122] The tribunal rejected this position. It should be noted that the tribunal's mandate required it to delimit the maritime zone in question and, for such purpose, apply the principles of international law governing maritime boundary delimitation and treat the provinces concerned as if they were states with the same rights as the federal government.[123] Accordingly, the tribunal was bound by the rules of international law:

> As a party to the 1958 *Geneva Convention* without any reservation, Canada is subject to the rights and obligations it incorporates, including those under Article 6. So too, under the Terms of Reference, are Nova Scotia and Newfoundland and Labrador. This in no way alters the substantive law prescribed by the legislation. It rather confirms and clarifies it.[124]

For Gerald Baier and Paul Groarke, granting sovereign status to Nova Scotia and Newfoundland and Labrador raises issues about the procedure underlying this arbitration:

> There is no precedent for treating provinces as sovereign states within a domestic context. It is one thing to adopt and make use of principles of international law in resolving disputes between the provinces. It is another thing to grant the provinces the status of sovereign states, even hypothetically, as if they exist independently of the relationships and responsibilities set out in the Canadian Constitution.[125]

Nevertheless, in establishing a maritime boundary between Nova Scotia and Newfoundland and Labrador, the tribunal felt bound by the *Convention on the Continental Shelf* and, more specifically, article 6:

> In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstance justify it.… [T]he applicability of the 1958 *Geneva Convention* in the present proceedings reinforces the case for commencing with an equidistance line.[126]

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122 Note that Canada did not ratify *UNCLOS* until 7 November 2003.

123 *Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas as Defined in the* Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act *and the* Canada-Newfoundland Atlantic Accord Implementation Act, *(Award of the Tribunal in the First Phase)* (17 May 2001) a para 3.1, online: University of New Brunswick <http://www.unbf.ca/law/library/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English[1]_opt.pdf>.

124 *Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas as Defined in the* Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act *and the* Canada-Newfoundland Atlantic Accord Implementation Act *(Award of the Tribunal in the Second Phase)* (26 March 2002) at para 2.24, online: Newfoundland Labrador Department of Natural Resources <http://www.nr.gov.nl.ca/mines&en/publications/offshore/dispute/decision.pdf> [*Award of the Tribunal in the Second Phase*].

125 Gerald Baier & Paul Groarke, "Arbitrating a Fiction: Canadian Federalism and the Nova Scotia/Newfoundland and Labrador Boundary Dispute" (2003) 46:3 Canadian Public Administration 315 at 324.

126 *Award of the Tribunal in the Second Phase*, *supra* note 124 at para 2.28.

The result was a delimitation based on the slightly modified equidistance method that extended to the limit of the continental shelf.

According to Baier and Groarke, an arbitration process through which a maritime boundary between two provinces is established by a tribunal reporting to the federal Minister of Natural Resources also raises constitutional questions regarding a practice that undermines the principle of government accountability:

> The arbitration process raises [questions as to] … whether the questions referred to the tribunal under the settlement provisions of the accords are "political questions." If so, it would follow as a constitutional matter that a legislatively accountable executive must decide them. This is apparent in the fact that the Implementation Accords give the federal minister the responsibility to decide how the revenue from offshore resources will be distributed. This is a decision reserved for the minister: a judicial or quasi-judicial body cannot make it. A cynical viewer might contend that the tribunal provided a convenient means of shifting the moral responsibility for such a decision onto another party, in order to distance the minister from any decision in the matter.[127]

In addition to the significant issues raised by Baier and Groarke concerning the form of the 2002 arbitration process, there is another question, one that goes to the very essence of the process itself: how is it possible to delimit a zone between two entities that have no jurisdiction over that zone? This question leaves legal scholars baffled. The political errancy that allows two Canadian provinces to share a maritime zone that includes the continental shelf, even though they have no rights over it, leads to legal and political incongruities and consequences that are hard to gauge. But an examination of these consequences is in order. Have we opened a political Pandora's Box? Are we letting the foundation of the Canadian federation erode? Does the exclusion of revenues generated by continental shelf resources from Canada's equalization system represent such an erosion?

G. THE EXCLUSION FROM EQUALIZATION CALCULATIONS OF REVENUES GENERATED BY NATURAL RESOURCE DEVELOPMENT IN THE CONTINENTAL SHELF

On 14 February 2005, the federal government and the provincial governments of Nova Scotia and Newfoundland and Labrador signed new agreements to share revenues from the development of oil and gas resources along their coasts.[128] Under these new agreements, the two provinces keep 100 percent of revenues generated by these activities. This represents an estimated $1.1 billion in revenues for Nova Scotia, and an estimated $2.6 billion in revenues for Newfoundland and Labrador. Under these agreements, the two provinces are exempted from any reduction in equalization payments received from the federal government, whereas, initially, Nova Scotia and Newfoundland and Labrador would have been obliged to pay the federal government 70 percent of their offshore oil revenues under

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127 Baier & Groarke, *supra* note 125 at 321-22.

128 Canada, Department of Finance, *Arrangement between the Government of Canada and the Government of Nova Scotia on Offshore Revenues* (14 February 2005), online: Department of Finance Canada <http://www.fin.gc.ca/fedprov/pdf/nsae.pdf>; Canada, Department of Finance, *Arrangement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Revenues* (14 February 2005), online: Department of Finance Canada <http://www.fin.gc.ca/fedprov/pdf/nae.pdf>.

the country's wealth-sharing system.[129] These agreements resulted from negotiations that were anything but commonplace. In an unprecedented move to force the federal government to yield to the province's demands, Newfoundland and Labrador Premier Danny Williams went as far as ordering the removal of all Canadian flags from provincial buildings. In the end, an agreement that satisfied the Newfoundland government's expectations was concluded. The term of the agreement was eight years, with a further eight-year extension. Under the agreement, Nova Scotia received an immediate advance of $830 million, while Newfoundland and Labrador received an advance of $2 billion.[130] The speech made by Paul Martin, then Prime Minister of a minority Liberal government, was outrageously high-handed: "I made a promise to the people of Newfoundland and Labrador, and I was determined to make good on that promise. Today, I am delighted to do just that."[131] Indeed, the only explanation for the Government of Canada's historical about-face regarding the country's wealth distribution seems to be an election campaign promise. Furthermore, the accord did not go unnoticed by the other Canadian provinces, and many demanded a review of their own equalization status.[132]

In June 2007, a new federal government passed a federal budget providing that 50 percent of provincial revenues from non-renewable natural resources would be included in the equalization calculation, contrary to the agreements of 14 February 2005.[133] This measure, contained in Minister Flaherty's second budget, raised the ire of the premiers of Nova Scotia and Newfoundland and Labrador.[134] Describing the system as "equalization for everyone but us," Newfoundland and Labrador Premier Williams urged Newfoundlanders not to vote for the Conservative Party in the upcoming elections.[135] Williams, who continued to believe that the changes in the June 2007 federal budget were unfair to his province, launched a campaign

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129 *Debates of the Senate*, 37th Parl, 1st Sess, Vol 139, No 110 (30 April 2002) at 2747 (Bill Rompkey), online: Parliament of Canada <http://www.parl.gc.ca/Contents/Sen/Chamber/371/Debates/pdf/110db_2002-04-30-e.pdf>.

130 *Debates of the Senate*, 38th Parl, 1st Sess, Vol 142, No 74 (21 June 2005) at 1530 (Jack Austin), online: Parliament of Canada <http://www.parl.gc.ca/Contents/Sen/Chamber/381/Debates/074db_2005-06-21-e.htm>.

131 Government of Newfoundland and Labrador, News Release, "Prime Minister Paul Martin and Premier Danny Williams Celebrate New Revenue Sharing Arrangement" (14 February 2005), online: Government of Newfoundland and Labrador <http://www.gov.nl.ca/atlanticaccord/releases.htm>.

132 This is especially true of Saskatchewan, which estimates that, because of its energy resources, it has lost $4 billion in equalization payments over the past 10 years. The province is therefore attempting to conclude a bilateral accord similar to those concluded between the federal government and the respective governments of Newfoundland and Labrador and Nova Scotia, which are sheltered from this type of loss. The problem in Saskatchewan is worsening; its equalization entitlements in non-energy tax bases are rising faster than in any other province. For an illustration of the issue, see Thomas J Courchene, "Energy Prices, Equalization and Canadian Federalism: Comparing Canada's Energy Price Shocks" (2006) 31:2 Queen's LJ 644 at 673-95. Note that no amendment to the *Nova Scotia Accord* or to the *Atlantic Accord* was needed.

133 House of Commons, Department of Finance Canada, *The Budget Plan 2007: Aspire to a Stronger, Safer, Better Canada* (19 March 2007) at 114, online: Government of Canada <http://www.budget.gc.ca/2007/pdf/bp2007e.pdf>.

134 "Rodney MacDonald en colère," *Radio-Canada* (11 June 2007), online: Radio-Canada <http://www.radio-canada.ca/nouvelles/Politique/2007/06/11/001-NE-MacDonald-budget.shtml>; "Harper dit tenir parole," *Radio-Canada* (11 June 2007), online: Radio-Canada <http://www.radio-canada.ca/nouvelles/Politique/2007/06/11/003-harper-atlantique.shtml>; Hélène Buzzetti, "Péréquation: Harper menace de traîner Halifax en cour," *Le Devoir* (12 June 2007), online: Le Devoir <http://www.ledevoir.com/2007/06/12/147070.html>; Gilles Toupin, "Revenus des hydrocarbures: Harper défie trois provinces," *La Presse* (12 June 2007) A14.

135 "Trahison et satisfaction," *Radio-Canada* (20 March 2007), online: Radio-Canada <http://www.radio-canada.ca/nouvelles/Budget/2007/03/19/019-reax-provinces.shtml>.

against the Conservative Party during the fall 2008 federal election.[136] In his "ABC" ("Anything But Conservative") campaign, he enlisted the support of his 43 caucus members to dissuade voters from voting for the Conservative Party.[137] It was, therefore, a rather unusual campaign, pitting the federal Conservative Party against the Newfoundland and Labrador Conservative Party.[138]

The decision to include 50 percent of provincial natural resource revenues in the equalization calculation can be traced back to a proposal in a report entitled *Achieving a National Purpose: Putting Equalization Back on Track*,[139] prepared by five economists. Seeking to achieve a fiscal balance, the authors of the report, which contains a total of 18 recommendations, focused on equalization reform. On this point, the expert panel was of the opinion that complete exclusion of natural resource revenues from the equalization calculation was unfair. One of the panel members, Robert Lacroix, former rector of the Université de Montréal, explained that "natural resources are one of the main sources of disparity among the provinces, which is why we believe that 50 per cent of revenues should be included."[140] This line of reasoning led some to wonder why 100 percent of natural resource revenues should not be included in the equalization calculation.[141]

The solution proposed by the expert panel was a compromise between the Council of the Federation's position, that all provincial natural resource revenues should be included, and the federal government's promise to Saskatchewan, Nova Scotia, and Newfoundland and Labrador that these revenues would be excluded from the equalization calculation.

Proponents of including all provincial natural resource revenues in the equalization formula maintain that the current system of excluding these revenues causes significant fiscal disparities among the Canadian provinces.[142] The disparity argument carries weight in a

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136 "Danny Williams fourbit ses armes," *Radio-Canada* (5 September 2008), online: Radio-Canada <http://www.radio-canada.ca/regions/atlantique/2008/09/05/005-TNL-campagne-abc.shtml>.

137 On 10 October 2007, the federal government and the Nova Scotia government announced that an agreement guaranteeing that the province would not lose its oil and gas royalties as a result of the measures provided for by the last federal budget put an end to their dispute. See "Ottawa et Halifax s'entendent," *Radio-Canada* (10 October 2007), online: Radio-Canada <http://www.radio-canada.ca/regions/atlantique/2007/10/10/003-NE-perequation_n.shtml>.

138 See Hélène Buzzetti, "Guerre de publicités — Ottawa répond au premier ministre de Terre-Neuve," *Le Devoir* (6 April 2007), online: Le Devoir <http://www.ledevoir.com/2007/04/06/138481.html> [translation]:

> In Newfoundland alone, the Department of Finance purchased $110,000 in advertisements to promote the last federal budget. The ad was entitled 'Premier, the facts do matter' and featured a photo of Danny Williams at the top. Conservative Newfoundland premier Danny Williams got worked up during the reading of the last federal budget because, in his opinion, the new proposed equalization formula would penalize his province. The ads were a response to Mr. Williams, who went so far as to ask his fellow citizens not to vote for the Conservative Party in the next elections. The federal ad appeared yesterday and will appear once again in the Island's two major Anglophone dailies. It will also run in each of the 19 weekly publications in Newfoundland and Labrador (including *Le Gaboteur* of Labrador City) and will be broadcast all week long 20 to 25 times on each of the main radio stations.

139 Expert Panel on Equalization and Territorial Formula Financing, *Achieving A National Purpose: Putting Equalization Back on Track* (Ottawa: Department of Finance Canada, 2006), online: Expert Panel on Equalization and Territorial Formula Financing <http://www.eqtff-pfft.ca/epreports/EQ_Report_e.pdf> [O'Brien Report].

140 Alec Castonguay, "Déséquilibre fiscal – Péréquation: des experts proposent de couper la poire en deux," *Le Devoir* (6 June 2006), online: Le Devoir <http://www.ledevoir.com/2006/06/06/110927.html> [translation].

141 *Ibid*.

142 O'Brien Report, *supra* note 139 at 56.

federation that, through equalization, affirms a "basic commitment to fairness and equity" by ensuring that its citizens, regardless of where they live, have access to reasonably comparable levels of public services (health care, education, social services, and justice) at reasonably comparable levels of taxation.[143]

Those who favour full exclusion of natural resource revenues from the equalization formula rely on the principle of provincial ownership of natural resources. According to the Saskatchewan government,

> [t]he current program fails to acknowledge that ownership of natural resources rests with individual provinces under the Constitution. Saskatchewan's rights of ownership extend to the financial rewards from those resources, to be used for the benefit of its citizens. Equalization transfers most of those benefits to other parts of Canada and to the federal government.[144]

Proponents of excluding natural resource revenues entirely from the equalization formula also assert that such resources are non-renewable and are not a permanent source of revenue for the provinces.[145] This argument was echoed by the panel of experts:

> [P]rovinces that benefit from natural resources face considerable uncertainty due to large swings in prices (for oil and gas in particular), wide variations in costs of production, uncertainty over the potential volume of production, and significant changes in profitability. On top of that, there are public costs involved in providing the necessary infrastructure to develop natural resources as well as in monitoring and regulating environmental impacts. Provinces with resource revenues reap not only the benefits but also must pay the costs for development, regulation, and management of their natural resource sectors.[146]

However, in the expert panel's opinion, the leading argument against full inclusion of revenues from natural resources in the equalization calculation is the one that essentially recognizes provincial ownership of these resources. The panel notes that "constitutionally, provinces own natural resources within their boundaries. As owners, the provinces determine when and under what conditions a particular natural resource will be developed. This is very different from other sources of revenues that are owned privately and simply taxed by a provincial government."[147]

In this regard, the expert panel agrees with former Alberta Attorney General Mervin Leitch's analysis of the issue:

> A provincial government under the Constitution has "vastly greater control over the natural resources it owns than it does over the natural resources it doesn't own.… A province can with respect to natural resources it owns: (a) decide whether to develop them, (b) decide by whom, when, and how they're going to be developed, (c) determine the degree of processing that's to take place within the province, (d) dispose of

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143 *Ibid* at 18.

144 Government of Saskatchewan, *Equalization Reform: A Fair Deal for Saskatchewan* (Paper presented to the Expert Panel on Equalization and Territorial Formula Financing, June 2005) at 1, online: Expert Panel on Equalization and Territorial Formula Financing <http://www.eqtff-pfft.ca/submissions/GovernemntofSaskatchewan.pdf>.

145 O'Brien Report, *supra* note 139 at 56.

146 *Ibid* at 57.

147 *Ibid*.

> them upon conditions that they only be used in a certain way, or in a certain place, or by certain people, (e) determine the price at which they or the products resulting from their processing will be sold."[148]

Indeed, the *Constitution Act, 1867* confers upon the provinces ownership of the natural resources on their territory:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say…
>
> The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.[149]

In light of these facts, it is surprising that the expert panel should conclude that 50 percent of natural resource revenues ought to be included in the equalization calculation. Are compromises really possible when one of the arguments being weighed is sheathed in the Canadian Constitution? This irregular approach leads along paths that are cause for concern. It is no clearer how the report's expert panel could have included the natural resources off the Canadian Atlantic coast in their proposal.

To recapitulate, natural resource revenues are excluded from the equalization formula mainly because the Canadian Constitution grants the provinces ownership of the natural resources on their territory. Yet international law, supported by Canadian case law, states that natural resources in the continental shelf do not belong to the provinces. Consequently, Nova Scotia and Newfoundland and Labrador are entitled to exclude from the equalization calculation part of the revenues from natural resources obtained from the continental shelf that they never owned in the first place.

IV. CONCLUSION

Thus, even though the case law confirms that the federal government of Canada has jurisdiction over the continental shelf, the provinces of Nova Scotia and Newfoundland and Labrador, through bilateral accords, have been granted joint management of the resources and the resulting profits. These accords cannot be regarded as having transferred jurisdiction from the federal government to the provinces and territories. Under international law, the Constitution, and Canadian case law, the right to explore and exploit continental shelf resources remains under federal jurisdiction. The federal government, therefore, has no constitutional duty to cooperate with the provinces and territories.

The interprovincial boundary of the continental shelf, the exclusive exploitation of its resources by the provinces of Nova Scotia and Newfoundland and Labrador, and the exclusion (in whole or in part) of revenues from these resources from the equalization calculation, are the result of a political will that is difficult to justify. It is true that, so long

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148 *Ibid* at 57, citing Merv Leitch, "The Constitutional Position of Natural Resources" (Address delivered to the Canadian Council of Resource and Environment Ministers, Victoria, British Columbia, 21 November 1974) in J Peter Meekison, ed, *Canadian Federalism: Myth or Reality*, 3d ed (Toronto: Methuen, 1977) at 173, 175-76.

149 *Constitution Act, 1867*, *supra* note 1 at 92(5).

as it complies with international law, the federal government may exercise its rights under such law with regard to the continental shelf as it sees fit. It is also true that "equalization is a federal program financed by federal tax dollars. As such, it is the federal government's prerogative to operate, administer and distribute equalization in any way it chooses."[150] Nevertheless, the Canadian practice concerning the exploration and exploitation of the Atlantic coast continental shelf defies the logic of a program that was established in 1957, that has been elevated to the status of a constitutional norm since 1982,[151] and that is now considered by many to be the glue that holds the Canadian federation together.[152] Through this program, the federal government committed itself to "making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."[153] As it is, the exclusion from equalization of revenues from natural resources under provincial jurisdiction — as in the case in Alberta — seems to be a deviation from this objective. Now what about the exclusion from equalization of revenues from natural resources under — not provincial — but rather federal jurisdiction?

Even assuming, for the sake of discussion, that the preferential treatment given to Nova Scotia and Newfoundland and Labrador concerning the development of natural resources in their continental shelf is warranted on the basis of their status as coastal provinces, how can one explain the fact that Prince Edward Island, New Brunswick, and Quebec are not given similar treatment and are excluded from the exploration and exploition of the Atlantic coast continental shelf?

Finally, with regard to the implementation of article 82 of *UNCLOS*, at international law the federal government is responsible for fulfiling the obligations imposed by that provision. However, the political agreements reached between the federal government and Nova Scotia and Newfoundland and Labrador allocates to these two provinces the responsibility for the setting and levying of royalties on the Atlantic coast outer continental shelf. At first glance, it seems that it is up to Nova Scotia and Newfoundland and Labrador to decide how Canada will absorb the cost, under article 82. As yet, neither the CNSOPB nor the CNOPB has implemented article 82 in its royalty regime, even though the CNOPB has already issued exploration licences for the extended continental shelf, subject to the royalty regime. Regarding the different scenarios possible raised by article 82, the study prepared for the

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150 Parliamentary Information and Research Service, Economics Division, *Equalization: Implications of Recent Changes* (4 January 2006) at 12, online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0591-e.pdf>.

151 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 36:

> (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:
> (*a*) promoting equal opportunities for the well-being of Canadians;
> (*b*) furthering economic development to reduce disparity in opportunities; and
> (*c*) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

152 O'Brien Report, *supra* note 139 at 2.

153 *Constitution Act, 1982*, *supra* note 151 at s 36(2).

International Seabed Authority, mentioned above, suggests three possibilities, and possible combinations of each:

> Although the obligation in Article 82 is one at international law and for which the OCS [Outer Continental Shelf] State is responsible, the implementation of that obligation will require the OCS State to determine the level at which the cost discharge will be absorbed. There appears to be three possibilities, and possible combinations of each. The first is for the national government of the OCS State to absorb the payments and contributions and effect payments through the Authority, possibly from royalty and tax revenues levied on production. The second is for the national government to pass the cost on to the producer in the form of additional royalty payments. The OCS State would need to consider the implications of its OCS royalty policy for (a) its existing royalty regime and (b) existing and future concession, production-sharing, service or other contracts, as the case may be. Third, and specifically in the case of States with multiple levels of governance, such as federal States, there might be sub-national governments that could be called upon to share the cost. Sub-national levels of government (e.g., states, provinces, regions) may have rights or expectations from the produced non-living resource. It is possible that a portion or even the bulk of the internal royalties may be enjoyed by sub-national levels of government. They are not bound by Article 82, although they may enjoy royalties under domestic law or political arrangement. Thus, in taking domestic steps to implement its obligation, the OCS State would need to decide what level (and actor) will bear the cost and how the payments or contributions will be levied.[154]

Unlike the US, which has already taken article 82 into account by providing that the outer continental shelf royalty will be levied from producers if the United States becomes a party to *UNCLOS*,[155] to date, the exploration licences issued for the outer continental shelf do not incorporate article 82. This situation raises one final question: if there is exploitation of the Atlantic outer continental shelf, who will pay the international royalties imposed by article 82?

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154 *Technical Study: No. 4*, *supra* note 69 at 47-48.

155 Although not yet a party to *UNCLOS*, the United States, has anticipated how article 82 will be discharged. The outer continental shelf royalty will be levied from producers if the US becomes a party to *UNCLOS* prior to or during the life of a lease. See *ibid* at 5, 48.