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THE CANADIAN ARCTIC WATERS POLLUTION
PREVENTION ACT OF 1970 AND THE CONCEPT
OF SELF-PROTECTION

A Thesis

Presented to
the School of International Affairs
Carleton University

In Partial Fulfillment of the
Requirements for the Degree of
Master of Arts

by

Gerald Francis Graham

June 1974

ABSTRACT

This thesis examines the merits of a claim to a right of self-protection for environmental measures beyond national boundaries.

The case is the Canadian Arctic Waters Pollution Prevention Act of 1970. The hypothesis is that, given the circumstances surrounding the legislation, the nature of the Arctic, and the lack of adequate positive international law pertaining to prevention of maritime pollution, a strong legal defence of the unilateral action can be made through application of the concept of self-protection.

Part I examines the domestic and international issues and factors, events and circumstances which bore upon the adoption of the legislation in 1970; the approach is mainly political-historical.

Part II incorporates that portion of the relevant principles, cases and state practice in international law which is pivotal to the matter of non-acquisitive extension of jurisdiction beyond national territorial limits.

The conclusion is that the Canadian legislation is substantially compatible with the standards emanating from the 'standard of reasonableness' which is employed in the assessment of acts of self-protection.

TABLE OF CONTENTS

INTRODUCTION.....	1
FOOTNOTES.....	21
PART I	
CHAPTER I	
THE ACT.....	33
FOOTNOTES.....	41
CHAPTER II	
THE DEBATE OVER ARCTIC POLLUTION CONTROL.....	49
FOOTNOTES.....	65
CHAPTER III	
THE IMMEDIATE REASONS FOR THE ACT.....	74
FOOTNOTES.....	98
CHAPTER IV	
THE RESORT TO UNILATERAL ACTION.....	115
FOOTNOTES.....	127
PART II	
CHAPTER I	
THE LEGAL DEFENCE OF THE ACT.....	133
FOOTNOTES.....	160
CHAPTER II	
SELF-PROTECTION AS A BASIS FOR ACTION.....	170
FOOTNOTES.....	180

CHAPTER III

THE 'STANDARD OF REASONABLENESS' AND ITS

APPLICATION TO THE ACT.....	184
FOOTNOTES.....	202
SELECT BIBLIOGRAPHY.....	206

INTRODUCTION

Within the past decade, 'pollution' has become a catchword for numerous environmental ills of varying dimension and intensity.

The prospect of ecological collapse has moved governments to reexamine goals and strategies, and to devise policies on everything from radioactive waste to mercury levels in fish.

An important concern in this large sphere of environmental management is the global shipment of oil by sea, and the ultimate effect that the inevitable spills, and the havoc they quickly create, will have upon the oceans and coastlines of the world.

One imaginative effort to prevent maritime pollution is the 1970 Canadian Arctic Waters Pollution Prevention Act. It has provoked a substantial debate, scholarly and otherwise, and is of interest chiefly for the following reasons

- it represents a bold attempt at grappling with modern environmental problems, particularly as they may affect especially delicate areas
- it highlights the rights and duties of coastal states and embodies the new, and as yet unaccepted notion of 'custodianship' in lieu of a more appropriate international regime
- it brings to the surface the complex, confusing matter of the status of arctic waters, waters within archipelagoes and the doctrine of innocent passage through international straits
- it points up the difficult challenge to the international community to develop flexible, functional and responsible

mechanisms and procedures to deal with heretofore little-known problems.

Moreover, as three professors of International Law at the University of Toronto have jointly stated, the Canadian action

- illustrates pointedly the interrelationship between unilateral state practice and multilateral action under United Nations auspices
- it demonstrates the problems that may result in large measure from less-than-optimal coordination and supervision in the development of international law by the United Nations, its organs and agencies
- it exemplifies the unavoidable resort to unilateral action by a national government faced by the inability of the international community to remedy a critical situation affecting its essential interests
- Canada's action has direct implications for the desirable pattern of procedure to be followed by the United Nations and national governments in relation to analogous international legal issues in the future.¹

The recency of ecological consciousness partially accounts for the scarcity of hard scientific data on short and long-term global effects of man's accelerated exploitation of the world's finite resources. Similarly, national governments in the western, developed regions have only recently begun to create bureaucratic apparatus to treat environmental matters in coordinated fashion, and international organisations are now devoting increased attention to harmonising strategies aimed at preserving man's natural habitat.²

Simultaneously, and somewhat paradoxically, there has been a parallel growth in the number of bodies charged with functional, regional efforts at coping with environmental problems. To a large extent, the trend towards regional and especially national approaches is hampered by the presence of 'transnational' maritime interests, powerful lobbies whose wellbeing depends upon uniform standards and universal accessibility. Perhaps "les écarts entre les législations nationales ne seront pas grands, grâce surtout aux influences 'transnationales' des constructeurs, des sociétés de classification, des compagnies d'assurances et autres facteurs analogues"³ although in another sense, regionalism is an outgrowth of these transnational interest groups, owing to the relative inflexibility of global IGOs.

INGOs have also become heavily involved in environmental affairs, but it has recently been argued that "(i)f one expects that the transnational associations, on behalf of a global environmental protection policy, will combine forces to mount a concerned assault against the fortresses of archaic national sovereignty, disappointment is certain."⁴

The present oil shortages being experienced by many Western industrialised nations have served to over-shadow ecological considerations with the more 'pressing' problems of ensuring adequate supplies, for economic and strategic reasons. Also, with oil prices expected to remain at very

high rates for the foreseeable future, increasingly greater emphasis will likely be placed on providing for cheaper maritime transportation. Heightened exploration and exploitation of offshore resources is forecast, and governments are beginning to appreciate the benefits which will accrue. For instance, United States' support for an international régime and the sharing of the potential wealth of the deep seabed is now in doubt; even before William Simon replaced George Schultz at Treasury, the 'energy crisis' led to a rethinking of American needs, and "has added to the pressure for extensive review of the U.S. position, lest a drop of oil or hard minerals escapes (its) grasp".⁵

At least one knowledgeable official has warned of the dangers inherent in an approach which ignores an important complement in the overall mix of issues:

...I think we will find an increasing interplay between the problems of the energy shortage, the problems of navigation on the sea, and problems of ensuring secure supplies and secure routes of oil. I would venture to suggest that we will find in the Law of the Sea Conference some states arguing that whatever may have been the case for legislation such as Canada's Arctic Waters Pollution Prevention Act, no longer can this kind of legislation be permitted. It is a luxury now because of the need to preserve potential routes. The answer to that question of course is that the problem of the environment is not going to go away just because the world is now concentrating on another problem.⁶

Mr. Beesley's remarks illustrate the reluctance of the international community to sanction Canada's Arctic legislation four years after its pronouncement. Furthermore, no nation has since sought to apply similar legislation

5

beyond the territorial sea to its own vulnerable coasts.⁷

One can argue, as Canada has, that the Arctic landscape and seascape are uniquely susceptible to pollution dangers; one might make equally compelling cases for areas unique in different ways, such as the beaches of Cornwall, the Caribbean and the French Riviera, as well as the hazards to navigation at the Cape of Good Hope and the Great Barrier Reef. Nevertheless, unilateral action in these areas has not been forthcoming.⁸

Just what has been the extent of progress towards international regulation of marine pollution since 1970? At the Stockholm Conference on the Human Environment in June 1972, Canada's 23 Principles and Statement of Objectives on the Marine Environment⁹ were unanimously endorsed; the statement "specifically recognises the particular interests of coastal states in the management of coastal area resources to prevent and control marine pollution through effective management".¹⁰

The Law of the Sea Conference will be considering principles originally submitted by Canada to the Intergovernmental Working Group on Marine Pollution in 1971;¹¹ these canons propose functional coastal pollution control zones adjacent to a state's territory, the right of coastal states to prohibit ships not complying with international standards from entering these zones, and the express delegation

to coastal states of international authority to exercise pollution control powers.

Otherwise, the only new international legislation lies in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters¹² and the new International Convention for the Prevention of Pollution from Ships,¹³ which contains provisions

aimed at eliminating pollution of the sea both by oil and other noxious substances which may be discharged operationally, and at minimizing the amount of oil which would be accidentally released in such mishaps as collisions or strandings.¹⁴

Canada had vigorously pushed for special rights for "coastal states to legislate concerning areas particularly sensitive ecologically"¹⁵ and although the proposal received a simple majority, it narrowly failed to gain the required two-thirds support. The Convention that was agreed upon will now be forwarded to the Law of the Sea Conference for consideration.

It will be useful to preface detailed treatment of the Arctic Waters Pollution Prevention Act with a survey of the issues leading up to the Law of the Sea Conference and a sketch of the general development of law of the sea. Finally, an outline of the thesis will be presented.

The General Assembly of the United Nations adopted a resolution on December 17, 1970 which called for the holding of a Conference on the Law of the Sea to consider

a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including inter alia, the prevention of pollution) and scientific research,"¹⁶

The mandate for the Conference can only be viewed as extremely ambitious, and its 'all-encompassing' character reflects the enormity of change in recent attitudes and practice involving maritime law at the international level. Not since 1609, when Hugo Grotius expounded the principle of Mare Liberum,¹⁷ a credo which has garnered overwhelming, though not complete support¹⁸ for over three hundred years, has there been such an opportunity for reversal of attitude towards the high seas and the rights and duties of states thereon. The concept had been successful, and therefore acceptable, "to the extent that it served a majority of interests",¹⁹ but events and circumstances in the past twenty to thirty years have pointed to the antiquity and obsolescence of the dictum.

The primary accomplishments of the two previous Law of the Sea Conferences which were conducted in 1958 and 1960 were the enormous strides they made towards the codification of customary law of the sea up to that point. As R.Y. Jennings remarks,

Half a century ago, the law of the sea was relatively simple, certain and stable, at any rate in time of peace. The classical dispute between the closed sea and open sea doctrines seemed at last to have been finally resolved on the basis of a kind of dualism by which the coastal state was to have sovereignty over a belt of territorial waters, subject to the general right of innocent passage, and the high seas outside that maritime belt were to be res communis, not subject to acquisition by title of sovereignty.²⁰

While the 1958 Conference, from which emerged the Convention on the High Seas,²¹ is viewed primarily as a consolidation of maritime international law,²² it nevertheless embraced significant new areas of concern, including the drafting of treaties on the continental shelf, the territorial sea and the contiguous zone, as well as fishing and conservation of the living resources of the high seas.²³ Conventions on these topics reflected the "general tendency towards the extension and augmentation of a coastal state's legal powers".²⁴ A portent of the eventual rash of national jurisdictional claims may well have been provided in Article I's definition of the high seas as being those parts of the sea which were "not included in the territorial sea or in the internal waters of a state".²⁵ The inability of the Second Conference to reach agreement on the outer limits of the territorial sea²⁶ no doubt strengthened the case for national initiative in outlining such boundaries.

And yet the compelling need for a Third Conference, first recognised just seven years after the Second Conference,²⁷

half-hearted justification only, given her refusal to submit to international arbitration⁶⁰ and her expectation that satisfactory environmental legislation will not likely be reached until the second session of the Third Law of the Sea Conference in 1975. Moreover, it is on January 1, 1975 that strict specifications for new tanker construction, pursuant to the 1973 IMCO Convention, will come into effect.⁶¹

Still, the 'self-protection' argument marks a milestone in the development of environmental legal theory internationally, and as such merits attention. Certainly, the Act has long-term implications for the direction of 'law of the sea' in general, and international environmental law in particular.

While the originality of the Canadian approach is due partly to the special conditions in the Arctic, and partly to the new approach of the Trudeau régime, with its concerted effort to conduct a two year review of foreign policy, the invocation of the 'self-protection' argument is apt to be witnessed with greater regularity in the future, just as "unilateral state action to prevent international environmental injuries is likely to play an important and continuing role in efforts to deal with international environmental problems".⁶²

Hence, "(t)he most significant problems of international environmental regulation may thus involve the

recent trends towards the politicisation of conventional law, most formal agreements, whether they be multilateral or bilateral in nature, have an earlier source in custom. Thus, they tend to be "formal written evidences of law rather than its original source".³⁴ Statutory law, embodied in conventions, treaties, protocols and other written agreements, has more often than not been an outgrowth of customary law, which "is considered to be law with as much binding force as statutory law because it has become the established pattern of action over a long period of time".³⁵

In the field of maritime law, this 'long period of time' has, in the twentieth century, become less of a consideration in the development of 'custom': in the space of thirteen years, scholars have witnessed the maturation of a unilateral declaration into a universally accepted, codified principle of international law; the example is the United States Proclamation with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf³⁶ of 1945. This bold declaration of jurisdiction served as the foundation for the 1958 Convention on the Continental Shelf. In a very real sense, the United States may be said to have been 'making custom'. The Proclamation represented a deliberate effort to protect and promote national interests whose significance in the seabed area was only just beginning to be glimpsed. In this sense, it

ushered in a whole new era in the development of maritime law.

In the interest of acquiring perspective, while risking oversimplification, one may divide the evolutionary process of the law of the sea into three historical periods.³⁷ From the seventeenth century up until the end of the Second World War, the predominantly unidimensional system, dominated by custom, prevailed in the interests of the colonial powers with their military and commercial adventures. The doctrine of 'freedom of the seas' was espoused and operationalised to the extent that it was viable and valuable; in Neuman's words,

Great Britain, Holland, Denmark and France championed the Grotian concept...more as a modus vivendi than as a matter of principle. Later, the United States, the Soviet Union and Japan, emerging as leading maritime powers, joined the Western Europeans as defenders of high seas rights.³⁸

In the second period, a decidedly new dimension was appended to the venerable principles of maritime law, in the form of agreements dealing with preservation and jurisdiction over resources of the sea, some of which had been previously undiscovered or untappable. During this same period there emerged the first real signs of unilateral declaration of jurisdiction.³⁹ The third phase is defined with much greater difficulty, if only because we have not yet emerged

from it. Nevertheless, it appears to be distinguishable from the other two chiefly in the quantity of states with an interest in ocean space, and their more comprehensive, all-embracing attitudes towards ocean space as a complex environment which, if properly managed, has to offer immense fruits for all mankind.

As Fawcett puts it, "claims to extended seaspace which have been more and more insistently made by many countries in the last twenty years may be seen as having two broad objectives: security and acquisition of resources",⁴⁰ both of which involve either enlargement of the territorial sea or creation of zones of exclusive jurisdiction. In a similar vein, Gotlieb and Dalfen classify threats as being either

(1) socio-psychological (economic, non-physical) or (2) threats to physical territorial well-being.⁴¹ The effect of prolific expansion of state claims, whether or not they are considered reactions to perceived threats, has been to blur the distinction between the various categories of ocean space, i.e., territorial sea, contiguous zone, and high sea.

The emergence of a political voice from the LDCs has had a significant effect on the shaping of present attitudes,⁴² as has the greatly increased usage of the sea as a source of food, energy and minerals. The backdrop

to the current 'free for all' has been technological advance and increasing population, and it is this capacity for exploitation, along with a heightened demand for the resources of the ocean which, ~~taken~~ together, have produced a need for international regulation of oceanic activity, and not simply a clarification of existing practice, which has become irregular and unstable.

Roughly, there appear to be three main groups of interest manifest in the deliberations leading to the Third Conference.⁴³ Each group, whether through individual or collective effort, by virtue of its geography, the nature of its economy and polity, and the direction of its trading patterns, has vital interests which must be defended and promoted. It is precisely this conflict of interests within states, between states and between groups of states which makes universal agreement and application of firm legal principle appear unattainable.

The first group, comprising maritime powers, has a vested interest in resisting any sweeping encroachment on the principle of 'freedom of the seas'; their emphasis on navigation unimpeded by coastal states, however, does not prevent them from claiming for themselves the resources of the sea close to their shores, and although

they may not be directly interested in exploiting the resources which coastal states want to claim, they are deeply fearful that coastal state authority, once agreed to, will expand and eventually hinder

navigation, thus impairing international commerce.⁴⁴

Coastal states, having less 'reach' in a naval sense, but equally interested in maintaining and promoting their interests in the sea area adjacent to their littoral environment, are calling for a new regime encompassing the concept of the 'economic zone', under which arrangement the 'contiguous' state would obtain full ownership of all resources in a wide area (200 miles is the figure gaining the greatest currency) off the coast.⁴⁵ Moreover, coastal states are seeking the responsibility for the protection of the marine environment within these regions, while guaranteeing rights of 'innocent passage' to foreign vessels.

The third group consists of nations either lacking coastline or possessing a small continental shelf. Understandably, the interest of these states lies in promoting an international régime under which they too may receive a portion of the sea's wealth. There are thirty land-locked states, a further twenty who are ~~shalf~~-locked, and a few others which have narrow shelves with coastlines of less than 200 miles;⁴⁶ these states, (41 of whom are members of the United Nations) will have a considerable impact on voting patterns at the upcoming Conference.

A prime example of the impracticality of relying on descriptions of nations as maritime, coastal or land-locked

and thereby drawing inferences on their behavior and attitude to 'law of the sea' issues is the posture of the Canadian Government on wideranging matters, i.e. regulation of shipping, fishing conservation, offshore mining, territorial limits, seabed regimes, etc...With the second largest coastline in the world, Canada has a tremendous interest in protecting herself against pollution from vessels off her shores; on the other hand, her reliance on water-borne commerce for foreign trade gives her "a particularly strong interest in maximizing the freedom of use of the world's sea lanes".⁴⁷ The fact that she does not have her own international fleet engaged in carriage of this trade, however, leads her to press for strong international regulation of pollution which simultaneously allows for coastal state enforcement⁴⁸ and more rigid controls for special environments such as the Arctic.

Her espousal of the 12 mile limit gives her 'effective sovereignty' over navigation of the Northwest Passage, and yet she is pushing strongly for innocent passage through international straits,⁴⁹ with the minimum interference necessary to protect the environment.

Her huge continental margin and her interest in fish conservation along with her involvement in oil and gas exploration have led her to co-sponsor draft treaty articles which promote a combination of exclusive sovereign

rights and preferential rights to the edge of the margin to the 200-mile limit and, where applicable, beyond; at the same time, she supports the creation of an International Seabed Authority, whose mandate would be limited to very deep seabed areas if the Canadian margin proposal is accepted.

Lastly, Canada supports the establishment of the territorial sea at 12 miles but "seeks confirmation" of her view that present law on 'innocent passage' allows "the coastal state to suspend the passage of a foreign vessel which may result in pollution of its environment".⁵⁰

Essentially, what the Canadian Government is seeking is a 'package' convention which treats the various questions not in isolation but as parts conjoined to a whole; for, as an American negotiator has observed, since the two earlier Conferences, a variety of conflicts have arisen between different users of the same ocean space: "For example, seabed drilling and mining may interfere with navigation and fishing, spills from tankers with recreation on beaches, and pollution control measures with maritime trade."⁵¹ Canadian recognition of this profound interdependence or interconnectedness has been expressed by Mitchell Sharp:

One cannot discuss the control of marine pollution without looking at its consequences for navigation or vice versa. We are, therefore,

looking for a package deal and this in turn means concessions and compromises on everyone's part.⁵²

The Canadian position has changed markedly since 1958 and 1960; in 1967 she was still arguing the principle of "non-interference with the freedom of the high seas, subject only to the strict requirements essential for effective exploitation".⁵³ Her present radically altered stance, with its support for the economic zone, reflects current functional approaches; it is practicable because "the Cold War, strategic deterrence, naval mobility and other NATO concerns"⁵⁴ are no longer accorded the significance and priority of the past.

It should not be surprising, therefore, to find that since the earlier Conferences, "Canadian-American relations on law of the sea issues have suffered a notable decline" and that this

cooling reflects overall changes in Canadian-American relations; the decline of the Cold War, an unswerving U.S. global commitment, an altered Canadian interpretation of national security as well as new directions in Canadian foreign policy. Equally important in widening the breach between the two nations has been the history of law of the sea relations itself.⁵⁵

The thorough reappraisal and subsequent trans-
mogrification of Canadian aims and interests in maritime matters has had the noticeable effect of altering traditional perceptions of 'friends and enemies'. Functional, 'national-interest' oriented policies have tended to cut across bloc

lines and to ignore levels of economic development. For instance, Canada's coastal situation has placed her solidly in the camp of the LDCs, while her presence in the Arctic leads her to solicit Soviet cooperation.

At the same time as Canada is pressing for an 'umbrella treaty' to cover enforcement procedures and areas of jurisdiction for pollution regulations along the lines adopted by IMCO,⁵⁶ she is still intent on obtaining support for the Arctic Waters Pollution Prevention Act,⁵⁷ mindful that the "total package approach will make negotiations at the conference complex" and "will make it harder to achieve national objectives on every issue".⁵⁸

The official attitude of the Canadian Government is curious and somewhat perplexing, for while the attempt is made to elicit support and develop law post facto,⁵⁹ the claim is made that the 1970 initiative lies within the bounds of established law, albeit in an unconventional form, and at its outer fringe. Although there does not appear to be much pre-existing law specifically to support intervention for pollution prevention on the high seas, the Canadian case has rested on the broader concept of rights of 'self-defence' or 'self-protection', without making any clear differentiation between the two.⁵⁹ It could conceivably be argued that Canada has taken up the 'self-protection' concept as an interim, temporary and

half-hearted justification only, given her refusal to submit to international arbitration⁶⁰ and her expectation that satisfactory environmental legislation will not likely be reached until the second session of the Third Law of the Sea Conference in 1975. Moreover, it is on January 1, 1975 that strict specifications for new tanker construction, pursuant to the 1973 IMCO Convention, will come into effect.⁶¹

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Hence, "(t)he most significant problems of international environmental regulation may thus involve the

allocation among states of jurisdiction to take unilateral action rather than the restriction of state prerogatives in favour of international authority".⁶³ In this sense, "(t)he impetus for developing state practice could quite well come through the unilateral action of a state 'going to the frontiers of the law', even though initially that statement comes as near to an admission of illegality as may be".⁶⁴

The purpose of this thesis is to analyse the legal aspects of the 'self-protection' argument and its invocation in the case of the Canadian Arctic Waters Pollution Prevention Act.⁶⁵ Towards this end, Part I is a scrutiny of the myriad reasons for legislating in the Arctic; Part II establishes a proper, solid case for application of the concept of 'self-protection' in light of its historical usage and the relevant features extant in the Arctic case, as outlined in Part I.

FOOTNOTES-INTRODUCTION

¹R. St. J. Macdonald, Gerald L. Morris and Douglas M. Johnston, "The Canadian Initiative to Establish a Maritime Zone for Environmental Protection: Its Significance for Multilateral Development of International Law," University of Toronto Law Journal, XXI, (1971), 247 Annex.

²In 1970 it was reported that no less than a score of international agencies were dealing with one or another aspect of environmental protection. Since then, the creation of the United Nations Environment Program, headquartered in Kenya and chaired by Maurice Strong, has centralised many of these activities.

³Andrassy, J., "Etude des mesures internationales les Plus Aptes à Prevenir la Pollution des Milieux Marins", Annuaire de l'Institut de Droit International Tome 1 (1969), 657. Even NATO, in October 1969, as part of its Problems of Modern Society program, initiated a study of marine pollution in the North Atlantic.

⁴Anne Thompson Feraru, "Transnational Political Interests and the Global Environment", International Organization, XXVIII (Winter, 1974) 55. The article includes an analysis of the inputs of INGOs into the 1972 Stockholm Conference on the Human Environment.

⁵Philip W. Quigg, "Is the U.S. Copping Out on the Sea Law Conference?" Saturday Review/World (April 20, 1974), 35.

⁶J.A. Beasley, Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence, no. 24, (November 22, 1973) 8. Hereinafter referred to as E.A. & N.D. Ann Hollick, "United States Oceans Politics", San Diego Law Review, X, no. 3, (1973), 494, anticipated in early 1973 the 'adverse effects' pollution and resource controls of coastal states would have on the petroleum industry with its increased emphasis on maritime oil shipments stemming from the 'energy crisis'. Hollick also cites the Canadian Arctic legislation as "a sample of pollution restrictions that may be expected in the future", 494.

⁷The Water Quality Improvement Act of 1970 is exceptional in that it gives the United States authority over "some activities of foreign flag vessels in a nine-mile zone of the high seas contiguous to her territorial

7(Cont'd.)

sea". Pub. L. no. 91-229, 84 Stat. 91, (1970). However, the right to intervene where there is actual or imminent threat of harm, is reserved only for casualties within the territorial sea (Sec. 11d). See Norman A. Wulf, "Contiguous Zones for Pollution Control", Journal of Maritime Law and Commerce III, no. 3, (1972) 537. The British Act to Consolidate the Oil in Navigable Waters Acts 1955 to 1971 permits the government, by order in council, to apply directions to foreign vessels "for the purpose of preventing or reducing oil pollution, or the risk of oil pollution..." outside the United Kingdom's territorial sea.

8These examples are given by Robert H. Neuman, "Oil on Troubled Waters : The International Control of Marine Pollution", Journal of Maritime Law and Commerce, II, no. 2, (1971), 360, who also notes that the adumbration of other interests, i.e., cargo-owners, shipowners and nation-states by the current emphasis on ecology has ignored the fact that all these interests, while competitive, "are not irreconcilable", 350.

9"Text of Canadian Proposals Accepted Unanimously in a Plenary Session of the U.N. Conference on the Human Environment on the 14th of June, 1972." Cited in Allan Gottlieb and Charles Dalfen, "National Jurisdiction and International Responsibility: New Canadian Approaches to International Law", American Journal of International Law, LXVII, no. 2, (1973), 243, footnote 46.

10Gottlieb and Dalfen, 243-44.

11The IWGMP was a product of the Preparatory Committee for the Stockholm Conference.

12Commonly referred to as the Ocean Dumping Convention, it was opened for signature December 29, 1972. At the November, 1972 IMCO meeting, pollution zones varying in size from fifty to 200 miles were proposed by a "sizeable bloc of countries", but action was postponed until the 1974 Law of the Sea Conference. See New York Times, November 11, 1972, p. 4, col. 3.

13The Convention is a product of the International Marine Pollution Conference, convened in London by IMCO, which meeting took place between October 8 and November 2, 1973.

14IMCO Press Release, November 2, 1973, p. 1.

¹⁵Beesley, E.A. & N.D., 24:23. See also Jack Davis, E.A. & N.D., no. 23, (November 15, 1973), II, where specific reference is made to the Canadian Arctic.

¹⁶Resolution 2750 C/XXV. Originally scheduled for 1973, the Conference was postponed until April 1974, at which time it was to convene in Santiago, Chile. Possible postponement had been anticipated, given the immensity and complexity of preparatory work required.

However, a second rescheduling, this time involving relocation, was necessitated by the refusal of the Chilean junta which seized power in September, 1973, to hold the Conference.

The meeting is now scheduled for June 20 - August 29, 1974 in Caracas, Venezuela (Resolution 3067 C/XXVIII). It is expected, however, that future consultations and negotiations will be necessary, and these will probably take place in Vienna in 1975.

Meanwhile, preparatory work involving draft resolutions has taken place in Geneva, summer 1973 and New York, December 3-15, 1973. The agenda of the latter meeting included the election of officers, and Canada's Alan Beesley was elected Chairman of the important Drafting Committee on December 12, 1973.

The body charged with the task of organising the meeting and its agenda is the Permanent Committee on the Possible Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, established by the General Assembly December 21, 1968 (Resolution 2467 C/XXIII), and commonly called the Seabed Committee. See John R. Stevenson and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference", American Journal of International Law, LXVIII (January, 1974), 1-32, for a review of the deliberations to date, especially pp. 23-32, "Pollution and Scientific Research, Subcommittee III".

¹⁷In his book The Freedom of the Seas (1609) the Dutch jurist rejected the broad claims of Spain, Portugal and England to 'sovereignty' over large ocean areas, and specifically addressed the problems of navigation and trade in the East Indies, thus reflecting Netherland's attitudes and interests in the matter.

One observer has pointed out that it "was not the equality, the equity of interest, the sense of uninhibited brotherhood that moved Grotius to argue for Mare Liberum. To the contrary, the increasing colonial trade and exploration among the great sea powers at the

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time were directly responsible for the Grotius manifesto----national economics and politics were directly responsible for its anonymous publication."

George S. Robinson, "Evolution of the Law of the Seas --- Destruction of the Pristine Nature of Basic Oceanographic Research", Natural Resources Journal, XIII, no. 3, (1973), 504.

Nonetheless, as John R. Stevenson, Legal Adviser to the U.S. Department of State, emphatically states, the fundamental premise of the law of the sea, that is the concept of 'freedom of the seas', "has been the cornerstone of (it) for the last three and one half centuries". Spontaneous aberrations notwithstanding, "the law of the sea remained relatively stable..., and the record of respect for it by states was remarkable". "Who is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference", International Lawyer, VI, (July, 1972), 465-66.

18 Strongest opposition to Grotius' principle of 'freedom of the seas' came during the reign of Charles I when John Selden's book, Mare Clausum, first appeared, after being written much earlier, in 1618.

With England asserting jurisdiction over most of the northeast Atlantic, Charles I left no doubt as to the method by which conflicting jurisdictional claims were to be resolved:

"...Mare Liberum gave the first warning piece, which must be answered by a defence of Mare Clausum, not so much by the discourses as by the louder language of a powerful navy to be better understood when overstrained patience seeth no hope of preserving her right by other means."

Quoted in J.H.W. Verzijl, International Law in Historical Perspective, Vol. IV (Leyden: Sijthoff, 1971), 8-39, cited in J.E.S. Fawcett, "How Free are the Seas?", International Affairs, XLIX, (January, 1973), 14, footnote 2.

19 Robinson, 505.

20 R.Y. Jennings, "A Changing International Law of the Sea", Cambridge Law Journal, XXXI, no. 1, (1972), 32.

21 United Nations Doc. A/conf. 13/37-43 (1958). Reproduced in 58 AJIL 842 and Ian Brownlie, ed., Basic Documents in International Law (Oxford: the Clarendon Press, 1967), 80-89.

²²Prior to the actual conferences the International Law Commission had been instrumental in codifying the customary law of the sea. The Commission's work is often credited with contributing to the success of the 1958 Conference, and for this reason some scholars decry its absence in the preparatory work leading to the ~~Third~~ Conference. See, for instance, Jennings, at p. 33, and F.M. Auburn, "The 1973 Conference on the Law of the Sea in the Light of Current Trends in State Seabed Practice", Canadian Bar Review, L, (1972), 91. Auburn quotes one source as saying that "the Law of the Sea is entirely too important to the welfare of society to be left in the hands of lawyers" (p. 91); the political bargaining conducted in an effort to reach a 'package agreement' makes the International Law Commission an unlikely source of treaty.

²³The Convention on the Continental Shelf, Convention on the Territorial Sea and Contiguous Zone, Convention on Fishing and Conservation of the Living Resources of the High Seas, are all reprinted in Brownlie, ed., 70-98.

²⁴Jennings, 5. Robert O. Freeman, "Possible Solutions to the 200-mile Territorial Limit", International Lawyer, VIII, (April, 1973), 387-95, traces the current controversy over extended resource jurisdiction beyond the territorial sea to Truman's 1945 Proclamation with Respect to Coastal Fisheries, September 28, 1945, 10 Federal Register 12303, reprinted in Urban G. Whitaker, Politics and Power: A Text in International Law (New York: Harper & Row, 1964), 332-33. The Proclamation reserves for the United States the right to establish conservation zones for the protection of fisheries resources in areas contiguous to the coast of the United States but constituting 'high seas'. However, as John G. Laylin, "Past, Present and Future Development of the Customary International Law of the Sea and Deep Seabed", International Lawyer, V, no. 3, (1971), 444, notes, prior to the Truman Proclamation several states claimed exclusive rights over fisheries beyond territorial waters, including India, Ceylon, Australia and certain Persian Gulf states.

²⁵Convention on the High Seas. However, it would be a mistake to isolate 1958 as the starting date for abandonment of the three-mile delimitation of the territorial sea. In fact, as Fawcett, p. 18, reminds, only forty-six of seventy-three countries at that Conference actually had a three-mile limit at that time. For instance, amongst European nations the limits were:

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- 4 miles - Finland, Sweden, Norway, Iceland
- 6 miles - Spain, Italy, Yugoslavia
- 10 miles - Albania
- 12 miles - Bulgaria, Romania, the U.S.S.R.

Moreover, whereas Article 24 of the Convention on the Territorial Sea and the Contiguous Zone in defining the 'contiguous zone' as a "zone of the high seas contiguous to the territorial sea" which "may not extend beyond twelve miles from the baseline" clearly sets the limit of the territorial sea somewhere short of twelve miles "it is true that the line has not been in fact drawn at any fixed distance", as W.T. Butte states in "The Law of the Sea-- Breakers Ahead", International Lawyer, VI, no. 2, (1972), 238. Although failure to agree on a uniform breadth was deplored, it "was not regarded in 1958 as of make-or-break importance". Ibid.

²⁶A Canadian-American sponsored compromise proposal, by which a six-mile territorial sea, extended by a six-mile exclusive fishing zone, would have been recognised, failed by one vote.

Furthermore, there was lack of agreement on the breadth of coastal state exclusive fisheries jurisdiction, and a well-defined limit for the exercise of coastal sovereign rights over the resources of the continental shelf.

²⁷On December 18, 1967 the General Assembly created an Ad Hoc Committee to study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, which became the Permanent Committee on December 21, 1968. It was Arvid Pardo, Maltese Ambassador to the United Nations, who raised the issue on August 18, 1967. It is generally conceded that the decision to convene the Third Conference was owing to the anticipated exploitation of vast mineral deposits in the deep seabed. Resolution 2750, December 17, 1970 broadened the mandate of the committee to include "the general framework of the law of the sea". As a foundation for an international law of the seabed, Resolution 2749 of the same day, by a vote of 108 in favour, none against, and with fourteen abstentions, declared that the seabed area and its resources are "the common heritage of mankind".

²⁸For example, the Anglo-Icelandic fisheries dispute which, after simmering for years, finally erupted in

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1973 following Iceland's pronouncement of a 50-mile fishing limit. See Richard B. Bilder, "The Anglo-Icelandic Fisheries Dispute", Wisconsin Law Review, Vol. 1973, no. 1, 37-132.

A second example, this one occurring in the late sixties, is the incident which involved the firing on a U.S. tuna fleet, allegedly fishing within Peru's 200-mile limit, by a Peruvian Navy gunboat. Two boats were damaged during the flare-up, and one was captured and later freed after payment of a fine. See New York Times, February 15, 1969, p. 1., col. 1.

A celebrated case involving traditionally hostile protagonists occurred on January 23, 1968 when a U.S. Navy Intelligence ship, the U.S.S. Pueblo, was seized by four patrol boats while allegedly wandering within North Korean waters.

In testimony before E.A. & N.D. on May 7, 1974, Arvid Pardo noted that the present 'crisis' in the law of the sea is a result of confusion, which has a tendency to produce conflict.

29Otherwise known as 'Craven's Law' the decidedly pejorative term will be discussed later as it relates to the Canadian action.

30Bilder, "The Anglo-Icelandic Fisheries Dispute", 119.

31Frederick L. Schuman, International Politics, 6th ed., (New York: McGraw-Hill Book Co., 1958), 109. Cited in Whitaker, 58.

32The Statute of the ICJ is reprinted in Whitaker, 620-633. The 'sources' listed above are abridged from the Statute.

33Whitaker, 60.

34Ibid.

35Ibid., 64.

36September 28, 1945. 10 Federal Register 12303. Reprinted in Whitaker, 333-34. For another example, this one tracing the rapid acceptance of 12-mile fisheries zones by the United States, see Laylin, 443.

37A similar interpretation of these evolutionary phases is proffered in the Canadian Government's position paper on Law of the Sea. See Third United Nations Conference on the Law of the Sea, tabled in the House of Commons November 2, 1973, by Mr. Jack Davis, Minister of the Environment.

38Neuman, 351.

39Jennings, 34-35, sees the judgment of the ICJ in the Anglo-Norwegian Fisheries Case of 1951 as clearly being the turning point, owing to its effect in "loosening the grip of the old law about sea boundaries". His evaluation of the impact of the Court's decision in bringing about a proliferation of coastal state claims overriding the traditional limits of their competence rests on the observation twenty years later that "the vague generality of some of its reasoning resulted in a relaxation of existing legal principles greater than even its severest critics realised at the time". One year after the judgment was handed down, the Santiago Declaration of August 18, 1952 created a 200-mile limit for Chile, Ecuador and Peru.

40Pawcett, 17.

41Gotlieb and Dalfen, 239-43.

42Fully one half of present United Nations members did not exist as nation-states in 1945. Within the Sea-bed Committee the number of members swelled from 42 to 86 on December 18, 1970, thereby giving considerably more voice to Third World nations in planning for a more comprehensive Conference.

43See General Assembly, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Official Records: Twenty-fifth Session Supp. No. 21 (A/8021), 1970; Twenty-sixth Session, Supp. No. 21 (A/8421), 1971; Twenty-seventh Session, Supp. No. 21 (A/8721), 1972; Twenty-eighth Session, Supp. No. 21 (A/9021), 1973.

Lewis M. Alexander, "Indices of National Interest in the Oceans", Ocean Development and International Law Journal, 1, no. 1 (1973), 21-49, offers a crude, skeletal taxonomy of national usage of the seas, based on four categories of involvement: accessibility, investment, dependence and

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control. Alexander's model represents a valid attempt to systematise the analysis of international maritime activity, but suffers from conceptual clumsiness and fuzziness, as well as operational gigantism.

⁴⁴John Lawrence Hargrove, "New Concepts in the Law of the Sea", Ocean Development and International Law Journal, 1, no. 1, (1973), 9.

⁴⁵Arvid Pardo feels that acceptance of the 200-mile zone is inevitable. See E.A. & N.D., no. 16 (May 7, 1974).

Mitchell Sharp has boasted that "many of the elements associated with the economic zone have their origin in Canadian attitudes and policies, for example, the control of marine pollution". E.A. & N.D., no. 22 (November 6, 1973), 10. For a comprehensive treatment of the 'economic zone' and 'custodianship', which Canada supports, see L.D.M. Nelson, "The Patrimonial Sea", International and Comparative Law Quarterly, XXII, (October, 1973) 668-686; "This notion of custodianship will also be of particular value in the control of pollution". 681.

Germane to this custodial approach which is tied to geographic, economic and biological desiderata is the regional movement which, for just these considerations is gaining increased support amongst nations. See Nelson 684-85, and Samuel A. Bleicher, "An Overview of International Environmental Regulation", Ecology Law Quarterly, II, no. 1, (1972), 1-90, who cites European pollution agreements as a step between unilateral and universal agreement. Charles W. Koburger, "Black Oil in the Blue Levant: A Modest Proposal for Fighting Pollution", Foreign Service Journal, (January, 1974), 12-14, 16, calls for a regional Mediterranean Surveillance and Information Center to prevent oil pollution in that particular area.

⁴⁶See Alexander, Table 1, pp. 37-38.

⁴⁷Alexander, 30.

⁴⁸At the 1973 IMCC Conference (October 8 - November 3) in London, Canada failed to gain the necessary support for the 'port state' concept of enforcement, whereby at the request of the offended state, any offending, polluting ships would be "prosecuted in the ports of contracting parties wherever the violation occurred, whether on the high seas or even in waters under the jurisdiction of

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another state." Davis, E.A. & N.D., issue no. 23 (November 15, 1973), 11.

In a recent article, D.J. Devine asks a rather probing question which is a variation on this theme of 'port state' adjudication: aside from certain technical difficulties, could one "reinforce the protection of a state's maritime environment by giving it not only the sanction of its own courts but also those of the courts of other states, where appropriate?" "The Protection of Maritime Environment by the Courts of Third States: Some Difficulties", McGill Law Journal, XIX, no. 2, (1973), 282.

⁴⁹Admittedly, Canada does not regard the Passage as constituting an 'international' strait. See infra, Part I.

⁵⁰Third United Nations Conference on the Law of the Sea, 16. The 'blue book', as it has come to be known, offers an overview of the Canadian position for the Caracas Conference. See also "Conference Sur le Droit de la Mer", Discours, Secrétaire d'Etat aux Affaires Extérieures, (May 3, 1974).

⁵¹Stevenson, 468.

⁵²Sharp, E.A. & N.D., issue no. 22 (November 6, 1973), 9.

⁵³Allan Gotlieb, Statement in First Committee, United Nations General Assembly, Press Release No. 77, November 15, 1967, quoted in Hollick, "Canadian-American Relations: Law of the Sea", 4.

⁵⁴Hollick, ibid., 2.

⁵⁵Ibid., 9.

⁵⁶See Davis, E.A. & N.D., issue no. 23 (November 15, 1973), 10.

⁵⁷Such as through the 'law for special environments'. Jack Davis, H. of C., Deb. 6895, (Oct. 16, 1973), noted that such a provision would "help us to gain international recognition for our Arctic Waters Pollution Prevention Act". As early as 1971, Alan Beesley affirmed that while "the Canadian Government is not going to abandon its legislation"

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or weaken its position in any way, there was no objection "to working out a treaty arrangement with other countries which would cast a kind of legal umbrella over our legislation...". Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, no. 10, (April 1, 1971), 10. Hereinafter referred to as I.A. & N.D.

58Davis, E.A. & N.D., issue no. 23 (November 15, 1973), 6.

59The first mention of the concept of 'self-defence' came on April 16, 1970 when Mr. Sharp flatly stated in the House that the bill "is based on the fundamental principle of self-defence and constitutes state practice, which has always been accepted as one of the ways of developing international law". H.of C. Deb. 5951, (April 16, 1970). On the same day, the Summary of Canadian Note to the United States claimed that the "proposed anti-pollution legislation is based on the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment". Reprinted in 9 International Legal Materials 607 (1970). Likewise, Beesley states that the "fundamental principle of self-defence" was invoked. J.A. Beesley, "Rights and Responsibilities of Arctic Coastal States: The Canadian View", Journal of Maritime Law and Commerce, III, no. 1, (1971), 8.

60Infra, Part II.

61At that time, tankers over 70,000 tons deadweight will be required "to be fitted with segregated ballast tanks sufficient in capacity to provide adequate operating draught without a need to carry ballast water in cargo oil tanks". IMCO Press Release (November 2, 1973), 2.

62Richard B. Bilder, The Role of Unilateral State Action in Preventing International Environmental Injury (Madison: University of Wisconsin Sea Grant College Program, September 1973), 37. Especially relevant to this thesis is Chapter VI, 29-31, entitled "Accommodating Individual State Action Within a Multilateral Framework". To be part of a book edited by Robert Stein and tentatively entitled International Responsibility for Environmental Protection.

⁶³Ibid., 1.

⁶⁴Jennings, 44.

⁶⁵For the moment, the terms 'self-defence' and 'self-protection' are used synonymously; only in Part II is a distinction drawn between the two.

PART I
CHAPTER I
THE ACT

On April 8, 1970, Jean Chrétien, Minister of Indian Affairs and Northern Development, introduced into the Canadian House of Commons a bill "to prevent pollution of areas of the arctic waters adjacent to the mainland and islands of the Canadian Arctic".¹ The main thrust of the bill lay in its establishment of pollution-free zones extending 100 miles outward from the coastline of Canada above the 60th parallel,² including the islands of the Canadian Arctic Archipelago.³

The bill was approved unanimously by the House of Commons on June 9, 1970,⁴ by the Senate on June 17, 1970,⁵ and Royal Assent was granted on June 26, 1970. The Act came into force by proclamation on August 2, 1972.

Designed to minimise the risk of polluting the region's maritime and coastal resources and, at the same time to permit the economic development of the Canadian Arctic, the Act gives the Canadian Government wide-ranging powers which include provisions for the control of all shipping within certain zones, the prescription of standards for vessel construction as well as navigation and operation, the authority to board ships within these zones, and the total prohibition of vessels, if deemed necessary.

In seeking to preserve the "peculiar ecological balance that now exists in the water, ice and land areas of the Canadian Arctic",⁶ the deposit of 'waste'⁷ within the prescribed area is prohibited. Moreover, anyone who for whatever reason has deposited, or is in danger of depositing waste is bound to report it to the authorities, and is liable for all costs incurred in remedying the situation and for all actual loss or damage incurred by other persons.⁸ Such civil liability is 'absolute', and does not depend upon proof of fault or negligence.⁹

'Shipping safety control zones' may be declared by order of the Governor in Council;¹⁰ within these zones he is authorised to regulate navigation, stipulate required standards of hull and fuel tank construction and myriad other technical matters.¹¹ By the time of writing, 16 areas of the arctic waters had been established as shipping safety control zones. Navigation standards have not as yet been promulgated.

For the purpose of inspecting vessels, 'pollution prevention officers' are reserved the right to board ships within these zones and to prevent ships suspected of non-compliance with standards from entering the zones.¹² In addition, the officer may when he is

satisfied that a grave and imminent danger of a substantial deposit of waste in the arctic waters exists,

- (1) order all ships within a specified area of the arctic waters to report their positions to him, and
- (11) order any ship to take part in the clean-up of such waste or in any action to control or contain the waste.¹³

Any person who violates the provisions of the Act by depositing waste in Arctic waters may be fined a maximum of 5,000 dollars; where the violation is performed by a ship, the fine cannot exceed 100,000 dollars.¹⁴ In addition, any person failing to make

required reports to pollution prevention officers or otherwise failing to comply with various orders or regulations, and any ship navigating within a shipping safety control zone while not complying with standards or regulations or otherwise failing to comply with various provisions of the Act is liable to fines not exceeding 25,000 dollars.¹⁵

Proof of financial responsibility is required in the form of insurance or indemnity bond against possible 'cleanup' and damage costs before ships are permitted to navigate 'shipping safety control zones'.¹⁶

Within any such zone, a pollution prevention officer, whenever he suspects on reasonable grounds that any provision of the Act or the regulations has been contravened, may

with the consent of the Governor in Council, seize the ship and its cargo anywhere in the arctic waters or elsewhere in the territorial sea or internal or inland waters of Canada.¹⁷

Finally,

Where a ship is convicted of an offence under this Act...the convicting court may...in addition to any other penalty imposed, order that ship and cargo...be forfeited;¹⁸

with the proceeds of its sale reverting to Her Majesty in right of Canada.

Another bill was introduced in the House of Commons on April 8, 1970: the Act to Amend the Territorial Sea and Fishing Zones Act¹⁹ extends Canada's territorial sea to a distance of twelve miles from the coast and protects certain fishing areas where Canada makes historic claims²⁰ and where conservation measures are, or may be, deemed necessary. Various efforts have been made inextricably to link the two Acts. Inasmuch as the latter deals with fisheries jurisdiction, its ramifications need not be stressed; nevertheless, as we shall see later, the extension of the territorial sea does have reverberations on the status of navigable waters in the Arctic Archipelago.²¹

Immediately preceding introduction of the Arctic Waters bill to the House, United Nations Secretary General U Thant was presented with a declaration from the Canadian Ambassador, Yvon Beaulne, in which the Canadian Government reserved its acceptance of the competence of the International Court of Justice to rule on

disputes arising out of or concerning jurisdiction of rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect

of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.²²

The introduction of the Arctic Waters bill produced a swift, curt and legalistic reaction from the United States Department of State:

We regret the introduction of this legislation by the Canadian Government which, in our view, constitutes a unilateral approach to a problem which we believe should be resolved by co-operative international action.

The United States does not recognize any exercise of coastal state jurisdiction over our vessels in the high seas and thus does not recognize the right of any state unilaterally to establish a territorial sea of more than three miles or exercise more limited jurisdiction in any area beyond 12 miles.²³

Six days later the Canadian Government became the recipient of an official note from the State Department, in which the latter furthered its denunciation of the Canadian legislation with a more extensive explanation than previously proffered.²⁴ Expressing its anxiety of a possible 'snowballing' effect following the Canadian 'precedent', the American communiqué contained an appeal for Canada to either set aside its legislation pending international agreement or voluntarily submit the matter to the International Court of Justice.²⁵

In reply to the American note of April 15, 1970 the Canadian Government framed a 'point by point' defence of its action; in refuting American charges, the Secretary of

State for External Affairs relied heavily on the notion that the Canadian action reflected the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment; moreover, that there was sufficient precedent for national jurisdictional claims beyond the territorial seas for specific, protective, definitive purposes;²⁶ and lastly, that "while the Canadian Government was prepared to participate in international efforts to deal with the problem, it was not prepared to await the development of international rules as the solution".²⁷ In fact, the Canadian note assumed the audacious task of citing national initiative as a spur to the development of international law, insofar as state practice is often a contributing factor to the unfolding of customary law.

Newspaper reaction to the legislation was sympathetic; as noted by Neuman, the "sharp exchange of diplomatic notes between good friends received substantial press coverage, and editorial comment both in the United States and in Canada was almost universally pro-Canadian."²⁸

An understanding of the pollution legislation can only be reached through an appreciation of the whole bundle of issues which surround it; the interplay of the various components is explained by Maxwell Cohen, and the passage is worth quoting at length:

Essentially there are three interrelated aspects to the Canadian Arctic question -- however one defines the Arctic -- but presumably any such definition includes at least a substantial continental area north of the 66th parallel and the immense groupings of islands within a single or multiple archipelago system. There are first of all the scientific problems, particularly those that have to do with the nature of the environment, the particular eco-systems involved, the vulnerability of those systems, the interrelationships of climatological and developmental activity, the consequences of viewing the Arctic basin as a single geographic and oceanographic area for purposes of better understanding or management of its regional and global functions and utilization -- indeed the whole congeries of scientific interests and questions of concern not only to Canada but to all the basin states and indeed, to the international scientific and political community as a whole. There is, secondly, the mixture of economic developmental problems -- mineral, petroleum, the renewable resources of the land and sea, -- all of which are now in varying degrees of actual or potential exploitation. But it is, of course, the discovery of petroleum and natural gas in the continental Arctic and sub-Arctic areas and the newer and further exploration of the continental shelves and the Arctic islands themselves, with all of the high stakes from hazards to profits these discoveries are presenting, that gives the economic aspect its most immediate priority in both the scientific and ecological areas, as well as in the area of political jurisdictional concerns. And to these general discovery -- exploitation aspects there should of course be added the parallel economic problem of transportation and communication involving both shipping and pipeline possibilities and electronic media, and therefore requiring thought about cost-benefit choices and about navigational and related communications regulations. And, thirdly, binding these scientific -- environmental and developmental -- transportation problems into a unity both of concept and of management are the jurisdictional issues, particularly, the ability of Canada to make claims and assert authority over all activities not only on its Arctic mainland but on all of the islands and on the main bodies of water and the ice linking these islands and immediately surrounding them. For such claims to jurisdiction are naturally related to whatever scientific environmental needs emerge from research and prediction and

equally relate to the whole process of economic development and transportation that in turn effects a range of matters from native peoples to harmful effects on eco-systems, from the trade-off between due exploitation of renewable and non-renewable resources to the preservation of a relatively "uncontaminated" habitat, a last frontier not for Canada alone but, Antarctica apart, for all mankind.

It will be recognized at once how interrelated are all of these issues, and therefore how important it is not to exaggerate one set of problems to the detriment of an awareness of the significance of the others.²⁹

Accordingly, taking into consideration the raft of issues upon which the Arctic legislation has an impact, it is not surprising that it touched off a ringing debate in the months following its introduction. An examination of the debate is desirable to the extent that it sheds light on the legal ramifications of the bill and the complicated, uncertain status of the geographic area over which the legislation purports to reserve rights of authority.

It goes without saying that, in turn, the configuration of the Arctic region in legal terms, and more precisely the locus of the Arctic Waters Pollution Prevention Act in that configuration, will have a significant effect on how the environmental legislation is interpreted from the standpoint of international law.

FOOTNOTES-CHAPTER I

¹Bill C-202 (hereinafter variously referred to as 'the Act', 'Arctic Waters Act', 'Pollution Prevention Act', AWPPA), 28th Parliament, 2nd Session, 18-19 Elizabeth II, C. 47, (69-70), reprinted in 9 International Legal Materials 543 (1970) and Richard B. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", Michigan Law Review, LXIX, no. 1, (1970), 38-54. Hereinafter referred to as "New Stresses".

Pursuant to Sections 4, 5, 8 and 9, Regulations were issued by the Governor-in-Council July 11, 1972, effective August 2, 1972 (Arctic Waters Pollution Prevention Regulations, Canada Gazette, Part II, Vol. 106, No. 16, August 2, 1972, pp. 1468-1474). Other Regulations were issued October 10, 1972 (Arctic Shipping Pollution Prevention Regulations, Canada Gazette, Part II, Vol. 106, no. 20, Oct. 10, 1972, pp. 1847-1880). Pursuant to Section 12 (1), an amendment to the Arctic Shipping Pollution Prevention Regulations was issued on June 5, 1973 on the recommendation of the Minister of Transport (Canada Gazette, Part II, Vol. 107, no. 12, June 8, 1973 p. 1398).

Action had been promised in the Speech from the Throne, delivered October 23, 1969: in the address, the Governor-General announced the Government's intention to introduce "legislation setting out the measures necessary to prevent pollution in the Arctic seas". H. of C. Deb. 3, (October 23, 1969).

Previously, the House of Commons Standing Committee on Indian Affairs and Northern Development had discussed the matter of legislating against Arctic pollution, and drafted a report which it then presented to the Government. The report appears in Votes and Proceedings of the House of Commons of Canada, no. 38, (December 16, 1969), 207-210.

²This is one reason why the bill was sponsored by the Minister of Indian Affairs and Northern Development; below the 60th parallel, administrative jurisdiction would fall within Energy, Mines and Resources. Moreover, inasmuch as the bill is deemed an extension of national jurisdiction, it is appropriate and consistent that it be sponsored by a Minister dealing with domestic affairs. Its drafting was also undertaken by legal experts from the Department of External Affairs, Transport, Justice, Prime Minister's Office and Privy Council Office.

³Specifically, Section 3 (1) delineates the area of application as being 'arctic waters' whether in a frozen or liquid state.

3(Cont'd)

"adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles,"

except in the case where the line of equidistance between the islands of Baffin, Devon and Ellesmere in the Eastern Arctic and Greenland is less than 100 miles. In this case, the line of equidistance becomes the outer limit of jurisdiction in matters involving pollution.

Section 3 (2) further includes those waters superjacent to the continental shelf surrounding the Arctic archipelago, should the shelf extend beyond 100 miles. In effect, then, the 100-mile zonal limit applies to shipping and navigation while any further area involving continental shelf exploration and exploitation also lies within the act's province.

Confusion has arisen over geographic application of the Act, with at least two publicists granting a very broad interpretation of Section 3, which deals with the locus of the law: Neuman, 355, footnote 17, errs in proclaiming that "the legislation encompasses all waters of the Arctic region up to the North Pole, between 145° (sic) longitude and an equidistant line running between Greenland and the East coast of Canada". Gary Sutton, "Pollution Prevention in the Arctic -- National and Multinational Approaches Compared", Ottawa Law Review, V, no. 1, (1971), 41, argues that "(t)he act could conceivably be interpreted to extend all the way to the Pole, under the sector theory, and depending upon how one chooses to classify ice".

Donat Pharand, The Law of the Sea of the Arctic (Ottawa: Ottawa University Press, 1973), 226, holds that the "pollution prevention zone in question cannot be interpreted as extending to the North Pole as some commentators would have it". In his considered opinion,

"the northerly limit of the Arctic waters as defined extends 100 miles from the mainland into the Beaufort Sea, beginning at the 141th meridian and running in a general north-easterly direction along the coastline of the Canadian Arctic Archipelago until it reaches the 60th meridian".

An example of the confusion surrounding the bill is afforded in the remarks of Mr. Thomas Barnett:

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"I thought I heard the minister say something about 100 miles from the coast. This is the very point. How far does it go when there is no coast?"

H. of C. Deb. 5970, (April 16, 1970).

⁴Bill C-202 had been debated in the House of Commons on April 8, 15, 16, 17 and 22, June 3, 4, and 9, and the debates appear in Hansard at 5626, 5890-5893, 5936-5955, 5960-5977, 5993-6012, 6170-6172, 7696-7709, 7722-7724, 7890-7907 (1970).

⁵The Senate gave swift consideration to bill C-202 on June 9, 10, 11, 16 and 17, and these debates are printed in 118 Sen. Deb. 1175, 1201-1204, 1215, 1241-1243, 1249 (1970).

⁶AWPPA, Preamble.

⁷As defined in Section 2 (h), waste includes "any substance that, if added to any waters would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by an animal, fish or plant that is useful to man" and any water containing such a substance to such an extent. Also included is "anything that, for the purposes of the Canada Water Act, is deemed to be waste."

⁸AWPPA, Sect. 7 (1). In determining the amount of liability "the size of such ship and the nature and quantity of the cargo carried or to be carried by it" shall be taken into account (Sect. 9).

'Person' includes anyone engaging in exploration, development and exploitation of natural resources, anyone "who carries on any undertaking on the mainland or islands of the Canadian Arctic or in the Arctic waters" as well as shipowners and cargo-owners of any ship in that area (Sect. 6).

⁹According to Pharand, The Law of the Sea of the Arctic, 228-29, the Regulations which have been drawn up since the passing of the Act now make the terming of the liability as 'absolute' a misnomer; the practical matter of underwriting insurance for vessels plying Arctic waters

⁹(Cont'd.)

required that liability not exist for such occurrences as 'force majeure'. Thus, the principle involved more closely typifies the concept of 'strict' liability.

Maximum liability is to "be determined by multiplying 2,000 gold francs by the number of tons of the ship's tonnage, but the maximum amount of such liability shall not exceed 210 million gold francs. Arctic Waters Pollution Prevention Regulations, Section 14 (2), 1036. Interestingly enough, this formula is identical to that contained in the 1969 IMCO Convention on Civil Liability for Oil Pollution Damage. See Victor Petaccio, "Water Pollution and the Future Law of the Sea", International and Comparative Law Quarterly, XXI, (January, 1972), p.19.

¹⁰AWPPA, Sect. 11.

¹¹Ibid., Sect. 12 (1). With respect to navigation, only 'equipment', i.e. radio, charts, etc...has been regulated. Arctic Shipping Pollution Prevention Regulations, Sections 7, 8, 9, pp. 1850-1852.

¹²AWPPA, Sect. 15.

¹³Ibid., Sect. 15 (3c).

¹⁴Ibid., Sect. 18 (1, 2). In either case, each 24 hours in which the waste is deposited is considered as constituting a separate offense, with a separate fine for each offense.

¹⁵A summary of Sect. 19 of the Act, by Bilder, "Stresses", 10. The article includes a comprehensive distillation of the Act's finer points. See also Daniel Wilkes, "International Administrative Due Process and Control of Pollution -- The Canadian Arctic Waters Example," Journal of Maritime Law and Commerce, 11, no. 3, (April, 1971), 499-539 for a critical, meticulous dissection of the Act, which includes a handy, quick reference Appendix to the Act's clauses. See also Daniel Wilkes, "Effects of Key Provisions of the Canadian Arctic Waters Anti-Pollution Package", Polar Record, XV, no. 97, (January, 1971), 540-543.

Perhaps the most thorough, and certainly the most up-to-date analysis of the Act and its ramifications is to be found in Pharand, The Law of the Sea of the Arctic,

¹⁵(Cont'd.)

Part VI, entitled "Oil Pollution Control in the Canadian Arctic", 205-252. See also Donat Pharand, "Oil Pollution Control in the Canadian Arctic", Texas International Law Journal, VII, no. 1, 1971, 45-72.

¹⁶AWPPA, Sect. 8.

¹⁷Ibid., Sect. 23 (1).

¹⁸Ibid., Sect. 24. The Act's rather unique characterisation of a ship as being 'criminal' has not escaped the notice of Wilkes, "Due Process", 511, whose explanation for it is the fact that it is a reaction to the maze of ownership and registry problems which appear in so many cases of litigation concerning maritime disputes. As Neuman, 352, points out, the

"wreck of the Torrey Canyon is a case in point. The vessel was registered in Monrovia and flew the Liberian flag. It was owned by a Bermuda company which was a subsidiary of a United States corporation. The crew was Greek, and the vessel was on charter to the British Petroleum Company Ltd. The accident occurred on the high seas off the coast of Great Britain and pollution damage was suffered by Great Britain and France".

¹⁹Bill C-203, 28th Parliament, 2nd. Session, was passed by the House of Commons on June 4, 1970, by the Senate on June 18, 1970 and was granted Royal Assent on June 26, 1970. The Act is reprinted in 9 Int. Leg. Matls. 553 (1970).

²⁰For instance the Gulf of St. Lawrence on the east coast and Queen Charlotte Sound on the west coast. An Order-in-Council drew 'fisheries closing lines' across the entrances of these and other areas. (Canada Gazette, 104, no. 52, December 26, 1970).

²¹In addition, an "Act to Amend the Canada Shipping Act", formerly Bill C-2, was passed by the House of Commons on March 1, 1971 (28th Parl. 3rd. Sess. 1970-1), following introduction by the Minister of Transport on October 19, 1970. The new regulations covering the pollution of navigable Canadian waters are similar to those contained in the Arctic Waters Act. For a brief outline of the new Canada Shipping

21 (Cont'd.)

Act's provisions and reaction to it by shipping interests, see Edgar Gold, "Pollution of the Sea and International Law: A Canadian Perspective", Journal of Maritime Law and Commerce, III, no. 1, (October, 1971), 38-39.

22 Included in the Canadian Government's "Background Notes on the Arctic Waters Pollution Prevention Bill and the Territorial Sea and Fishing Zones", printed in 22 External Affairs at 130-131 (1970), and reprinted in 9 Int. Leg. Mtls. 598 (1970), and 1970 Canadian Yearbook of International Law 34.

Canada's recognition of Article 36 (the so-called 'optional clause'), Section 2 of the Statute of the ICJ, reprinted in Ian Brownlie ed., 228-243, dated back to the Court's inception and before that, under the Permanent Court of International Justice, from September 20, 1929. The reservation does not apply to matters related to the breadth of the territorial sea.

Prime Minister Trudeau had met with Secretary General U Thant on November 11, 1969, and at that time discussed the problems of Arctic pollution. See Toronto Star, "Trudeau seeks UN aid to stop arctic pollution", (November 12, 1969), p. 1, col. 6.

23 Portion of a statement by Robert J. McCloskey, State Department spokesman, New York Times, April 10, 1970 at 13, col. 3. Reprinted in Bilder, "New Stresses", 11. Mr. McCloskey also stressed the willingness of the United States to "promptly...seek either bilateral or multilateral solutions to these problems in the framework of international law".

24 U.S. Department of State Press Release no. 121, 52, Dept. of State Bull. 610 (1970), reprinted in 9 Int. Leg. Mtls. 605 (1970). It cannot be said that the United States Government was caught 'off-stride' by the Canadian move; aside from mention of impending legislation in the Speech from the Throne of Oct. 23, 1969, in response to an American request two rounds of meetings were held by senior officials from both governments in March of 1970. The second of such meetings, on March 20, 1970 was arranged by President Nixon. For a listing of participants and a summary of the agenda, see the comments of Mitchell Sharp in H. of C. Deb. 5952-5953 (April 16, 1970). According to a newspaper interview with Alan Beesley, "Washington was reported so incensed (by introduction of the Act) that President Richard Nixon refused to talk to Prime Minister Pierre

24 (Cont'd.)

Trudeau when Mr. Trudeau phoned him to explain Canada's position." John Best, "Law of the Seas: Nixon was so angry he refused Trudeau's call", Globe and Mail (Toronto), August 25, 1973, p. 7.

25 The United States Government is the only country known to have issued official pronouncement vis à vis the Arctic legislation. However, it is alleged by the former Legal Advisor to Canada's Department of External Affairs that "(t)he Soviet Government has also clearly indicated its support for Canada's Arctic waters pollution legislation ..." Beesley, "Rights and Responsibilities", 5. W. Joseph Dehner, "Creeping Jurisdiction in the Arctic: Has the Soviet Union Joined Canada?", Harvard International Law Journal, XIII, (1972), 271, examines Soviet state practice in her Arctic regions in order to determine that nation's support for Canada's assertion, "because there is no definitive Soviet pronouncement on the subject".

Mitchell Sharp has stated:

"I think I may say that the Soviet Union has never disagreed with the fundamental position we have taken in protecting our own Arctic environment. They at least go as far as we do."

E.A. & N.D., no. 22, (November 6, 1973), 24. In one form or another the Government has had expressions of views from a number of countries, mainly West European. France, the Netherlands and Belgium were sympathetic, although they regretted its unilateral aspect. The Scandinavians, and to a lesser degree the Latin American states, were also understanding, but the only country to clearly support the Canadian position is the U.S.S.R., according to Beesley in I.A. & N.D., no. 10, (April 1, 1971), 9.

During his May, 1971 trip to the Soviet Union, Prime Minister Trudeau attempted to secure firm Soviet support for Canada's arctic pollution legislation, but the protocol signed at the end of his visit reflects the lukewarm reception the idea received from the Russian hosts:

"Taking into account the fact that the Arctic regions, distinguished by their particularly severe climatic conditions, are of great importance to both Canada and the Soviet Union, the two sides discussed the possibilities of promoting cooperation in developing the northern territories and agreed to expand the exchange of experience in this field between Canada and the U.S.S.R.

Both sides share the view that they have special responsibilities and corresponding rights with

²⁵(Cont'd.)

respect to ensuring the safety of navigation and preserving the natural balance in the Arctic regions."

Toronto Star, (May 28, 1971), p. 4.

In the United Nations Seabed Committee, Sub-committee III on marine pollution, only passing mention was made of Canada's legislation, although the précis for the deliberations of the Twenty-Sixth Session (Supp. No. 21, A/8421, 1971), p. 45, states that

"Several delegations suggested the necessity of setting up zones of special jurisdiction beyond that of the territorial sea for the protection of the marine environment and prevention of pollution."

The verbatim transcripts reveal one European nation (Spain) as feeling that, through jus cogens, "(a) marine environmental protection area of reasonable breadth should be established beyond States' territorial waters. (July 29, 1971).

²⁶Mr. Sharp used the tactic of basing Canadian claims on American precedent. See Infra, Part II.

²⁷Bilder, "New Stresses", 12.

²⁸Neuman, 357. For instance, the New York Times, (April 20, 1970), in an editorial:

"The United States has rejected with unseemly sharpness Canada's bid to extend her control over the Northwest Passage in order to prevent pollution of her Arctic territories. That rejection is sure to exacerbate relations with Canada while failing to advance the cause of more enlightened international regulation of the seas...Canada has undertaken the initiative in trying to protect a heritage that is precious to all mankind."

²⁹Maxwell Cohen, "The Arctic and the National Interest", International Journal, XXVI, (1970-71), 52-81.

CHAPTER II

THE DEBATE OVER ARCTIC POLLUTION CONTROL

The tenor of the debate on the Arctic Waters Pollution Prevention bill as it passed through the House of Commons and the Standing Committee on Indian Affairs and Northern Development¹ was overwhelmingly supportive insofar as 'pollution' matters were raised and discussed.

The vast majority of parliamentarians appear to have responded positively to the plea contained in the following remarks of the Minister of Indian Affairs and Northern Development:

Although we have taken this action unilaterally, we stand ready at all times to enter into international agreement which will provide for control over the dangers of pollution. Until this occurs, however, we must and will act now to protect the ecology of the north. This bill is evidence of our determination in this regard. I would ask that all members of the House give the Arctic waters pollution prevention bill full and firm support.²

Robert Stanfield, Leader of the Opposition, proclaimed his appreciation of the bill's environmental thrust:

...I say without any reservation that I and my party support Bill C-202 in principle. We very earnestly support it as a measure to control the pollution of the north.³

Elsewhere:

...(W)e in this party welcome and support any effective action to prevent pollution of our north...⁴

Mr. T.C. Douglas of the New Democratic Party echoed Mr.

Stanfield's endorsement of the bill, in principle:

I want to begin by congratulating the government on introducing this legislation. Any reservations we may have about some aspects of this question should not detract from our whole hearted endorsation of the legislation...⁵

In the course of the debate, the predominant focus of attention became the effect the legislation gave to Canadian claims of sovereignty over the Arctic area in general, and the 'arctic waters' in particular.⁶ In fact, harshest criticism came from those who most strongly hailed it as an important piece of environmental legislation:

It would have been preferable if the government had made a forthright declaration of sovereignty over the Arctic rather than restricting itself to an assertion of jurisdiction to control pollution.⁷

(T)he government of Canada has introduced these two bills which, taken together, imply the abandonment of our assertion of sovereignty over much of the waters that we regard as ours.⁸

And,

I suggest that by introducing them, the government does not expand our claim to sovereignty; it reduces it.⁹

Pollution control is urgent but it is important also to Canada that we maintain our claim to sovereignty of the waters between the islands and that we do not abandon that claim.¹⁰

From others, the bill has elicited somewhat less certitude that Canada indeed regards all Arctic waters as being 'ours'; in 1963, Gordon Smith had written that

(t)here appears to be no well-defined or consistent Canadian attitude over the past sixty

years regarding the waters of our Arctic Archipelago, no doubt largely because of vagaries of policy concerning the sector principle.¹¹

Mr. Lloyd Crouse of the Progressive Conservatives has remarked that "Canada's official attitude toward the status of our Arctic waters has never been altogether clear".¹²

Bilder surmises that there is broad international consensus that the waters of the Arctic Ocean are 'high seas',¹³ while "the status of the waters within the Canadian Archipelago is more controversial".¹⁴

Mr. Sharp has asserted that "the position of Canada has always been that these waters are regarded as Canadian".¹⁵ Unfortunately, the Government has not, Bilder and Pharand both point out, specified whether or not this means "internal waters".¹⁶ As recently as November 1973, an official Government position paper waffled by repeating that

Canada...considers the waters of the Arctic Archipelago as being Canadian and therefore it is not ready to accept that the Northwest Passage should be treated as an international waterway free of any coastal state controls.¹⁷

The Canadian Note of April 16, 1970 to the United States Government appears to suggest an archipelagic claim over the waters between the Arctic islands, as does the above policy pronouncement. Furthermore, this same position paper on the Third Conference on the Law of the Sea supports the establishment of a "special legal status for the waters linking the various islands of oceanic archipelagic states".¹⁸

While recognising that as a 'coastal' archipelago the Arctic would not directly be subject to such a régime, Canada nevertheless lends its support to the proposition creating "archipelagic waters over which the archipelagic state would have complete sovereignty, subject to the right of innocent passage by foreign vessels in sea lanes designated by the archipelagic state".¹⁹

However, the paper goes on to state that

Canada appreciates the legitimate concerns of the Archipelagic states for their security and for the protection of their peculiar environment. The thorny issue of transit through straits is of course a major difficulty in this context.²⁰

Thus, the Canadian position with respect to Arctic waters, and especially the Northwest Passage, appears to lie somewhere between 'inland waters' and 'high seas'. Maxwell Cohen has argued that

while innocent passage may be permitted, the waters must be treated if not as wholly 'inland waters', certainly at the least as an extension of the idea of 'territorial waters', in some modified form.²¹

In 1962, Ivan Head, an External Affairs official at the time, made the definitive assertion that "Canada regards the water between the islands as Canadian territorial waters, and this claim has been recognized by the United States".²²

It is difficult to see how this could ever have been the Canadian stance, given the fact that a three mile territorial sea around each island would still exclude vast portions of

water 'between the islands' from Canadian jurisdiction.

On the other hand, the hypothesis is lent some support by Mitchell Sharp's telling and somewhat cryptic comment in 1970:

There may be territorial waters around the Arctic islands and along our coasts. I doubt very much, however, whether the government will fill in all the gaps as yet.²³

Prime Minister Trudeau, in a statement which affirms the commitment of his Government to economic expansion in the North, takes note of the balance which must be struck between potentially conflicting issues:

We are ready for the opening of the Canadian Arctic for development, and that development is one of our great national objectives. It is with this in mind that we have stressed the desirability of keeping the Arctic waters open for innocent passage. We will do what is necessary for this purpose.

We do not believe that the passage of ships which threaten the destruction or deterioration of the coastal environment can be considered innocent under any interpretation of international law. We have made clear to the world that while Canada welcomes the use of the Arctic waters as a transportation route for the vessels of all flags, the Canadian government will ensure that these waters are used for peaceful purposes and by ships complying with required safety standards.²⁴

The statement is particularly noteworthy for its use of the concept of 'innocent passage', which applies normally to the territorial sea, as well as to international straits. Mention of 'arctic waters', however, presumably includes the Northwest Passage, which, being a part of the Arctic archipelago, and thus, if consistency is observed, 'Canadian

waters' would in no way be subject to the doctrine of innocent passage, if indeed these waters had always been regarded as 'internal' waters.²⁵ Why then would the Canadian Government even mention the concept of 'innocent passage'? For one, Canada recognises that "certain states, however, maintain that the Northwest Passage is an international strait and are demanding a right of free transit through it".²⁶ Moreover, in 1969 the Prime Minister allowed that

not all countries would accept the view that the waters between the islands of the archipelago are internal waters over which Canada has full sovereignty. The contrary view is indeed that Canada's sovereignty extends only to the territorial sea around each island.²⁷

The effect of an extension of the territorial sea to 12 miles was to eliminate any further possibility of the Northwest Passage being considered as a continuous strip of the high seas, since navigation of the Barrow Strait between Lowther and Young Islands necessarily involves transit through Canadian territorial waters.²⁸

Donat Pharand has summed up the issues and Canada's position with respect to those issues:

If Canada could establish proof of historic title to those waters by the exercise of exclusive authority and control over a long period of time, accompanied by the acquiescence of foreign states, particularly those affected by the claim, the waters in question would then have the status of internal waters and the right of innocent passage would not apply.²⁹

However, Pharand sees little likelihood of a successful, acceptable claim being made on these grounds.³⁰ An alternative

procedure for enclosing the entire archipelago is to apply the method of drawing straight baselines as decided in the Anglo-Norwegian Fisheries Case.³¹ But here also,

by virtue of Article 5 of the 1958 Territorial Sea Convention, the establishment of such straight baselines -- even presuming their validity in international law -- would not bar the right of innocent passage, if the waters in question were previously considered as part of the territorial sea or the high seas.

As for the Canadian Government's position on the right of innocent passage of foreign ships, it is quite clear; regardless of the exact status of the waters, innocent passage will be allowed.³²

Canada has conspicuously abstained from drawing straight baselines around the archipelago in order to avoid a direct clash on the matter; the Secretary of State for External Affairs tried to skirt the issue in the House:

The hon. gentleman knows, for example, that we have not drawn in lines within the St. Lawrence and the reason that we have not drawn those lines is that we do not want to compromise our position as to the status of the Gulf of St. Lawrence.³³

Specifically, the concept of delimiting territorial waters by drawing straight baselines is rejected by the United States; and as Pharand points out, the "attitude of the United States has been quite consistent in its restrictive delimitation of territorial waters around groups of islands".³⁴

The Convention on the Territorial Sea and the Contiguous Zone (1958) stipulates that "(p)assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state".³⁵ Canada's position

is "that it doesn't consider that a passage through any body of water by a ship giving rise to a danger of pollution is an innocent passage. Such a ship is an inherently dangerous object. It represents a threat to the security of the state".³⁶

The 1958 Geneva Convention allows that in

a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.³⁷

The following section clearly states that the "contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured".³⁸

While Article 16 (1) states that the "coastal state may take the steps necessary in its territorial sea to prevent passage which is not innocent", Sutton rightly opines that a

judgment on this (the Arctic) question depends in large part upon one's interpretation of the concept of a state's security; the idea that environmental protection can be included is rather recent, but not necessarily erroneous. Moreover, it is clear from the history of unsuccessful attempts at the formulation of a more precise definition of the innocent passage concept that there is some consensus that a coastal state should have a wide discretion in deciding which rights it can legitimately protect.

If the Canadian position on innocent passage is accepted..., at least a substantial part of the act is legitimized, as parts of the Northwest Passage are within Canadian territorial waters.³⁹

Yet it has been argued, with some merit, that in suggesting that vessels carrying oil are inherently 'non-innocent',

Canada's interpretation of that phrase as allowing coastal states to determine for themselves when a potential environmental hazard makes passage non-innocent or hostile, appears to elasticize the standard into meaninglessness.⁴⁰

The question remains as to what type of jurisdiction is envisaged as being asserted by Canada to a potential limit of 100 miles. Mitchell Sharp responded to criticism of timidity in the House of Commons by asserting that

(t)his exercise of jurisdiction for the purposes of pollution control can in no way be construed to be inconsistent with a claim of sovereignty over the waters between the islands or otherwise.⁴¹

In support of this proposition Mr. Sharp cited the North Atlantic Coast Fisheries case of 1910 in which the predecessor to the ICJ held that a state

...may, without prejudice to its claim to sovereignty over the whole of a particular area of the sea, exercise only so much of its sovereign powers over such part of the seas as may be necessary for immediate purposes.⁴²

Alan Beesley also stated that "because a state asserts a particular form of jurisdiction or even sovereignty up to a certain point by no means does it thereby abandon a further claim". In other words, declaration of a 12-mile

limit around each Arctic island should not mean the abandonment of a claim to sovereignty over waters within the archipelago but beyond the 12-mile limit. On the other hand, the 100-mile pollution zone "is not a claim". It is an assertion or exercise of jurisdiction".⁴³

On April 8, 1970, while being questioned by reporters outside the House, the Prime Minister drew a firm line of distinction between measures to control Arctic pollution on the one hand and declaration of sovereignty on the other:

This is the first bit of legislation -- it is not an assertion of sovereignty, it is an exercise of our desire to keep the Arctic free of pollution and by defining 100 miles⁴⁴ as the zone within which we are determined to act, we are indicating that our assertion there is not one aimed towards sovereignty but aimed towards one of the very important aspects of our action in the Arctic.⁴⁵

Pharand concurs: "In the first place, the claim is not one of sovereignty over the waters in question".⁴⁶ Nor is it a denial of the right of innocent passage. The claim at issue involves "the right to exercise a limited jurisdiction over foreign ships in an area of the high seas contiguous to its coast for the special purpose of protecting certain (including territorial sea) interests".⁴⁷

Johnston stresses that "(i)t is essential to understand that this assertion of Canadian jurisdiction is not a claim to sovereignty".⁴⁸ Bilder also contends that the Arctic Waters Act has not been used as a prop for an "assertion of Canadian jurisdiction over the Northwest Passage".⁴⁹ Nor is

it acquisitive; "Canada does not acquire direct benefits in these zones but rather incurs responsibility to prevent certain defined harms".⁵⁰

And yet, in the process of explaining and defending the Act, the opportunity is presented to Government officials to remind of Canada's claims, and this opportunity is seldom wasted:

Yes, there has been resistance to that legislation; not on the grounds, though, that it is an assertion of sovereignty, because it represented a very deliberate attempt to assert only that kind of jurisdiction and that degree of jurisdiction necessary to meet that particular problem. In other words, Canada did not proclaim a 100-mile territorial sea thereby implementing its longstanding claim that the waters of the Arctic Archipelago are Canadian waters;⁵¹

In short, the Act "does not make and does not require an assertion of sovereignty, any more than it constitutes a denial of sovereignty or is inconsistent with any basis for sovereignty".⁵² An article in a Toronto newspaper, though, casts a different light on the matter of the Act's intended effect:

Following the October 24 policy speech... federal officials disclosed that Ottawa sees pollution control as a major weapon to strengthen Canada's claim to sovereignty.

.....
The Trudeau government believes a Canadian program to prevent the fouling of the Arctic environment would be difficult to challenge, sources said. But it would also strengthen Canada's claim to jurisdiction over the area.⁵³

It has been suggested that a direct claim to sovereignty was avoided in order to prevent a possible confrontation with the U.S. Navy. In connection with the Pollution Prevention Act, however, such a clash could and probably would be avoidable through application of Section 12 (2), which exempts any "ship or class of ship that is owned or operated by a sovereign power other than Canada", where such a vessel complies with standards "substantially equivalent to the Act's provisions". Nonetheless, the Arctic Waters Pollution Prevention Act does appear "to be based on a separate and more farreaching contiguous-zone theory",⁵⁴ under which concept "functional exercise of coastal — state jurisdiction to protect against threats of coastal-water pollution"⁵⁵ is sanctioned. Likewise, Dellapenna finds that "the Canadian Government has asserted a functional jurisdiction to an arbitrarily determined limit in the form of a 100-mile contiguous zone".⁵⁶

There are some grounds for considering this dual, territorial-contigual approach redundant, since without application of a contiguous-zone theory, "Canada would seem to have broad authority to establish reasonable pollution control regulations and requirements for all ships transiting such territorial straits, and thus, in effect, for all vessels utilizing the Passage".⁵⁷ To be sure, the 100-mile limit is geographically more extensive, but one is

then confronted by the projection that the "outer limits of this zone will be reached by expected shipping only in three exceptional cases...;"⁵⁸ a voyage through the Beaufort Sea towards M'Clure Strait, an exploratory trans-polar attempt originating in Canadian waters, and a diversionary voyage in Baffin Bay.

Mitchell Sharp, in his initial address during debate on the bill, considered the legislation a product of a "constructive and functional approach that distinguishes between jurisdiction and sovereignty..." Also:

The Arctic waters bill represents a constructive and functional approach to environmental preservation. It asserts only the limited jurisdiction required to achieve a specific and vital purpose. It separates a limited pollution control jurisdiction from the total bundle of jurisdictions which together constitute sovereignty.⁵⁹

The remarks of an official of the Department of External Affairs at an international conference echo this emphasis on the 'restricted' applicability of the Act:

Canada regards maritime sovereignty as a bundle of jurisdictions which is kept whole and complete in relatively narrow territorial sea but which may be broken up for the purpose of exercising specific limited forms of jurisdiction for specific functional purposes beyond the limits of territorial sea or even in areas where there may be a claim to territorial sovereignty but where functional requirements do not demand the assertion of a claim to full sovereignty.⁶⁰

As to the status of the Arctic Ocean, over which the Act partially applies, Canada has given some indication that it does not consider the area as fitting the normal definition

of high seas:

...the unique characteristics of the Arctic, where there is an intimate relationship between the sea and the ice and the land,⁶¹

are cited as nullifying application of traditional principles regarding pollution control and freedom of the high seas;

It is idle, moreover, to talk of freedom of the high seas with respect to an area, large parts of which are covered with ice throughout the year, and where the local inhabitants use the frozen sea as an extension of the land to travel over it by dogsled and snowmobile far more than they can use it as water...⁶²

Canada's doubts as to the applicability of traditional principles of international law to territorial and international waters in the Arctic did not simply surface in the period surrounding the 1970 legislation; in 1966, the Legal Advisor to the Department of External Affairs wrote that "it would appear that international law as it now exists, is silent with respect to waters which are covered by ice all year round thus making the sea a sort of extension of the land".⁶³ As early as 1930, the eminent Soviet publicist Lakhtine argued that "floating ice should be assimilated legally to open polar seas, whilst ice formations that are more or less immovable should enjoy a legal status equivalent to polar territory".⁶⁴

Johnston writes that "(t)he Arctic Ocean is largely hypothetical, a peculiar combination of hypothetical waters and hypothetical islands, the distinction mostly covered

over by large masses of ice".⁶⁵ He questions whether "the prospective principles most appropriate to the Arctic environment must be drawn exclusively from the existing stock of oceanic principles, for the Arctic is at most quasi-oceanic in character".⁶⁶ Elsewhere, Johnston cautions members of his profession:

If international lawyers are prepared to give full weight to the ice factor in the treatment of sovereignty claims to hypothetical islands, they should be ready to question the mechanical application of the freedom of the high seas to hypothetical waters.⁶⁷

Beesley cites the opinion of U.S. Commander Ben Partridge to the effect that

The forcible navigation of this area by ice-breakers is more in the nature of a rape of the frozen seas than it is the free movement of seagoing commerce upon which the doctrine of the freedom of the high seas is based. (It) is no more navigation in the accepted high seas sense of the word than is the creation and navigation of a canal or ditch by a floating clam shell dredge. The ice so penetrated does not become sea any more than the land so penetrated becomes sea.⁶⁸

Yet Pharand holds that it is "possible for states to exercise all of the freedoms of the seas in the Arctic Ocean".⁶⁹

This criterion, coupled with the fact that of Arctic coastal states, only Canada has doubts as to its status, tends to discount the 'ice is land' theory. Still, one tends to sympathise with the Canadian feeling that "certain traditional concepts are of no particular relevance to the Arctic".⁷⁰

As we shall see in Part II, 'freedom of the seas' is not an absolute: maintenance of the public order of the oceans involves a process of compromise between interested parties. The peculiarity of the Arctic environment, particularly the 'navigable' waters, accentuates this 'give and take' aspect of the maritime-coastal interface.

Delicate questions involving such topics as innocent passage, freedom of the seas, status of international straits, and the position of waters between the islands in a coastal archipelago are not so much circumvented as they are 'absorbed' in and subsumed by the assertion of a 'special interest' in an area adjacent to and including the Canadian coast, an area which is clearly in need of regulation commensurate with and appropriate to the impending, prospective exploitation of its northern resources through the medium of a sophisticated but untried technology capable of disaster on a massive scale.

Section Three examines the reasons for an exercise of a form of 'custodianship' over areas adjacent to the mainland and islands of the Canadian Arctic.

FOOTNOTES-CHAPTER II

¹The House of Commons gave 'second reading' to the bill on April 16 and 17, 1970 and referred it to the Committee, where it was discussed at four meetings. See I.A. & N.D., no. 15 (April 30), no. 16 (May 5), no. 17 (May 7), and no. 19 (May 14) 1970.

Symbolising the unqualified support shown towards the bill, the House of Commons took the unusual step of participating in a recorded vote at second reading. The suggestion had been made by T.C. Douglas, Leader of the N.D.P.:

"I...express the hope that we will have a recorded division on these bills. I think we should let the whole world know that on this question Canadians are united and unanimous in the support of exercising jurisdiction over pollution in the Arctic archipelago."

H. of C. Deb. 5943, (April 16, 1970). Mr. St. Pierre, Parliamentary Secretary to the Prime Minister, supported 'very strongly' the position of Mr. Douglas. H. of C. Deb. 5965, (April 16, 1970).

²Jean Chrétien, H. of C. Deb. 5940, (April 16, 1970).

³Robert Stanfield, ibid., 5943 (April 16, 1970).

⁴Ibid., 5941, (April 16, 1970). Still, Mr. Stanfield expressed initial doubts as to the efficacy of the provisions embodied in the legislation. See ibid.

⁵T.C. Douglas, ibid., 5943, (April 16, 1970).

⁶A complete historical background to the topic of sovereignty in the Canadian Arctic may be obtained from the following sources: Gordon W. Smith, "Sovereignty in the North: The Canadian Aspect of an International Problem", in R. St. John Macdonald, ed., The Arctic Frontier (Toronto: University of Toronto Press, 1966), 194-255; Ivan Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions", McGill Law Journal, IX, no. 3 (1963), 200-216; Maxwell Cohen, "The Arctic and the National Interest", International Journal, XXVI, (1970-71), 52-81; Albert Legault, "Problèmes de Souveraineté et de Défense", Notes de Recherche, Centre Québécois de relations internationales, (juillet, 1971).

⁷T.C. Douglas, H. of C. Deb. 5943, (April 16, 1970).

⁸Robert Stanfield, ibid., 5943, (April 16, 1970). The opinion that bills C-202 and C-203, a bill to Amend the Territorial Sea and Fishing Zones Act must be jointly considered is a recurrent theme expressed in debate, these two bills being considered as having equal significance under the broader, umbrella headline of 'sovereignty'.

⁹Ibid., 5941, (April 16, 1970).

¹⁰Ibid., 5942, (April 16, 1970).

¹¹Gordon W. Smith, 244.

¹²Lloyd Crouse, H. of C. Deb. 5962, (April 16, 1970).

¹³At least, there is no claim to sovereignty being made by any Arctic nation over the Arctic Ocean. Even the controversial 'sector theory', under which banner Canada curiously maintains the practice of issuing all maps displaying boundary lines right up to the North Pole, was not invoked by Prime Minister Trudeau with respect to the waters of the Arctic Archipelago in 1969 (H. of C. Deb. 6396, March 10, 1969). See Pharand, The Law of the Sea of the Arctic, Part III, "Historic Waters in the Arctic", 99-144. On many occasions, Canadian officials up to and including prime ministers have claimed the theory.

¹⁴Bilder, "New Stresses", 6.

¹⁵Mitchell Sharp, H. of C. Deb. 6029, (April 17, 1970). This amounts to a reaffirmation of his earlier remarks in the House that "Canada has always regarded the waters between the islands of the Arctic archipelago as being Canadian waters". H. of C. Deb. 5948, (April 16, 1970).

Moreover, while the report of the Standing Committee on Indian Affairs and Northern Development in December 1969 emphatically stated that "the waters lying between the islands of the Arctic Archipelago have been, and are, subject to Canadian Sovereignty historically, geographically, and geologically", (p.6) it strongly urged the Government to take "whatever steps are necessary, consistent with international law" (6-7) to effect and manifest that sovereignty.

¹⁶Bilder, "New Stresses", 6. Pharand, The Law of the Sea of the Arctic, 231.

¹⁷Third United Nations Conference on the Law of the Sea, 5.

¹⁸Ibid., 5.

¹⁹Ibid., 18.

²⁰Ibid.

²¹Maxwell Cohen, "Polar Ice and Arctic Sovereignty", Saturday Night, Vol. 73, no. 18 (August 1958).

²²Head, 218. Presumably, Mr. Head's information is based on an exchange in the House in 1957 during which Prime Minister St. Laurent was probably referring to Bellot Strait (1½ miles wide) when he stated that "these are Canadian waters", H. of C. Deb. 3186, (April 6, 1957). However, he may in fact be referring to the American applications for waivers of the provisions of the Canada Shipping Act for the summer supply voyages which were not specifically related to Bellot Strait.

²³Sharp, H. of C. Deb. 5954, (April 16, 1970).

²⁴Prime Minister Trudeau, quoted by Mr. Doug Rowland, H. of C. Deb. 7903, (June 9, 1970). See also the Prime Minister's remarks on the same issue, reprinted in 9 Intl. Leg. Matls. 1970, 603.

²⁵See Section III, "Right of Innocent Passage", Convention on the Territorial Sea and Contiguous Zone, Geneva 1958, reprinted in Brownlie, ed., 70-79.

²⁶Third United Nations Conference on the Law of the Sea, 5. "Canada takes the view that any regime devised for straits used for international navigation would not be applicable to the Northwest Passage since it has not been used for international navigation." (p. 18). This argument seems weak, since the passage has not been used for national navigation any more than for international. This point was brought to my attention by Dr. Gordon W. Smith.

Pharand, in "Innocent Passage in the Arctic", Canadian Yearbook of International Law 1968, 3-60 gives masterly treatment to the question of applicability of the doctrine through straits; essentially, his thesis is that the "geographic situation (is) the decisive criterion" (p. 13) - if a strait connects two parts of the high seas, then it

26(Cont'd.)

becomes subject to the international custom. Pharand held that the relevant judgment of the ICJ in the seminal Corfu Channel Case, handed down in French, made the volume of international navigation through the strait another, but secondary consideration, whereas the English translation wrongly implies that the two criteria possess equal weight (p. 13). See also Pharand, The Law of the Sea of the Arctic, 16.

However, the 1958 Convention gives increased importance to the clause "are used for international navigation" (Article 16, 4), which the waters of the Northwest Passage are not. According to Pharand, "a suspendable right of innocent passage applies to straits not used for international navigation and a nonsuspendable right of innocent passage applies to straits that are used for international navigation," 18.

27Trudeau, H. of C. Deb. 8720, May 15, 1969. Another article by Pharand, "The Waters of the Canadian Arctic Islands", Ottawa Law Review, III, no. 2 (1969), includes a forthright analysis of the various options available to Canada in demarcation of Arctic regions.

28Alan Beesley left little doubt as to the significance the lawyers attached to the expanded limit when applied to the Arctic.

"An important affect (sic) of this action is that it brings two key 'gateway' areas of the Northwest Passage, Barrow Strait and Prince of Wales Strait, indisputably under complete Canadian sovereignty under any realistic and reasonable view of existing international law, regardless of differences of views as to Canada's claim to sovereignty over the whole Northwest Passage."

"Rights and Responsibilities", 7. Elsewhere, Beesley concedes that while a 12-mile territorial sea "in a sense does not close any gateway to the Northwest Passage,...it covers the gateways..." I.A. & N.D., no. 10 (April 1, 1971) 11-12. Nevertheless, "one of the main reasons the territorial sea was established was because it gave Canada 'total sovereignty' at two key points", 15.

For Forget, on the other hand,

"...on the basis of some assumptions about the technology of Arctic navigation and some policy objectives, the choice between a three-mile or a twelve-mile limit is indifferent whereas for other objectives the choice is irrelevant."

Claude E. Forget, "The Arctic: Economic Development,

²⁸(Cont'd.)

Pollution Control, and Sovereignty", Memorandum M-98
Canadian-American Committee, (February, 1970), 48-49.

²⁹Pharand, The Law of the Sea of the Arctic, 62.

³⁰See ibid., Part III, entitled "Historic Waters in the Arctic", 99-144. Also by the same author, "Historic Waters in International Law, with Special Reference to the Arctic". University of Toronto Law Journal, XXI, no. 1, (1971), 1-14.

³¹Anglo-Norwegian Fisheries Case, 1951 ICJ 116. This case is generally regarded as having greatly influenced the decision to convene the 1958 Conference on the Law of the Sea, in Geneva. For a detailed examination of the concept of straight baselines, see Pharand, The Law of the Sea of the Arctic, Part II, entitled "Straight Baselines for the Canadian Archipelago", 65-98.

³²Pharand, ibid., Part I, entitled "Innocent Passage in the Arctic", 62. The author makes a similar point in "The Waters of the Canadian Arctic Islands", 430. Pharand's proposal of a dual archipelago approach to the Arctic, with a strip of high seas running through the Northwest Passage, appears in this article. The fact that Canada has now declared a 12-mile territorial limit effectively eliminates this proposal, for as J.W. Dellapenna, "Canadian Claims in Arctic Waters", Land and Water Review, VII, no. 2, (1972), 413, notes,

"there would remain no continuous strip of high seas...The elimination of this alternative excuses a discussion of the complex question of whether the same rules apply to mid-ocean archipelagos (sic) as apply to coastal ones."

Appropriately, Pharand's proposal is excluded in his recent book.

³³Mitchell Sharp, H. of C. Deb. 5954 (April 16, 1970).

³⁴Pharand, "The Waters of the Canadian Arctic Islands", 414-15, footnote 3.

³⁵Article 14 (4), Geneva Convention on the Territorial Sea and Contiguous Zone, reprinted in Brownlie, 74.

19. ³⁶Beesley, E.A. & N.D., no. 25, (April 29, 1970),

³⁷Geneva Convention on the Territorial Sea and Contiguous Zone, Article 24 (1).

³⁸Ibid., Article 24 (2).

³⁹Sutton, 43.

⁴⁰Neuman, 358.

⁴¹Sharp, H. of C. Deb. 5949, (April 16, 1970).

⁴²Ibid.

⁴³Beesley, I.A. & N.D., no. 15, (April 30, 1970), 36. Emphasis added. Drawing a firm distinction between 'claim' and 'assertion' amounts to pedantry: the latter is a genteelism for what might be termed 'a positive declaration without attempt at proof', allowing for very little difference from 'claim', which is nothing more than 'an assertion of a right'.

Beesley may be objecting to the air of 'vigour'-- a pugnacity almost -- which 'claim' attaches to itself, and which, according to Fowler's Modern English Usage (2d ed. rev. 1968 by Sir Ernest Gowers, p. 89), "makes such words as allege, assert, contend, declare, maintain, profess, represent, say, and state seem tame by comparison". In a legal context, there appears to be no real distinction, since both a 'claim' and an 'assertion' are equally contestable.

⁴⁴The Government did not respond to queries in the House as to why a 100-mile zone was settled upon. See H. of C. Deb. 5942, 5943, (April 16, 1970). Wilkes, "Due Process", 508, reasons that such a limit conveniently coincides with "what was deemed to be an already accepted zone for pollution control rather than in terms of contestable sea claims". This thesis is supported by testimony in I.A. & N.D., no. 16, (April 30, 1970), p. 17.

The International Convention for the Prevention of Pollution of the Sea by Oil (London, 1954), ratified by Canada in 1962, prevents discharge of oil by ships "for the main part, at fifty miles from the coast, although in some cases this was extended to 100 miles", according to L.C. Green, "International Law and Canada's Oil Pollution Legislation", Oregon Law Review, L, (1971), 466.

⁴⁴(Cont'd.)

Referring to the Torrey Canyon and Santa Barbara disasters, Warren Allmand, who displayed keen interest in the Arctic Waters Act both in committee and in the House, said that "...one can appreciate that ships travelling between 50 and 100 miles off our coast can encounter disaster and be shipwrecked". H. of C. Deb. 5998, (April 17, 1970).

Writing as an expert in Arctic ecology, Daniel Wilkes dolefully observes that "the 100-mile zone, far from overreaching itself, is too narrow if the aim is to safeguard the unique ecology of the Arctic". "Due Process", 509-10.

⁴⁵"Canadian Prime Minister's Remarks on the Proposed Legislation", reprinted in 9 Intl. Leg. Matls. 600 (1970), 601.

⁴⁶Pharand, The Law of the Sea of the Arctic, 237.

⁴⁷Ibid., 238.

⁴⁸Douglas M. Johnston, "Canada's Arctic Marine Environment. Problems of Legal Protection", Behind the Headlines, XXIX, (July, 1970), 2.

⁴⁹Bilder, "New Stresses", 7.

⁵⁰Gotlieb and Dalfen, 246.

⁵¹Beesley, as Special Advisor on Law of the Sea to the Secretary of State for External Affairs, in E.A. & N.D., no. 24, (November 22, 1973), 10. Emphasis added.

⁵²L. Legault in The United Nations and Ocean Management: Proceedings of the Fifth Annual Conference of the Law of the Sea Institute, June 15-June 19, 1970 (Kingston, R.I.: University of Rhode Island, 1970), 297.

⁵³"Trudeau seeks UN aid to stop Arctic pollution", Toronto Star, November 12, 1969, p. 1, col. 6.

⁵⁴Bilder, "New Stresses", 7.

⁵⁵Ibid., p. 7, footnote 21.

⁵⁶Dellapenna, p. 413, footnote 170.

⁵⁷Bilder, "New Stresses", 22.

⁵⁸Wilkes, "Due Process", 508.

⁵⁹Sharp, H. of C. Dep. 5951, (April 16, 1970).

⁶⁰L. Legault, remarks quoted in Neuman, 361.

⁶¹"Summary of Canadian Note", reprinted in 9 Intl. Leg. Matls. 1970, p. 611.

⁶²Ibid.

⁶³Allan Gotlieb, ed., "Canadian Practice in International Law during 1960 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs", 5 Canadian Yearbook of International Law 1967, p. 253.

⁶⁴W.L. Lakhtine, "Rights Over the Arctic", American Journal of International Law, XXIV (1930), 703-17.

⁶⁵Johnston, "Canada's Arctic Marine Environment: Problems of Legal Protection", 2.

⁶⁶Ibid., 1. In his 1958 article, p. 36, Cohen noted that the polar ice cap "represents a kind of quasi-land for all purposes of peaceful or military use".

⁶⁷Douglas M. Johnston, "The Arctic Environment: A Managerial Perspective", in The United Nations and Ocean Management: Proceedings of the Fifth Annual Conference on the Law of the Sea Institute, June 15-June 19, 1970, 297.

⁶⁸Ben Partridge, "The White Shelf: A Study of Arctic Ice Jurisdiction", U.S. Naval Proceedings, LXXXVII, (1961), 55, quoted in Beesley, "Rights and Responsibilities", 3.

⁶⁹Pharand, The Law of the Sea of the Arctic, 178.

⁷⁰Beesley, I.A. & N.D., no. 15, (April 30, 1970), 30. Legault, in his Lima Speech, stated that "traditional law of the sea concepts are irrelevant and inapplicable". Quoted in Neuman, p. 359, footnote 32.

⁷¹The notion of 'custodianship', absent from the debates in 1970, has, as Pharand, The Law of the Sea of the Arctic, 237, footnote 50, observes, "been mentioned occasionally in support of the legislation". For example, see Beesley, "The Law of the Sea Conference: factors behind Canada's stance", International Perspectives, (July/August, 1972), 35. Employment of the concept by Canada reflects its greater usage internationally in the past four years.

CHAPTER III

THE IMMEDIATE REASONS FOR THE ACT

In his Address following the Speech from the Throne on October 23, 1969, the Prime Minister outlined four primary interests in the Arctic:

- the security of Canada¹
- the economic development of the north
- the preservation of the ecological balance
- the continued high stature of Canada in the international community.²

Strict regulation of oil exploration and shipping activities in the North should not be construed as an indication that the Canadian Government is attempting to discourage economic development, foreign or domestic. The Prime Minister noted that "the Arctic Ocean and its coastal regions may soon enter a period of rapid economic development".³ In 1969, Mr. Trudeau allowed that "(A)rtic navigation will be an important factor in the general development of northern Canada and as such it will, of course, be encouraged rather than restricted by Canada".⁴

Ivan Head, Special Assistant to Prime Minister Trudeau, has stressed the need for an innovative approach to the Arctic which would embrace the dual concerns of 'wealth' and 'health':

A new balance of interest needed to be struck, not to deny the exploitation of mineral and living resources or to interdict maritime traffic but to husband the resources and protect the wholesomeness of the environment.⁵

As Mr. G.W. Stead, Assistant Deputy Minister, Marine, Department of Transport testified before the Standing Committee on Indian Affairs and Northern Development, "it is a question of balancing risks; trying to develop regulations that will give the maximum security from the pollution point of view compatible with a reasonable amount of development".⁶ These two competing aims are clearly stated in the Preamble to the Act:

Whereas Parliament recognizes that recent developments in relation to the exploration of the natural resources of arctic areas, including the natural resources of the Canadian arctic, and the transportation of these resources to the markets of the world are of potentially great significance to international trade and commerce and to the economy of Canada in particular;

And whereas Parliament at the same time recognizes and is determined to fulfil its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian Arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic;

Given the commitment to northern economic expansion, why did the Canadian Government feel it necessary to legislate in a manner which would seem to inhibit exploration, exploitation, transportation and development?⁸ In essence, the Arctic legislation is inextricably tied to the further development, for without international navigation there is no need for laws governing such transportation. Conversely,

without the preservation of the delicate ecological balance which presently exists in the Arctic archipelago, the prospects for future, long-term access to Arctic resources become bleak. It is as Jean Chrétien aptly phrased it: "Investors will now know the rules of the game regarding sea transportation".⁹

Several events and circumstances in the latter part of the sixties may be said to have influenced the Canadian Government's decision to enact legislation protecting the Arctic environment. An attempt will be made to outline the most important considerations bearing on and surrounding the Canadian decision to initiate its bold plan.

Although as early as 1926 the problems caused by pollution of the seas by oil were serious enough to lead to an international conference,¹⁰ it was really not until the mid-sixties that, as a result of a few spectacular catastrophes and increased public awareness of environmental issues, the gravity of the situation was appreciated, and this nascent awareness partially explains the 'groping' that is occurring in efforts to deal with the problem. An oceanographer with the Scripps Institute is quoted as saying as late as 1971:

We're essentially operating in a vacuum as far as ocean pollution is concerned. Ecologists tell us terrible tales of ocean pollution but they can not really justify what they're saying. On the other hand, one can't prove them wrong. There's

always the possibility things are even worse than we think.¹¹

A widely used definition of 'ocean pollution' is that provided by experts of the International Oceanographic Commission:

Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities.¹²

Operationally, the treatment of pollution problems is hampered by a profound ignorance "of much that goes on in the marine environment. The oceans are, along with extra-terrestrial space and the interior of the atomic nucleus, one of the frontiers of scientific and technological research". Regrettably, there is a "lack of knowledge of fundamental aspects of the physical, chemical and biological working of the oceans".¹³

While there is insufficient information on hand dealing with the extent of ocean pollution and its severity, there is little doubt concerning the potential for disruption and imbalance of what at least one observer terms "perhaps the most obvious of the world's endangered ecological systems".¹⁴ Covering four fifths of the earth's surface, ocean waters in their interaction with the atmosphere determine weather and climate; phytoplankton, tiny plants responsible for primary production of 90 percent of the

living material in the sea, have produced approximately 70 percent of the world's oxygen supply by photosynthesis.¹⁵

Thus, the destruction or alteration of the ocean's ecosystems would threaten the earth's supply of oxygen, lead to the possibility of seriously altered climates and threaten destruction of an important source of the world's present and future food supply.¹⁶

In short, the ocean is, in global perspective, "the basis of our life support system".¹⁷

While there is sufficient cause for alarm, and some evidence to expect that, if left unchecked, the fate of such well-used seas as the Mediterranean and Baltic may well be similar to that of certain bodies of fresh water (notably Lake Erie),

(m)arine pollution is not yet--despite some cries of doom--a total imminent plague; the seas as such are not yet ineradicably polluted and no species of fish has, so far as is known, entirely disappeared solely because of pollution.¹⁸

Nonetheless, as Gold remarks, "the seriousness of pollution as a threat to the environment, whether underestimated or exaggerated, is becoming increasingly more apparent".¹⁹

What constitutes marine pollution? Hardy categorises it in its various forms by isolating human activities involved. He establishes six major headings:

- 1 - marine pollution caused via the atmosphere by land-based activities
- 2 - the disposal of domestic and industrial wastes
- 3 - radioactive pollution

- 4 - the disposal of military materials
- 5 - ship-borne pollutants
- 6 - pollution resulting from offshore mineral exploitation.²⁰

It is widely reported that land-based activities account for 80 percent of ocean pollution in all forms.²¹ Furthermore, it is estimated that 50-90 percent of land-based pollutants are comprised of petroleum; thus, hydrocarbons make up a large percentage of the total persistent pollutants²² in the marine environment.²³ Of the three basic types of pollutants, i.e. oil, refuse and hazardous materials (nuclear and chemical wastes),²⁴ oil is found in the greatest quantities.

Gold classifies oil pollution into six categories, based on source:

- (1) deliberate pumping of oil into the oceans by seagoing vessels
- (2) accidental spilling of oil into the oceans by seagoing vessels
- (3) oil spills due to shipping accidents and casualties
- (4) oil spills due to accidents or negligence at shore oil installations
- (5) oil spills due to accidents or negligence on off-shore drilling stations
- (6) miscellaneous spillage.²⁵

And while the "long-term, low-level effects of oil pollution are still not well understood",²⁶ the volume of hydrocarbonic

pollutants entering the oceans can be expected to increase, for the following reasons:

- a) the total volume of maritime transportation of oil will increase in spectacular fashion by 1980²⁷
- b) the percentage of production obtained from offshore wells is expected to rise (the risk of blowouts and the problems of plugging them increase in offshore areas)²⁸
- c) the size of tankers will continue to increase.²⁹

Two separate incidents in the late sixties involving maritime disasters illustrate the monumental hazards and the short-term effects of maritime pollution by oil, particularly as they affect coastal populations: both can be said to have had a definite impact upon the Canadian people and Government, leading it to enact unilateral measures intended to forestall any similar catastrophe in the North.³⁰

The first catastrophe involved the third largest tanker afloat, the 120,000 deadweight ton Torrey Canyon.

~~On March 18, 1967,~~ she 'impaled herself' on the Seven Stones reef in the English Channel, eight miles from the Scilly Isles. The ship was laden with 119,328 tons of Persian crude, more than 90,000³¹ of which escaped into the sea and headed for French and English beaches. Some of the oil travelled a distance of 225 miles before landing on the French coast.³²

British Prime Minister Wilson ordered the ship bombed after twelve days of futile attempts at salvage,³³ and after intense pressures from both sides - the owners of

the tanker and the salvor lined up on one side, and "hotel-keepers, lobstermen, town officials, tourists, politicians, the press - all those to whom ecological interests were dominant",³⁴ on the other side.

British and French claims totalled roughly fifteen million dollars, and

(a)fter long proceedings instituted in Singapore by the British Government and in Rotterdam by the French Government, the owners and charterers of the tanker agreed to pay a total of three million pounds in final settlement of the claims of the two governments. This was half of the actual amount which the two governments had estimated their damage to be. And, of course, this cannot take into account the undetermined, but nevertheless very real, effects on marine life and its environment.³⁵

The Torrey Canyon affair is a paradigm of the classic dichotomy between the interests of coastal states and the freedom of vessels on the high seas. Sutton goes so far as to say that the Torrey Canyon disaster "marked the beginning of the Ecological Age, much as Hiroshima ominously portended the Nuclear Age".³⁶ At the least, the massive spill can be credited with raising the following legal questions and thrusting them into the public forum:

...(W)hat happens when a supertanker is damaged and empties its oil into the high seas? Must a coastal state stand helplessly by while that oil, pushed by the wind, currents and tides turns into an agent of death and destruction as it flows toward its shores?³⁷

The second incident which was to gain international attention involved the blowout of a drilling well in a

channel five miles off the coast of Santa Barbara, California on January 8, 1969.³⁸ For one month, oil spilled at the rate of 200-500 barrels a day³⁹ from a well 200 feet below the surface, drilled to a depth of 3,500 feet. As the oil spread, it "coated 400 square miles of ocean and forty miles of shoreline with oil",⁴⁰ causing extensive, short-term damage to the ecological balance of the area.⁴¹

These two maritime catastrophes of major proportion occurred at a time when economic interest in the resources of the Arctic was rapidly accelerating.⁴² The area is known to be rich in minerals, both on the islands and on the continental shelf. Deposits of iron, zinc and silver which run north from Cornwallis Island off Barrow Strait await extraction as world reserves of these ores shrink in the resource-hungry seventies.⁴² At least seven mines producing silver, lead, zinc, cadmium, asbestos, copper, gold and tungsten are presently in operation above the 60th parallel, and from these operations 'trailings' travel down river systems into "arctic waters".⁴³ In addition, on Baffin Island at Mary's River, an iron ore deposit which has been termed "one of the richest ever discovered in Canada",⁴⁴ might increase production if an Arctic sea route can sufficiently reduce transportation costs.

In the late sixties, however, interest in mineral resources was dwarfed by commercial euphoria resulting from

the discovery of vast quantities of oil in Arctic regions. At Prudhoe Bay on the North Slope of Alaska, bordering the Beaufort Sea at a site approximately two hundred miles west of the Yukon, a joint exploration team from Atlantic Richfield and Humble Oil made an historic oil find in early 1968; estimates of the total reserves ran up to 10 billion barrels, which would make the field one of the largest pools in the world.⁴⁵

The Prudhoe Bay find served as a tremendous spur to exploration activities in the Canadian Arctic islands and on the surrounding continental shelf. On January 14, 1970, Imperial Oil announced a successful drilling effort at Atkinson Point on the Tuktoyaktuk Peninsula on the Beaufort Sea near Amundsen Gulf; by March 1972, Imperial was able to report that in-depth scientific research indicated "an encouraging and significant oil-bearing reservoir".⁴⁶ By April 1974, a month after drilling commenced from an artificial island in the Beaufort Sea, Imperial Oil announced oil discoveries in the test well, and "some oil industry sources are already suggesting privately that the company has tapped the immense reservoir it was looking for, and the word is out within the territorial government to expect a stampede that will double the size of Inuvik in a year or two."⁴⁷

Gas and oil have also been discovered in the Queen Victoria Islands,⁴⁸ and oil in the Queen Elizabeth Islands.

on Ellesmere Island, and on the continental shelf. The accelerated pace at which development activity is proceeding can be attributed, beyond the impetus of Prudhoe Bay, to over a decade of Geological Survey and to the fact that offshore exploratory leases have 'built-in' development clauses, under which system oil and drilling companies are required to drill a minimum number of wells and spend a specified amount of money by a certain date.⁴⁹

The American discovery of substantial petroleum reserves at Prudhoe Bay posed the problem of routing raw products from the drilling wells to East Coast and West European refineries and markets. In order to test the Northwest Passage as one alternative transport route, the Humble Oil and Refining Company converted a large, 115,000-ton conventional tanker, the Manhattan, into a 'super-ice-breaker'.⁵⁰ Two other possible routes were under consideration at the time: both involved construction of a pipeline, one travelling across Alaska to ports on the North Pacific, the other down the Mackenzie Valley and eventually into the American Midwest. One attraction of the fully maritime route to the East Coast lay in the estimated saving of 600,000 dollars per day in transport costs.⁵¹

Forget also sees a cost advantage in maritime transport, but notes at least one drawback of a tanker route;

The coastal waters are very shallow, and oil would have to be pumped about eight miles out to the tanker,

probably across ice islands. Not all Arctic finds along the hypothetical tanker route will warrant capital outlays of the importance required to ship the oil.⁵²

The 1005 foot Manhattan, with its specially reinforced bow, entered the Passage on September 15, 1969, escorted by the Canadian icebreaker John A. Macdonald. Ten days later, after being freed from the ice several times by the Canadian vessel, the Manhattan docked at Sachs Harbor on Banks Island at the other extremity of the Passage, having navigated Lancaster Sound, Barrow Strait, Viscount Melville Sound and Prince of Wales Strait; thus, the Manhattan became the first commercial vessel to navigate the Northwest Passage.⁵³

It would be difficult to overestimate the significance of the voyage of the Manhattan. Essentially, the first voyage, and the second in April, 1970, in capturing the interest and imagination of public and politicians alike, highlighted and focused attention on the three overriding concerns involving the north:

- 1) sovereignty and control
- 2) economic development and nationalism
- 3) environmental preservation.

As Cohen points out, "(i)t will be readily seen how the economic, environmental and jurisdictional issues were suddenly and significantly interwoven in a network of concerns that required very early decisions legally and administratively".⁵⁴

While the Prime Minister, prior to the Manhattan's first voyage, hastened to "point out that the legal status of the waters of Canada's Arctic archipelago is not an issue in the proposed transit....," the Government made every effort to ensure that Canadian claims were respected, while at the same time avoiding any forthright claims which "might call into question the established legal position".⁵⁵ Concern over the historic voyage focused on the suspicion that Canadian sovereignty in the Arctic had been effectively challenged by the Manhattan's conquest, and the political pressure exerted on the Prime Minister to take some form of action was immense.⁵⁶ Refraining from allaying prevalent fears, Prime Minister Trudeau is reported to have made no response when a reporter suggested that the Manhattan's voyage would soon be followed by others that would establish an international legal precedent before Canada's claims in the area could be effectively asserted.⁵⁷ The proposed crossing raised the following question:

Le voyage du Manhattan a-t-il pour effet de transformer le passage du Nord-Ouest en une série de détroits internationaux reliant deux parties de la haute mer?⁵⁸

Others have played down the significance of the voyage in terms of its effect on Canadian claims over Arctic waters. For example, L.C. Green feels that

...sufficient time has ensued for Canadian sovereignty over the entire Canadian Arctic

as far as the Pole (sic), and embracing land, islands, sea and pack-ice to have become a fact in law. Had any question arisen, say five years before the Manhattan effort, there is little doubt that the world at large would have recognized Canada's historic title to the whole area.⁵⁹

Still, Mr. Trudeau's remarks in the House on May 20, 1969 would seem to indicate possible infringement by the Manhattan over potential, future Canadian claims:

...we are certainly not neglecting to consider the practical question of whether it will eventually be in Canada's interest to have these waters declared Canadian internal waters rather than to encourage their use for commercial purposes.⁶⁰

If one operates under the assumption that the arctic waters were, in 1970, regarded even by the Canadian Government as something less than 'internal waters', one must then accept the fact that the Manhattan, in following the proposed route for the first voyage, "would have remained on the high seas throughout if it had managed to negotiate M'Clure Strait".⁶¹

Nevertheless, the Canadian Government had little if any difficulty in asserting its 'influence' over arrangements concerning the voyage, mainly due to Canadian expertise and the availability of support systems:

...(T)he Canadian Government has welcomed the Manhattan exercise, has concurred in it and will participate in it. The oil companies concerned and the United States Coastguard have consulted with appropriate Canadian authorities in the planning of the operation. The government will support the trials with the Canadian Coastguard icebreaker John A. Macdonald, as already indicated, and will

also provide aerial ice reconnaissance and assume responsibility for the coordination of such reconnaissance. The government has also selected and appointed an official Canadian government representative on board the S.S. Manhattan who will act as technical adviser and as co-ordinator of Canadian support for the operation.⁶²

The Manhattan venture did not, in itself, in any way alter the status of the Arctic waters; it simply brought a long, quiet, complicated issue out in the open, into the public domain, and raised issues which had been discussed, but unresolved for decades. As such, the Manhattan served as a convenient jumping-off point for a debate on a subject which requires attention regardless of the particular voyage - the topic of sovereignty and control over the waters and islands of the archipelagic region.

Members of the House of Commons Standing Committee on Indian Affairs and Northern Development were sufficiently concerned to fly over the Manhattan in a Canadian Armed Forces plane as the American ship entered Lancaster Sound, and to radio the following message to Captain Roger Stewart:

Your daring voyage through the Canadian Arctic Archipelago will stir the imagination of people everywhere who are interested in Arctic development. Bienvenue dans ces eaux Canadiennes. Welcome to Canadian Waters. We wish you God speed. Bon Voyage.⁶³

In assessing the various motives for the Arctic Waters Pollution Prevention Act, the issue of nationalism, broadly defined to encompass both a psychological sense of security and an economic concept of independence, cannot be discounted,

although an effort to measure its relative impact proves difficult. It may well be that "Canadians regard the area as a treasured part of their national heritage,"⁶⁴ as Canada's "last frontier",⁶⁵ and as a "touchstone of the Canadian identity",⁶⁶ and that for those 'nationalistic sentiments', as a sort of legislative muscle-flexing, the pollution regulations were enacted.

By the time of the first Manhattan voyage in 1969, Canadian 'sovereignty' in the Arctic had become 'a fighting word', according to Maxwell Cohen.⁶⁷ For Cohen, perhaps the most important stimulus of all was this

...mood of Canadian neo-nationalism with its particular focus on United States investment and business activity in Canada, and the fear that the rapid movement of United States interests into the Canadian Arctic had to be challenged at once by some swift re-assertion of Canadian jurisdiction over these regions and the commercial and related activities taking place there.⁶⁸

For Dellapenna, a mélange of factors combined to make the Act important:

Canada needs to control these waters if she is to control resource exploitation in the (Arctic) waters⁶⁹ and if she is to prevent the intrusion of a foreign military power. The waters are no less important than the land to the cultural and psychological problems of Canadian identity.⁷⁰

As a spur to indigenous economic development, and as a response to the apprehension in the late sixties that foreign-controlled companies operating in Canada would 'gobble up'

a sizeable portion of the oil leases for exploitation in the land and waters of the Arctic, the Government and private enterprise formed Panarctic Oils Ltd., with the former having a 45 percent interest in the company.⁷¹ The creation of Panarctic reflects both the economic interest in the Arctic and the element of nationalism in the issue of northern development.

Finally, an extremely important consideration leading to the drafting of pollution legislation was recognition of the Arctic environment as an ecosystem uniquely and hazardously susceptible to marine pollution, particularly that of oil. Cohen recalls the scenario in 1969 in capsule form:

...the entire debate coincided with the escalating national and international "panic" over pollution in general, and the growing knowledge that the ecology of the Arctic - water and land, flora and fauna - was particularly vulnerable to any industrial agents including oil spilled at sea or on land, the most likely immediate consequence of intensive exploration and exploitation.⁷²

Beyond the nationalist sentiment, as Bilder says, "(t)he dangers which utilization of the Northwest Passage pose to this unique environment are generally considered by Canadians to be particularly acute".⁷³ Prime Minister Trudeau in his Toronto speech went as far as to label the Arctic waters and ice

...the most significant surface area of the globe, for it controls the temperature of much of the

Northern Hemisphere...Its continued existence in unspoiled form is vital to all mankind.⁷⁴

In the area of shipping, Bilder notes that "the hazards of Arctic navigation substantially increase the risks of maritime accidents".⁷⁵ The 43,000 horsepower, plowbowed Manhattan has demonstrated that navigation through thick polar ice is possible,⁷⁶ but even here, the dangers became readily apparent; on the return trip through Lancaster Sound, in October, 1969, a "huge panel of old steel" was knocked out of the Manhattan's "thin, unprotected hull - not in the reinforced section",⁷⁷ with the result that 15,000 barrels of ballast water were spilled. The project manager of the venture was quick to point out that future ships would be fully armoured: "The oil companies are very much aware of the environmental problem", he is quoted as saying; "You may be sure that we will proceed only when we know it is safe to do so, from an ecological as well as an economic standpoint".⁷⁸

It has been reported that the Manhattan came precariously close (within 15 feet) to piling herself up on shoals, a series of which have only recently been charted by the Canadian research vessel Hudson.⁷⁹ With the prospect that "large ore carriers would be plying their trade between Arctic islands by 1976 and that container traffic between Europe and the Far East would be initiated within a few years thereafter...",⁸⁰ the Canadian Government was clearly not

prepared to put its faith in the 'concern' of the oil companies and developers for ecological matters. In fact, before the Arctic Waters Act was introduced in the House, and thus well before the Regulations affecting engineering standards were drafted, pressure was exerted on Humble Oil to equip its vessel for the second voyage according to standards contemplated for bill C-202. Morin reports that "(l)es exigences imposées au Manhattan avant son second voyage, très détaillées, concernaient aussi bien, le ré-inforcement de la coque du pétrolier que la résistance des machines, les aides à la navigation ou le personnel."⁸¹

And while there were early indications that the choice of the Northwest Passage as a route for the shipment of Alaskan oil had been rejected, at least for the moment, there were at the same time "proposals to build fleets of United States icebreakers as well as to design a tanker which, in fact, would be a super-icebreaker capable of going on its own..."⁸² through the Passage, possibly all year round. There were other proposals mentioned:

In the late fall of 1969, General Dynamics Corp. formally proposed to five major oil companies operating on the North Slope the building of six 170,000 ton nuclear submarines, each carrying up to 300,000 tons of oil, to transport oil to the east coast under the water and ice of the Northwest Passage.⁸³

Following the completion of the Manhattan's maiden voyage, a spokesman for Standard Oil predicted that we might

...well see 25 to 30 supertankers operating across the top of the continent during the 70s, and if Arctic oil can be shipped in quantities through the northwest passage, so can iron, zinc, lead, copper, nickel and asbestos. They are only to be unearthed and delivered. The sleeping Arctic could become a very busy place.⁸⁴

Moreover, there was evidence of American dissatisfaction with the need to rely on 'foreign-flag' icebreakers, and Congress accordingly authorized a start on construction of "the most powerful icebreaker fleet in the world".⁸⁵

Given this sudden spurt of activity and interest in the Arctic, one can readily appreciate the view of Mr. Chrétien that "as the economic pressure of resource development in the North increases in speed and scope, the need for environmental protective measures takes on a new sense of urgency".⁸⁶

There appears to be universal agreement, even from the Act's detractors, with the fact that

...the peculiar ecology of the Arctic region -- an environment in which life exists only precariously -- coupled with the slow rate of hydrocarbon decomposition in a frigid climate and the difficulty of dispelling oil in Arctic areas, might cause any major oil spill to have disastrous and irreversible ecological consequences.⁸⁷

Frequent reference is made to the fact that spilled oil "would seep beneath the ice and congeal",⁸⁸ and "collect in pockets at the interface"⁸⁹ of oil and water. Even in more temperate climes, a large oil spill may seriously affect the

complex ecosystem which exists in interaction between living creatures and the water, air and land;⁹⁰ the ecosystem is "infinitely more delicate and precarious in the cold waters of the Arctic seas".⁹¹

Dr. Richard Warner notes that "decomposition in the Arctic oceans, whose temperatures are at 0°C. or below throughout the year, would be very slow indeed."⁹² Where oil is exposed to still lower temperatures, for instance when carried to shorelines and ice floes, biochemical decay would be virtually nonexistent, and the oil would persist for decades, perhaps centuries".⁹³ The cold air and water would also have debilitating effects on clean-up operations, which are costly and presently are in a 'low state of the art'.

Wilkes finds two further characteristics -- the motility of Arctic ice and the mobility of fish and game under and over the pack -- as contributing to the widespread effects of an oil spill in the Arctic, more so than in other geographic areas. Due to the movement of pack ice in the Arctic,

...territorial seas are threatened by spills far from land, although it can take months or even years to bring ice and oil to a melting zone near shore. Far more important, fish and game on whom the native Canadians depend for survival are wideranging over and under the pack. For example, when the thaw approaches, reindeer herds cross the ice toward the mainland; a slippery spill which traps them midway is fatal not only to them but to whole communities along the migration route which had depended on them.⁹⁴

It has even been predicted that owing to the delicacy of the Arctic ecosystem, "biological damage caused by a major oil spill would affect the whole pattern of reproduction".⁹⁵

It is difficult to assess accurately the damage that might be caused by a massive oil spill in the Arctic, simply because none has yet occurred.⁹⁶ According to Moira Dunbar,

(w)e have been caught in a state of scientific near-nudity in the particular respect in which we now so urgently need protective covering: namely knowledge of what the proposed developments will do to the environment, in precise terms, and knowledge of what should be done to conserve and to protect.⁹⁷

As of writing, only two accidents involving oil have been reported: the first involved two barges, one carrying oil,⁹⁸ the other dry cargo, both owned by Panarctic Oils; the barges sank in Byam Martin Channel, east of Melville Island after being crushed by ice on August 21, 1969. An Interdepartmental Oil Pollution Disaster Committee "failed to pinpoint the exact location "of the sunken barges, thus losing the opportunity to make scientific studies on the long-term effects of a spill."⁹⁹ The second spill, which occurred June 6, 1970 (three days before passing of the AWPPA), was caused by an avalanche which destroyed a large portion of a tank farm in the Hudson Strait, releasing 427,000 gallons of oil: "The oil easily penetrated the surface layers of the sea ice to a depth of four or five inches, or until the water table was reached".¹⁰⁰ Two McGill University biologists

in 1972 recognised that it was "apparent that we must intensify our efforts to understand the workings of the arctic systems and their response to oil pollution, while delaying hazardous developments and minimizing the danger of a large-scale spill".¹⁰¹ Meanwhile, "because of formidable ice problems and extreme pressures in geological formations being drilled, the Beaufort Sea is "one of the most hazardous areas in the world for exploratory drilling".¹⁰²

In order to increase knowledge of the effects of oil spills on Arctic ice, Water Associates Ltd. began a two month study on April 30, 1974 at Resolute Bay. The 'controlled spill' is a forerunner to one which the Department of the Environment will conduct in the Beaufort Sea in the fall of 1974.¹⁰³

Previously, two oil spill tests were conducted in the Arctic: in 1970, the U.S. Coast Guard carried out experiments off the northern coast of Alaska;¹⁰⁴ additional research was undertaken in early 1972, this time with the participation of a Canadian scientist.¹⁰⁵

Another dramatic event, which even though it occurred after Canadian intent to regulate pollution was publicised, can be said to have influenced the voting on the bill, the resolve with which it was adopted and the general slant and tone in which the Act was received, was the wreck of the tanker Arrow on Cerberus Rock in Chedabucto Bay, off the

coast of Nova Scotia on February 4, 1970. A foretaste of the problems to be encountered in disposing of oil spilled in near-freezing waters was gained when the 329.4 foot, 11,374 ton Liberian vessel, ¹⁰⁶ on a voyage from Venezuela to Port Hawkesbury, spilled half of her 17,119 tons of bunker oil fuel and 24.5 tons (1.5 million gallons) total of winter grade fuel.

The estimated cleanup bill was four million dollars, oil fouled the beaches of Belle Island over 100 miles away, killed 4,000 birds, and resulted in a Royal Commission being appointed to study the causes and effects of the disaster.

¹This concept, akin to that of 'safeguarding sovereignty and independence, is expounded in Defence in the 70s: White Paper on Defence (Ottawa: Queen's Printer, August 1971). On the activities of DND in the North, see Robin McNeill, "New Look at the North", Arctic, XXIII, no. 4, (December, 1970), 215-126.

On January 27, 1973, Defence Minister James Richardson announced the establishment of an arctic training centre for Churchill, Manitoba. The centre will also serve as a base for 'winter-warfare' exercises.

²Trudeau, H. of C. Deb. 40 (October 24, 1969).

³Ibid., 3. Jean Chrétien likewise felt that "Northern Canada is on the brink of significant developments in the fields of mining and oil and in the transportation of these resources to world markets". H. of C. Deb. 5938, (April 16, 1970).

⁴Trudeau, H. of C. Deb. 8720-8721, (May 15, 1969).

⁵Ivan Head, "The Foreign Policy of the New Canada", Foreign Affairs, L, (1972), 243. R.W. Kowan, "The Manhattan's Conquest and Canada's Arctic Sovereignty", Cornell International Law Journal, III, no. 2, (1970), 194, footnote 31, makes the shrewd observation that

"...pollution is a danger precisely because the Northwest Passage may be used as regular transportation, particularly oil-carrying supertankers. This fact would seem contradictory to the assertion that the frozen waters should be regarded as land." (emphasis added)

B.K. Carnahan, "The Canadian Arctic Waters Pollution Prevention Act: An Analysis", Louisiana Law Review XXXI, (1971), 642, makes a similar point: "However, any claims to justify the anti-pollution legislation on this (the ice as land) basis suffers from the logical contradiction that the AWPPA attempts to regulate shipping traffic". The Canadian counter-argument might well be phrased in the following fashion:

"Although we do not argue literally that ice is land, I must point out that it is not water to all intents and purposes; otherwise we would not have the very situation we now have where there is intense interest in the attempted passage of one vessel."

Beesley, I.A. & N.D., no. 15, (April 30, 1970), 30.

⁶G.W. Stead, I.A. & N.D., no. 16, (May 15, 1970), 17.

⁷Preamble to AWPPA, reprinted in Bilder, "New Stresses", 38.

⁸It is rather difficult to accept at face value Mr. Chretien's confidence that "this bill will encourage commercial shipping in the North and the development of our last frontier". H. of C. Deb. 5938, (April 16, 1970).

⁹Ibid.

¹⁰Preliminary Conference on Oil Pollution of Navigable Waters, Washington. A Convention was drafted by the twelve nations participating, but it never came into force owing to lack of sufficient ratification.

¹¹Mr. Joe Reed, cited in Butte, 245.

¹²Accepted by Joint IMCO/FAO/UNESCO/WMO/WHO/IAEA/UN Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), DOC. A/7750, Part I, 3, 10, November 1969, cited in Michael Hardy, "Offshore Development and Marine Pollution", Ocean Development and International Law. The Journal of Marine Affairs, 1, no. 3, (1973), 267, footnote 3. Petaccio, p. 37, footnote 56, offers a selection of other, similar definitions, at the same time calling for greater research and monitoring facilities, p. 38.

¹³Oscar Schachter and Daniel Serwer, "Marine Pollution Problems and Remedies", American Journal of International Law, LXV, no. 1 (1971), 85. Butte, 255, reasons that this lack of scientific consensus accounts for "shamefully inadequate" United States pollution control proposals.

¹⁴John C. Klotz, "Are Ocean Polluters Subject to Universal Jurisdiction? - Canada Breaks the Ice", International Lawyer, VI, (1972), 706. L.C. Green, "International Law and Canada's Anti-Pollution Legislation", 462, observes that only recently has there been "an increasing realization that the resources of the seas are not unlimited and not permanently regenerative". Previously, man could find no better place than the sea for dumping his waste material: "(t)he more developed he became, the more he was prone to use the sea as his sewer".

¹⁵Schachter and Serwer, 85.

¹⁶Klotz, 707.

¹⁷Douglas M. Johnston, "Marine pollution control: law, science and politics", International Journal, (Winter, 1972/73), 69.

¹⁸Hardy, 240.

¹⁹Gold, 13.

²⁰Hardy, 242.

²¹This figure is used by Johnston, "Marine Pollution Control", 70, among others. Hardy refrains from stating a percentage, but concedes that "outflow from rivers and outfalls, industrial waste, agricultural runoff, airborne pollutants such as vaporized hydrocarbons, and direct sewage discharge, provide the largest amounts of pollutants to the marine environment". p. 242. The National Petroleum Council in the U.S. presents an estimate of "as much as 90 percent". Law of the Sea - Particular Aspects Affecting the Petroleum Industry, National Petroleum Council, U.S., (May 1973), 25. Philip W. Quigg, "Curbing Pollution From Ships", World Environment Newsletter, Saturday Review/World, (January 26, 1974), 51, also uses the 90 percent figure.

The Canadian Minister of Transport, Jean Marchand, passes on an estimate of "less than 25% from ships, including both accidental and intentional pollution". Regardless of the exact percentage, Mr. Marchand rightly maintains that "even if we conclude a perfect convention on pollution from ships, we cannot afford to sit back and feel that we have solved the problem of pollution of the seas". E.A. & N.D., no. 26, (December 4, 1973), 9.

²²Non-persistent oils (i.e. gasoline) are highly volatile and evaporate quickly in normal, temperate climates; Gold, 16, figures that the "main problem of sea pollution is caused by persistent oils, which include crude oils transported in bulk for refining, and heavy fuels as well as diesel and lubricating oils which are used in the engines of most modern ships". And as John B. Yates, "Unilateral and Multilateral Approaches to Environmental Problems", University of Toronto Law Journal, XXI, (1971), 185, says:

22(Cont'd.)

"The troublesome characteristics of these products is their inability to dilute readily in water. They persist for months on the surface of the sea and as a result of their stability and buoyancy are capable of being carried considerable distances by ocean currents and the wind."

23See Schachter and Serwer, 88; Hardy, 242; Klotz, 707; Gold, 14-15. Schachter and Serwer cite a figure of up to 10 million tons per year, of which one million stems from land-based sources and offshore wells, p. 89. A similar range and ratio is attributed to the findings of Max Blumer of the Woods Hole Oceanographic Institute, in "The Greatest Oil Polluter-Man or Nature?" Sea Frontiers, XVIII, no. 5, (1972), 343.

24These three types are noted by Gold, 14.

25Ibid., 15. Schachter and Serwer, 88, use a similar classification system.

26Schachter and Serwer, 90. An identical point is made by Wulf, 540.

27Wulf, 539, reports that roughly sixty percent of the annual world production of oil, or some one thousand million metric tons, was transported by sea in 1971. The National Petroleum Council in the U.S. says 1973 volume was roughly 1.50 billion tons, a sevenfold increase from 1946, p. 28.

28Hardy gives a figure of less than 2% to represent that portion of total marine pollution which is caused by exploration activities, p. 242. The N.P.C. puts the amount at less than 5%, p. 25.

Within ten years, "offshore production of oils is expected to reach 25 million barrels a day, or about 33 percent of total world output..." Hardy, 240.

29A concise account of the startling increase of tanker tonnage, tanker fleets, sizes and their handling ability is given by Gold, 40-41.

30See the remarks of Jean Chrétien, H. of C. Deb. 5938, (April 16, 1970). Other major disasters involving tankers "which have caused farreaching damage to coastal

³⁰(Cont'd.)

waters" include

- (1) Anne Mildred Brovig, 1966 off Germany in the North Sea - 125,000 barrels spilled
- (2) Ocean Eagle, 1968, San Juan Harbor, Puerto Rico
- (3) World Glory, 1968, South Africa, 332,000 barrels
- (4) Arizona Standard and Oregon Standard collision, 1971, San Francisco Bay.
- (5) Wafra, 1971, South Africa.

See R. Palmer Cundick, "High Seas Intervention: Parameters of Unilateral Action", San Diego Law Review, X, no. 3, (1973), 516-17, for details of these and other spills.

³¹Ibid., 537. Gold reports a spill of "over 80,000 tons" (p. 22), Yates "35,000 tons" (p. 183), Bilder "35 million gallons" (p. 3).

³²Wulf, 545, gives this figure of 325 miles.

³³According to Pharand, The Law of the Sea of the Arctic, 207.

³⁴Within three weeks of the bombing, the shipowners (Union Oil Company of California) were paid a total of \$14,850,000 by the insurance companies for the loss of the ship. For a thorough treatment of the British intervention in the aftermath of the spill, see Cundick, 537-43; Edward Cowan, Oil and Water: The Torrey Canyon Disaster, 1968; C. Gill, F. Booker and T. Soper, The Wreck of the Torrey Canyon, 1967.

³⁵Cundick, 538. The settlement was the biggest for oil claims in maritime history, according to a November 11, 1969 article in the Toronto Star, entitled "Firm pays \$7,200,000 for ship's oil pollution", p. 1, col. 3.

³⁶Sutton, 38.

³⁷Cundick, 515. John Kish, The Law of International Spaces (Leiden: Sijthoff, 1973) 150, makes the curious and faulty observation that the Torrey Canyon does not constitute a precedent for high seas intervention, since it was "...not on the high seas but on the British continental shelf". Also, Kish feels that as the shipwreck was broken into three parts, it did not constitute a ship in the legal sense at the time of the bombing; "(a)ccordingly, the intervention

37(Cont'd.)

was carried out not against a ship, but against objects unprotected by flag jurisdiction".

38See M. Baldwin, "The Santa Barbara Oil Spill", Colorado Law Review, XLII, (1970), 33.

39According to Pharand, Law of the Sea of the Arctic, 207.

40Bilder, "New Stresses", 3, footnote 6. Pharand, Law of the Sea of the Arctic, 207, measures the affected coastline at "about 30 miles".

41According to the National Petroleum Council, 27, a two year study at the University of Southern California produced the conclusion that "no permanent damage resulted from the spill; other experts, however, question whether sufficient time has elapsed since the incident to determine the long-term impact". Ibid., 27.

42See Note, "Recent and Future Mineral Developments in Northern Canada", Polar Record, XV, (1970), 185. See also Forget, especially, Chapter I, entitled "Arctic Development -- The Costs and Benefits of Maritime Transportation; Implications of an Arctic Sea Route for the Mineral Extractive Industry in the Yukon and Northwest Territories", 4-9.

43According to Wilkes, "Due Process", 530.

44E.A. Coté, in People of Light and Dark, (1966), 41, cited in Wilkes, "Due Process", 530, footnote 114.

45Pharand, The Law of the Sea of the Arctic, 266.

46"Imperial confirms 2,000 bopd flow from Arctic wildcat", World Oil, Vol. 174, no. 4, (March 1972), 71, cited in Pharand, Law of the Sea of the Arctic, 267. On December 12, 1973, Energy Minister Donald Macdonald was able to report that

"...seismic surveys have been carried out in open waters of the Beaufort Sea, Baffin Bay and in channels between the Southern Arctic islands, as well as on the ice which covers most of the waters surrounding

⁴⁶(Cont'd.)

the northern Arctic archipelago. The first off-shore drilling has begun in the Beaufort Sea off the Mackenzie Delta from an artificial island which Imperial Oil constructed last year in about 10 ft. of water, about 6 miles from shore."

"Statement of the Minister of Energy, Mines and Resources to the House of Commons Committee on External Affairs and National Defence, December 12, 1973, Third United Nations Conference on the Law of the Sea, Appendix, E.A. & N.D., no. 27, (December 12, 1973), 40.

For an up-to-date summary of exploration activity in the Arctic, see "Energy from the frontiers", Imperial Oil Review, no. 1, (1974), 27-31.

⁴⁷Steve Hume, "Oil, environment controversy simmers in Arctic", Montreal Gazette, April 17, 1974, p. 16.

⁴⁸Specifically, Melville Island off M'Clure Strait and Viscount Melville Sound, is reported as producing rich quantities of natural gas. See Note, "Mineral Developments", Polar Record, 185.

⁴⁹Wilkes, "Due Process", 530.

⁵⁰See Bern Keating, "North For Oil. Manhattan Makes the Historic Northwest Passage", National Geographic, Vol. 137, no. 3, (March, 1970), 374-91 and E. Stolee Report on the voyage in the Canadian Arctic of CCGS John A. Macdonald, Summer 1969, Manhattan's journey. (Ottawa: Queen's Printer, 1970). Humble sank 39 million dollars into the project, with Atlantic Richfield and BP Oil contributing a total of 4 million dollars more.

⁵¹Ibid., 376. See Judith Maxwell, Energy From the Arctic: Facts and Issues (Montreal: Canadian-American Committee, November, 1973). Maxwell feels the cost will be 'hundreds of millions', while there would still be the risk of damage or destruction by ice. p. 39.

An outline of the unique proposals made for transportation of oil from Arctic sites, which include submarines, giant aircraft and railway, is presented by Maxwell, 40-45. Earle Grey, The Great Canadian Oil Patch (Toronto: Maclean-Hunter, 1970), 359, reports that in 1962, a full seven years before the first Manhattan voyage, a British firm began intensive research into the technology of building submarine oil-carriers.

51 (Cont'd.)

A 1969 report by the Professional Services Division of Warnock Hersey International Limited, entitled Arctic Transportation Study. Report Prepared for the Department of Indian Affairs and Northern Development, Northern Economic Development Branch, includes feasibility studies for various modes of transporting crude, including the use of tankers.

52 Forget, 14.

53 Cohen, noting that only six other vessels have ever traversed the Passage, terms the Manhattan's voyage the first 'serious commercial' experiment, p. 66.

For a history of voyages through the Passage, see Pharand "Innocent Passage in the Arctic" 42-47. See also Gordon W. Smith, A Historical Summary of Maritime Exploration in the Canadian Arctic and its Relevance in Connection with Subsequent and Recent Sovereignty Issues, paper prepared for publication in the Proceedings of the International Comm. for Maritime History, meeting in conjunction with the 13th Congress of the International Comm. for Historical Sciences in Moscow, August 1970.

54 Cohen, 63. Forget, p. IV, observes that it "... is difficult to find a set of issues with a higher combined voltage" than those of freedom of the seas, oil and Canadian-American relations.

Fanning the flames of nationalism were the reports that

"...some United States oil companies, interested in the mineral resources of the area, had printed maps showing that part of the territory was regarded, by them at least, as being within the jurisdiction of the United States, or as still being terra nullius liable to occupation by those who exploited it."

L.C. Green, "Canada and Arctic Sovereignty", Canadian Bar Review, XLVIII, (1970), 740.

55 Trudeau, H. of C. Deb. 8720, (May 15, 1969). On the same page one finds the Prime Minister's admission that "not all countries would accept the view that the waters between the islands of the Archipelago are internal waters over which Canada has full sovereignty".

56 Peter C. Dobell, Canada's Search for New Roles: Foreign Policy in the Trudeau Era (London: Oxford University Press, 1972), 69-70, grants to some Liberal backbenchers

56 (Cont'd.)

and the Standing Committee on Indian Affairs and Northern Development much of the credit for getting the Cabinet to eventually take tough decisions. One tactic of the MPs was to call for an emergency debate at the moment the Manhattan entered Arctic waters. Dobell speculates that the Prime Minister placated them "presumably by offering to take action in the next sitting".

Forget also has remarked on the 'uncompromising' attitudes of a number of Parliamentarians, including "a substantial number of Liberal members", whose approach was in sharp contrast to the deliberately cautious and collected stance of the Government, pp. 35-36. See H. of C. Deb. 3681-2701, (January 22, 1970), dealing with discussion of the first Report to the House from the Standing Committee on Indian Affairs and Northern Development, from December 16, 1969.

57 According to Konan, 189, who is citing an article from the Globe and Mail (Toronto), September 12, 1969, p. 1, col. 7.

Visions of a Northwest Passage choked with commercial vessels were not uncommon following upon the Manhattan's much publicised venture; project director Stanley B. Haas of Humble expressed such a futuristic view:

"If the Northwest Passage does become operable, the whole world could benefit. Icebreaking ships could carry electronics gear from Japan to Europe and bring back machinery. Iron deposits at Baffin Island could feed steel mills in India. The Arctic might well bloom with industry."

Keating, 374. Captain R. Maybourn of BP expressed the same optimism when addressing members of the British Institute of Navigation in 1971:

"Once navigation is established along the North-West Passage route it can only be a matter of time before the logic of opening routes across the pole to Europe, or from Baffin Island's rich iron ore mines to Japan through the Bering Strait, is accepted."

"Problems of Operating Large Ships in the Arctic", The Journal, The Institute of Navigation, XXIV, no. 2, (1971), 142.

58 Pharand's response would appear to be that it does not, since the status of 'international strait' is acquired by long usage and acquiescence. Morin answers his own question similarly:

"...les détroits n'ont pas servi à la navigation étrangère et le premier navire commercial a s'y

58 (Cont'd.)

aventurer, le Manhattan, ne l'a fait qu'à titre expérimental et avec l'aide Canadienne." (p. 219).

59 Green, "Canada and Arctic Sovereignty", 760. This is a wild assertion for two reasons, as brought to my attention by Dr. Gordon W. Smith: firstly, Canada has not clearly and consistently claimed all this; secondly, the United States has clearly and consistently refused to accept sector claims.

60 Trudeau, H. of C. Deb. 8826, (May 20, 1969).

61 Pharand, The Law of the Sea of the Arctic, 57. The M'Clure Strait is sometimes plugged with ice for years on end; on September 11, 1970, Stanley Haas reported to the crew that the strait had proved to be "beyond the capabilities of this test vessel". Quoted in Keating, 388.

62 Trudeau, H. of C. Deb. 8721, (May 15, 1969).

63 "Reports to the House", I.A. & N.D., no. 1, (December 16, 1969). 4.

64 Bilder, "New Stresses", 4.

65 Trevor Lloyd, "Canada's Arctic in the Age of Ecology", Foreign Affairs, XLVIII, (1970), 740. Also Chrétien, H. of C. Deb. 5938, (April 16, 1970).

66 Bilder, "New Stresses", 4.

67 Cohen, 65.

68 Ibid. At least one American newspaper placed great stock in the 'nationalist' slant of the Act: in an April, 1970 editorial, the New York Daily News 'guessed' Canadian motivations:

"Canada's Prime Minister, Pierre Elliott Trudeau is big-mouthing about extending Canadian jurisdiction 100 miles northward in the Arctic Ocean for pollution-control purposes.

"We're anti-pollutant as anybody, but we think that in this case lucky (up to now) Pierre is mainly intent on snooting Uncle Sam for the Canadian home folks edification.

68(Cont'd.)

"If our guess is correct, how about Washington leaning politely but heavily on Pierre until he drops this nonsense? He's been asking for such treatment for quite some while."

69Of the 604.5 million acres over which oil and gas permits were distributed by December 1973, it is reported that 265 million acres were located in the High Arctic. Statement of the Minister of Energy, Mines and Resources, 38. It is estimated that 80 percent of potential oil reserves (63 billion barrels) lies offshore, "much of it in areas where the technology to drill for and develop the resources does not yet exist". "Energy From the Frontiers", Imperial Oil Review, 27. An example of imaginative industrial efforts to get around problems of shallow water and unpredictable movement of ice floes is Immerk B-48, a man-made island 12 miles offshore from the delta of the Mackenzie River. Immerk is a permanent drilling platform completed in mid-1973. See ibid., 27-31.

For an account of the problems to be encountered from drilling operations on ice-islands, see "Proposed offshore ice drilling plans waiting for issue of drilling permit", Oil Week, (January 28, 1974), 4.

70Dellapenna, 391.

71The mixed consortium was founded on December 12, 1967. Initial Government investment in the company's shares amounted to 9 million dollars, with the balance of 11 millions being supplied by 20 private firms. On February 4, 1970, Government investment of 13.5 millions was announced, keeping its percentage of the total at 45. Estimates for 1974-75 call for a further 11.25 millions, the same amount as for 1973-74.

According to Wilkes, "Due Process", 531, "(i)n 1968 alone, Panarctic Oils 'farmed in' 180,000 square miles from some 75 companies and individuals". For an account of the company's drilling operations to 1972, see Pharand, The Law of the Sea of the Arctic, 368-69. On May 8, 1973, five major gas discoveries were reported, according to Maxwell, 22.

72Cohen, 65.

73Bilder, "New Stresses", 5.

74Trudeau, "Address to the Annual Meeting of the Canadian Press", 1. In his Lima speech, Mr. Legault said

74(Cont'd.)

that the "essential consideration is that the degradation of the Arctic environment would have catastrophic consequences for the northern hemisphere and perhaps indeed for the western hemisphere and areas beyond." Quoted in Neuman, 359, footnote 32.

75Bilder, "New Stresses", 5.

76See Maybourn, 135-146, for an examination of navigational problems.

77Keating, 631. According to MP Ray Perrault, who witnessed the docking of the Manhattan at New York November 12, 1969, "(t)here were two large holes below the waterline in the cargo tanks, and one hole would have accomodated a large truck, and yet the voyage was termed a resounding success". H. of C. Deb. 5973, (April 16, 1970), emphasis added.

The Public Relations manager for the Manhattan project, Mr. Beathard, admitted that "the portion of the hull where the tanks were located was not designed to withstand the impact of ice". Quoted in Maud Gagné, "The Legal Status of the Waters met by the Manhattan during her voyage through the Arctic", Les Cahiers de Droit, XI, (1970), 70.

78Stanley Haas, quoted in Keating, 391. Pharand correctly reminds that "...such a possibility had not been guarded against and that similar accidents are bound to occur in the eventuality of tanker traffic developing". The Law of the Sea of the Arctic, 211.

79Reported by Michael Galway, "The Legacy of the Manhattan", Sea Frontiers, XVIII, no. 5, (Sept./Oct. 1972), 293-297. The Hudson crossed the Arctic in the fall of 1970.

80Carnahan, 637.

81Morin, 215. In a letter addressed to Humble by Don Jamieson, Minister of Transport, Canada served notice that it reserved the right to inspect the vessel at any time, that a Canadian icebreaker would accompany the tanker and that an insurance bond of 6.5 million dollars was to be posted prior to the voyage. The conditions were accepted by Humble. See Ministère des Transports nouvelles, no. 14-70 (26 mars, 1970), cited by Morin, 215. Fleming, 6,

81(Cont'd.)

reports that the Manhattan "was inspected on behalf of the Canadian government and met the standard". See also Appendix, H. of C. Deb. 8156, (March 16, 1970), cited by Green, "Canada and Arctic Sovereignty", 740. Despite these precautions, the Manhattan's hull was once again punctured by ice, this time in the stern section. This second accident lends credence to Moira Dunbar's admonition that one ought to be "concerned less with the ice-breaking power of the ship than with the ship-breaking power of the ice". Environment and Good Sense (Montreal: McGill-Queen's University Press, 1971).

82Cohen, 67-68. According to Pharand, The Law of the Sea of the Arctic, 212, these submarines would be 900 feet long, with a beam of 140 feet and a hull depth of 85 feet.

83Bilder, "New Strasses", 4, footnote 8. See also Maxwell, 40-45.

84Quoted by Ray Perrault, H. of C. Deb. 5973, (April 16, 1970). See Terence Armstrong, "International Transport Routes in the Arctic", Polar Record, XVI, no. 102, (1972), 375-382.

85Ray Perrault, H. of C. Deb. 5973, (April 16, 1970). See Carnahan, 637, for a note on new icebreaker technology. See also the evidence before the Standing Committee on Indian Affairs and Northern Development, February 11, 18, 25, March 4, April 1, 20, 29 (1971), resulting in a "Report to the House", no. 25, (June 17, 1971). The Report advised the Government to "proceed in the expectation that Arctic development will make construction of a Polar icebreaker necessary...", despite the fact that "the capability of foreign ships to operate in our Arctic would not necessarily constitute a threat to Canadian sovereignty", p. 5. The purpose of a year-round icebreaker would be to "protect the Arctic against intolerable ecological damage, to assist in the economic development of the North and possibly to maintain Canadian sovereignty in the North". pp. 3-4.

Three icebreakers had been planned, one authorised, but that one has now been shelved, because of exorbitant bids, owing in part to the price of steel. Instead, the Ministry of Transport is now examining a proposal whereby two, of 15,000 planned horsepower, would be built for Gulf and Arctic use, but not yearround. Plans are in the formative

85(Cont'd.)

stage and a submission to Treasury Board for approval in principle is expected in the near future. Meanwhile, another plan is afoot for a huge, powerful breaker for yearround Arctic use, making it the most advanced in the hemisphere.

The most modern, powerful design in the world presently is the 80,000 horsepower Arctica class Soviet fleet, using turbo-nuclear generation, twice the power of the Lenin, which is believed to be equipped now with two prototypes of the Arctica plant instead of its original three atomic, turbo-electrical units. The Lenin had mysteriously been out of service for almost three years, and there were rumours of ghastly foulups resulting in radiation burns to crew.

In the United States, the 78,000 horsepower, conventionally powered Polar Star is presently under construction and is scheduled to begin service for the Coast Guard later this year, according to Armstrong, 377. The vessel will actually be smaller than the St. Laurent, and since normal horsepower output will only be around 25-30,000, she isn't expected to navigate yearround past Cornwallis Island.

86Chrétien, H. of C. Deb. 5938, (April 16, 1970).

87Bilder, "New Stresses", 5. Also Beesley, 4: "The unique environmental characteristics of the Arctic, with its minute rate of decomposition, its relatively low restorative capacity, and the hazards it presents for navigation, all make it particularly susceptible to pollution..."

An environmental biologist, Dr. Richard Warner, warns that "(t)he sinking - or even serious damaging - of but one large tanker in these waters could have catastrophic and longterm effects on the arctic coastal environment."

Environmental Effects of Oil Pollution in Canada: An Evaluation of Problems and Research Needs. A Brief Prepared for the Canadian Wildlife Service, (Aug. 14, 1969), 15.

88For example, Trudeau, "Address to the Annual Meeting of the Canadian Press", 1-2: "Ce pétrole s'infiltrerait immédiatement sous une couche de glace de plusieurs pieds d'épaisseur".

89David P. Hault, "Marine Pollution: Concentrating on the Effects of Hydrocarbons in Sea Water", quoted in Pharand, Law of the Sea of the Arctic, 209-210.

⁹⁰See Marine Science Affairs, Annual Report of the President to the Congress on Marine Resources and Engineering Development. (April, 1970), cited in Pharand, The Law of the Sea of the Arctic, 209.

⁹¹Pharand, The Law of the Sea of the Arctic, 209.

⁹²A.D. Hunt, Acting Assistant Deputy Minister, Northern Development, Department of Indian Affairs and Northern Development, discounts the suggestion that recovery of oil is aided by the cold which congeals it; in his opinion, "most crude oil pours or runs fairly easily at the freezing point". I.A. & N.D., no. 15, (April 30, 1970), 13.

⁹³Warner, 7-8. Also Trudeau, "Address to the Annual Meeting of the Canadian Press", 3:
"Etant donné que le taux de décomposition des hydrocarbures dans les régions glaciales est très faible, la présence de pétrole doit y être considérée comme permanente."

Neuman as well, although he strongly criticises the legislation, is compelled to admit that there is

"...little doubt that the Arctic ecology is fragile, and that the slow rate of hydrocarbon degradation in frigid waters threatens slow or impossible clean-up and potentially permanent damage", p. 360.

Carnahan, 636, also relays the information that "hydrocarbon breakdown in the Arctic is many times slower than in normal climates". Professor Gerald Morris of the University of Toronto puts the longevity of spilled oil there at as much as 50 years. American Society of International Law, Proceedings, LXIV, (1970), 52.

A Canadian scientist, E.C. Chen, has determined that "(t)he rate of aging for spilled oil is extremely slow". Arctic Winter Oil Spill Test, United States Coast Guard, Technical Bulletin No. 68, Inland Waters Branch, Department of the Environment (Can.), 1972, p. 10.

⁹⁴Wilkes, "Due Process", 509.

⁹⁵Pharand, The Law of the Sea of the Arctic, 209.

⁹⁶Taking note of the "serious lack of knowledge, worldwide, as to the destructive effects of hydrocarbons and particularly as to the effect of hydrocarbon pollution

⁹⁶(Cont'd.)

in Arctic Waters", The Report to the House on Dec. 16, 1969, pp. 8-9, strongly urged the Government to immediately undertake research into the problems. Dr. Richard Warner's brief in August of 1969, p. 111, recommended, among other things, "instigation of a research program into the biological effects of oils in arctic and subarctic waters".

⁹⁷Moirra Dunbar, Environment and Good Sense (Montreal: McGill-Queen's University Press, 1971).

⁹⁸The John A. Norberg was loaded with 470,000 gallons of bulk oil.

⁹⁹According to "Report to the House", (December 16, 1969), 8.

¹⁰⁰René O. Ramseier, "Oil Spill at Deception Bay, Hudson Strait", The Arctic Circular, XXI, no. 1, (Feb./March 1971), 26. Around the same time, an Imperial Oil gas find at King Christian Island blew out of control for 14 months, and "...reminded the industry and the public what havoc would have been created if oil had gushed out of that well for fourteen months". Maxwell, 22.

See Warner, Environmental Effect, for a summary of the numerous pollution incidents, including some "extremely destructive" ones, which have occurred at oil drilling locations in Cook Inlet. Warner believes that the poor record "is in part the result of inadequate controls, in part the result of attempting to exploit oil resources in a difficult and poorly understood environment." p. 14.

¹⁰¹M.J.A. Butler and B. Berkes, Biological Aspects of Oil Pollution in the Marine Environment, 1972. A Review. (Montreal: McGill University Sciences Centre) Manuscript no. 22, p. 77.

¹⁰²Steve Hume, "Oil, environment controversy simmers in Arctic", Montreal Gazette, April 17, 1974, p. 16.

¹⁰³Lydia Dotto, "Scientists spill oil, test effects on ice", Globe and Mail (May 1, 1974), p. 8.

¹⁰⁴See J.L. Glaesser and G.P. Vance, A Study of the Behavior of Oil Spills in the Arctic (Springfield, Virginia: National Technical Information Service, 1971).

¹⁰⁵See Chen.

¹⁰⁶Using Liberian registry as a 'flag of convenience', the Arrow was, according to Wilkes, "Due Process", 32-33, owned by a "filing cabinet" in Monte Carlo, on long term charter to a U.S. company incorporated in the Bahamas, and on a charter to a Canadian company. Morin traces the same trail. In the House, anger over the spill resulted at one point in the vessel being termed "a rotten old tub of Aristotle Onassis". H. of C. Deb. 5963, (April 16, 1970). The Monte Carlo firm Olympic Maritime S.A. is thought to be the shipping arm of Onassis Group of Companies.

CHAPTER IV

THE RESORT TO UNILATERAL ACTION

It was, then, against the backdrop of the following amalgam of events and circumstances

- nationalist sentiment
- doubt as to effective Canadian control over Arctic waters
- proliferation of maritime oil spills
- recognition of the delicacy of the Arctic ecosystem
- prodding by the Standing Committee on Indian Affairs and Northern Development and other MPs, including Liberals
- the discovery of oil and minerals in the Arctic
- the voyage of the Manhattan and prospects for maritime transportation in the Arctic

that the Government decided to take action, part of which included the Arctic Waters Pollution Prevention Act. Why was that action initiated unilaterally? There are three main interwoven considerations which serve to reveal the answer to this important question:

- 1) there existed in Canada, in 1970, a lack of faith in the capacity of international organs to act appropriately and expeditiously to preserve and protect coastal state interests
- 2) there was widespread feeling amongst Government officials that there existed an overwhelming bias in maritime law in favor of shipping interests
- 3) the Canadian experience at international conferences relating to law of the sea had been one of great frustration and failure to obtain satisfactory agreements.

In the words of the Secretary of State for External Affairs,

...it is precisely this long experience with multilateral and bilateral approaches which convinces us that immediate action by Canada is required for protection of the Arctic environment.

We know only too well that a situation requiring urgent action cannot be met by the slow and difficult process of negotiating international agreements.¹

And, as the Canadian Note to the United States flatly stated:

...(T)he Canadian Government is not prepared to await the gradual development of international law, either by other states through their practice nor through the possible development of rules of law through multilateral treaties.²

In essence, the Canadian position was that "international solutions take too long for unilateral action to await the conclusion of appropriate multilateral dispensations".³

Canada's impatience with an international community that "moves slowly in the creation of new law and the construction of new apparatus" was coupled with her conviction that eventually a "combination of an international regime, and the exercise by the Canadian Government of its own authority in the Canadian Arctic",⁴ would serve everybody's interests; and while Canada stands ready

...at any time to co-operate with the world community in the development of a regime for the prevention of pollution and the protection of the environment,⁵

apparently she is unwilling to "abdicate" her own responsibility concerning these questions,⁶ or to participate in any deliberations which would "internationalise" Canadian waters.⁷

In short,

...the Canadian Government has stressed its general desire to encourage consultation and negotiation under suitable terms of reference with other governments affecting the protection of the marine environment adjacent to Canadian waters.⁸

Unilateral action reflected the immediacy of the threat, but Canada "immediately afterwards began to negotiate multilaterally".⁹

Gotlieb and Dalfen suggest that Canada's resort to "difficult and innovative decisions" reflects a priority emphasis on 'the protection of Canada', which includes ice, land, water, air and other resources as being subjected to the dangers brought on by new technology;¹⁰ the overall policy, moreover, reveals "a continued readiness to pursue an international solution in the first instance".¹¹

Not only was the Arctic Waters Act regarded as a response to immediate needs; it was seriously viewed as a stimulus to the development of international law on maritime pollution, as evidenced in the following selection of public pronouncements:

Canada...has decided to lead the way and to show by example what can and should be done.¹²

I firmly believe that by introducing and passing these bills we shall be developing international law relating to pollution.¹³

The bill we have introduced should be regarded as a stepping stone toward the elaboration of an international legal order which will protect and preserve this planet earth for the better use and greater enjoyment of mankind.¹⁴

...the Canadian government decided to take unilateral action in the expectation that its proposed legislation would meet critical national needs in the Arctic and at the same time galvanize the international community into a realistic study of the dangers and problems involved.¹⁵

If necessary, we must offer leadership to the world and withstand the cries of complaining vested interests.¹⁶

One need not wholeheartedly support Canada's unilateral approach to appreciate her view that, in matters pertaining to pollution,

...such law as does exist...is largely based on the principle of freedom of navigation, and is designed to protect the interests of states directly or indirectly involved with the maritime carriage of oil and other hazardous cargoes.¹⁷

The law of the sea has been characterised by laissez-faire attitudes which heavily favor shippers and shipping states, to the neglect of coastal states,¹⁸ the interests of the major maritime powers, or 'flag states',

...are preponderantly global rather than coastal. The system of law they have developed seeks to restrict the assertion of coastal authority, both quantitatively and qualitatively in order to maintain an essentially laissez-faire regime conducive to the operation of their great navies and merchant and fishing fleets.¹⁹

The fact that conventional law of the sea tends to be 'shipping state law'²⁰ does in no way reflect on its international legitimacy: "(t)he historic rationale for maritime law has been to reconcile the rights of people in the industry",²¹ for example in collisions between ships and the resultant claims of the owners of the vessels as well as the cargo

owners and insurance companies; and this preoccupation has been quite understandable as well as being legitimate.

Unfortunately, modern technology has rendered the transportation of cargoes of oil potentially very hazardous, and yet "we are stuck with the law as it has developed in the past centuries, and the centuries before when in the era of steamships and sailing ships, there was no danger of pollution..."²² While shipping states are "potential perpetrators of serious pollution threatening coastal states as well as the 'commonage' of the seas", they also "have the votes at conferences and the principle of unanimity to resist comprehensive regulation".²³

The facts that pollution transcends national boundaries, that no substantial principles of international law had been established concerning this problem, and that existing agreements had not had rapid success in correcting or preventing pollution, had been recognised in 1968,²⁴ following upon the wreck of the Torrey Canyon, as well as the need for a "permanent international organisation with supervision over all aspects of international maritime trade and transport".²⁵ Needless to say, such a body still does not exist.

The 1969 Brussels Conference of the Intergovernmental Maritime Consultative Organization²⁶ proved to be an exercise in frustration for the Canadian delegation. The conference

produced two conventions: the first, the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,²⁷ the so-called "public law" convention, empowers states to

...take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty, which may reasonably be expected to result in major harmful consequences.²⁸

The second, the Convention on Civil Liability for Oil Pollution Damage,²⁹ the so-called "private law" convention, "imposes strict liability on shipowners, but there is a ceiling on liability in the absence of fault".³⁰ Canada abstained on the convention concerning intervention, and cast the sole negative vote to the "private law" convention.³¹ The conventions are for the most part in line with the position put forward by the United States at the Conference,³² and they represent somewhat of a compromise between powerful shipping lobbies and coastal interests; but since most nations attending the Conference had a major interest in shipping, the balance remains in their favour.

Although the maritime powers are primarily concerned with strategic and commercial considerations, they too have, to some extent, come to appreciate the

...argument for protection of special coastal state interests, particularly coastal fisheries and environmental interests. What is more, the maritime powers

have been sufficiently sensitized to the voting strength of developing nations to understand the necessity of satisfying their needs as a prerequisite to reaching international agreement on new jurisdictional limits.³³

Still, the compromises and advances of the 1969 Brussels conventions were not sufficient to quell Canada's immediate concerns.³⁴ Much of the "public law" convention is merely declaratory of existing practice and the two conventions are "likely neither to reduce substantially the number of oil spills, or dramatically mitigate the damage resulting from them, nor will they fully compensate in all cases the coastal victims of such incidents",³⁵ and thus for Canada, "the results of the Brussels conference were disappointing and did not strike a proper balance between the interests of flag states in unfettered freedom of navigation and the fundamental interests of coastal states in the protection of their shores".³⁶ G.W. Stead states that it was Canada's

clear impression that the delegates of most other countries attended that conference merely to clarify the law as it effected ship owners, whereas we went there to protect the taxpayers, the innocent bystanders and the rights of coastal states. So this bill (the AWPPA) is really an outgrowth of that different approach.³⁷

Essentially, Canada's rejection of the "public law" convention stems from its 'remedial', 'post facto' rather than 'preventive' thrust.³⁸ Moreover, both conventions are, like all treaties, "enforceable only as between contracting parties and against their own nationals in many important

respects".³⁹

Canada's bewilderment with the logic of international provisions for intervention in the case of maritime casualty threatening pollution has been expressed by Mr. Sharp:

I must say in this connection that I find it anomalous that certain countries can accept the right of a coastal state to sink a foreign ship on the high seas when a marine accident threatens pollution, but at the same time assert that coastal states do not have the right to prevent such an accident by turning away such a ship from areas off its coasts, or by imposing certain safety standards or preconditions for entry into these areas.⁴⁰

Though Canada argued forcefully against the "shallowness and limited utility of this approach",⁴¹ Canadian arguments and "strenuous efforts"⁴² failed to carry the day,⁴³ and the outcome of the Conference confirmed Canadian fears that

antipollution via international law, either by the various states through their practice or through the possible development of rules of law by means of multilateral treaties, would not be forthcoming in the immediate future.⁴⁴

In 1970 it appeared that Canadian proposals for what amounts to a "victim-oriented"⁴⁵ law to protect the marine environment would clearly not be implemented within the next few years, and were said to have been regarded as "almost heretical" by those at Brussels who displayed "excessive caution, conservatism and rigid pre-occupation with the old concept of absolutely unqualified freedom of the seas".⁴⁶

Several scholars have noted the conventions' novel, progressive aspects, including legal recognition of a coastal

state's rights to protect itself through unilateral action,⁴⁷
but progress was deemed too slow by Canada:

...who can suggest that in circumstances such as these, when we face the prospect of oil tanker shipments through the Northwest Passage, this country can sit back any longer and wait for international agreement?

How long do we have to wait, and how hard do we have to try to get it?

We tried in 1958. We tried last fall at the IMCO meeting in Brussels.⁴⁸

In keeping with her long record of international co-operation, Canada had made serious efforts to conclude viable international agreements, and was "reluctant to abandon the possibility of achieving a constructive international consensus",⁴⁹ but given

the intensity of the physical threat to its territorial well-being, and the inadequacy and unlikelihood of international responses to such a threat, Canada turned to its domestic institutions for the appropriate means of dealing with it.⁵⁰

Her experience in international fora would appear to "amply justify a belief that international solutions take too long for unilateral action to await the conclusion of appropriate multilateral dispensations".⁵¹ And while it is unfair to brand the Canadian posture as 'isolationist', it is reassuring to find that powers have been exercised with "restraint and realism", not to mention abundant tact.⁵²

Finally, in order to 'round out' the environment in which the Arctic legislation was brought in, it is essential that one appreciate the 'new' foreign policy posture of

Canada, one which surfaced and was adopted in the late sixties.

There has been considerable debate over the degree to which the Trudeau Government has revamped traditional Canadian approaches to international affairs. Specifically, the argument has revolved around the thorough review of Canadian foreign policy ordered by Prime Minister Trudeau in 1968, which resulted in the 1970 publication of Foreign Policy for Canadians, and the extent to which Canadian behavior at the international level can be said to have experienced dramatic shifts.⁵³

Did the review result in substantive, or merely stylistic revisions in foreign policy? Can the Arctic Waters Pollution Prevention Act be regarded as a prime example of novel and bold Canadian initiative, bearing an identifiable Trudeau stamp? Opinion varies on both these questions. Allan Gotlieb talks of a "notable shift in emphasis", with a "markedly heightened emphasis on Canadian interests", which includes a new willingness to "pursue these interests by means formerly considered out of bounds",⁵⁴ there has been a "dual Canadian approach of extending national jurisdiction unilaterally as well as working towards heightened international responsibility".⁵⁵

While Gotlieb notices a 'qualitative difference of behavior' over the last six years, Alan Beesley feels that

continuity of policy has for the most part been adhered to, whereas the 'rhetoric' and 'style' have been altered.⁵⁶ Nevertheless, he concedes that "perhaps there has been a certain shift",⁵⁷ although it is probably "more as a shift of emphasis rather than a turn around in a new direction..."⁵⁸

Maxwell Cohen believes that it would be "somewhat of a distortion of perspective to say that we had an activist foreign policy that was internationalist-oriented until about 1968, when we suddenly turned a corner and decided to take our national interests more seriously, and then go on to say we must have a foreign policy projected in the national interest".⁵⁹ More particularly, Cohen rejects Gotlieb's thesis of a 'new Canada', reflected in part in our policies regarding ocean space, as lacking a proper sense of historical perspective in that "it gives too much credit to the short recent record and not enough to the historical continuities that are involved".⁶⁰

Although one appreciates the semantic twist of Cohen's statement that recent Canadian policies on issues such as environmental problems, "...far from being an expression of the national interest, have suddenly become much more sophisticated at home in reflecting the international issues",⁶¹ one is inclined to side with Gotlieb's firm stand that Canadian willingness to take unilateral action and to reserve her position before the ICJ represented a different attitude

to that of the early sixties, when such options were deemed 'out of the question'.⁶²

If one grants to 'nationalistic sentiments' a fairly broad interpretation, it is accurate to state that

(i)n the spring of 1970, the confluence of genuine environmental concern and nationalistic sentiments appeared to produce an initiative quite in contrast to Canada's traditional conservative and internationalist approach to international law issues.⁶³

In view of the 100-mile pollution zone's continuing controverted position in international law (and thus, the confidentiality of Canadian Government memoranda), a more precise causal statement on the decision to legislate in the Arctic is elusive.

FOOTNOTES-CHAPTER IV

¹Mitchell Sharp, H. of C. Deb. 5950, (April 16, 1970). Neuman, 358, bluntly states that the "assertion of international lack of concern or foot-dragging is simply not valid".

The Torrey Canyon disaster did evoke concern and action which resulted in the scheduling of the 1969 Brussels IMCO session. However, international agreement on special environments such as the Arctic would require lengthier deliberations, and there is reason to believe that many shipping nations lack the concern necessary to produce an agreement. This reluctance was amply demonstrated at the fall 1973 London IMCO session.

²Summary of Canadian Note, 611.

³Dellapenna, 397.

⁴Trudeau, "Address to the Annual Meeting of the Canadian Press", 3.

⁵Chrétien, H. of C. Deb. 5939, (April 16, 1970). See also his remarks on June 3, 1970 in H. of C. Deb. 7708.

⁶Summary of Canadian Note, 611.

⁷Ibid., 613.

⁸Macdonald, Morris and Johnston, 248.

⁹Beesley, E.A. & N.D., no. 24, (November 22, 1973), 25.

¹⁰Gotlieb and Dalfen, 238.

¹¹Ibid.

¹²Chrétien, H. of C. Deb. 5939, (April 16, 1970).

¹³Allmand, H. of C. Deb. 5997, (April 16, 1970).

¹⁴Sharp, H. of C. Deb. 5949, (April 16, 1970).

¹⁵Macdonald, Morris and Johnston, 248.

¹⁶Trudeau, "Address to the Annual Meeting of the Canadian Press", 1. Iceland has apparently applauded the unilateral initiative, and regards her own 50-mile fishing limit as a "creative contribution to the development of international maritime law". See Bilder, "The Anglo-Icelandic Fisheries Dispute", 119-20.

¹⁷Sharp, H. of C. Deb., 5951, (April 16, 1970). Two examples of scholars who reject Canada's unilateral move but accept the argument that the law of the sea does not reflect coastal state interests, thus making any attempts at regulating ocean pollution subject to strong resistance, are Bilder, "New Stresses", 31, and Louis Henkin, "Arctic Anti-Pollution: Does Canada Make or Break International Law?" American Journal of International Law, LXV, (1971), 32.

¹⁸In Trudeau's own words; "...the way international law exists now, it is definitely biased in favor of shipping in the high seas and in various parts of the globe". "Prime Minister's Remarks", 602. See also Allmand, H. of C. Deb., 5997, (April 17, 1970).

¹⁹This point is made by L.H.J. Legault, "The Freedom of the Seas: A Licence to Pollute?" University of Toronto Law Journal, XXI, (1971), 211. A similar point is made in the Summary of Canadian Note, 610. Legault mentions that all littoral countries have both flag and coastal interests, and that the weight attached to either one interest varies from time to time. p. 212.

²⁰See Beesley, I.A. & N.D., no. 15, (April 30, 1970), 8.

²¹G.W. Stead, I.A. & N.D., no. 15, (April 30, 1970), 16.

²²Trudeau, "Prime Minister's Remarks", 603.

²³Henkin, 132.

²⁴See Abel Wolman, "Pollution as an International Issue", Foreign Affairs, XLVII, no. 1, (1968), 164-175.

²⁵Joseph C. Sweeney, "Oil Pollution of the Oceans", Fordham Law Review, XXXVII, (December, 1968), 208.

²⁶IMCO was created in 1948 by the UN Maritime Conference in Geneva, but its first Assembly was only convened on January 6, 1959 in London. It is a specialised agency of the United Nations, headquartered in London, with an Assembly of Member States, an 18 member Council of nations acting as governing body between biennial Assembly sessions and a 16 nation Maritime Safety Committee, the technical arm of IMCO. There are also a number of sub-committees of non-permanent character, such as the Legal Committee, initiated as a result of the Torrey Canyon disaster in 1967, and responsible for the drafting of the Conventions presented at Brussels in 1969.

²⁷Opened for signature November 29, 1969, reprinted in American Journal of International Law, LXIV, (1970), 471. For a summary of the Convention, see Pharand, "Oil Pollution Control in the Canadian Arctic", 51-56, and Pharand, Law of the Sea of the Arctic, 217-224; Bilder, "New Stresses", 17, footnotes 66, 67; L. Green, "International Law and Canada's Anti-Pollution Legislation", Oregon Law Review, L, (1971), 470-76.

²⁸Kish, 151, glibly observes that this "...is how the international regime of the high seas harmonizes the conflicting interests of coastal safety and flag jurisdiction".

²⁹Opened for signature November 29, 1969, reprinted in American Journal of International Law, LXIV, (1970), 481. For a summary of the Convention, see supra, footnote 27.

³⁰Green, "International Law and Canada's Anti-Pollution Legislation", 474; the maximum is 2,000 gold francs per ton, to a maximum of 210,000,000 gold francs per tanker.

³¹The vote was 34: 1 with 10 abstentions.

³²Except that the United States, according to Delapenna, 396, favoured absolute liability on polluting ships.

³³Neuman, 351.

³⁴Legault, 216, concedes that certain aspects of the conventions represent "some forward movement" in development of maritime law, as does Sharp, H. of C. Deb. 5951, (April 16, 1970). For a point-by-point comparison of the provisions of the Convention with Canadian proposals, see Legault, 214-15.

³⁵Neuman, 353.

³⁶Legault, 215, Mitchell Sharp cited the same lack of balance as reason for Canada's voting pattern on the two conventions. H. of C. Deb. 5951, (April 16, 1970).

³⁷Stead, I.A. & N.D., no. 15, (April 30, 1970), 19.

³⁸See Sharp, H. of C. Deb. 5951, (April 16, 1970); Bilder, "New Stresses", 17; Dellapenna, 396. Even with its 'remedial' emphasis, action must be preceded by consultations with other states, shipping interests and independent experts supplied by IMCO, according to Forget, 25.

³⁹Legault, 216.

⁴⁰Sharp, H. of C. Deb. 5951, (April 16, 1970).

⁴¹Klotz, 709.

⁴²Summary of Canadian Note, 610. Daniel Wilkes, "Effects of Key Provisions of the Canadian Arctic Waters Anti-Pollution Package", Polar Record, XV, no. 97, (1971), 540, also contends that Canada "worked hard" at Brussels, but received "sharp rebuffs" from other participants.

⁴³Canada, however, was successful in securing the following:

- a) extension of the Civil Liability Convention to cover "major" damage and not just "catastrophic" consequences
- b) the defeat of an attempt to limit the rights of coastal states in the territorial sea
- c) limitation of coastal state liability for damage resulting from protective measures.

See Legault, 214-15, and Green, "International Law and Canada's Oil Pollution Legislation", 472. A proposal to include other pollutants failed to receive necessary support.

⁴⁴Gold, 28.

⁴⁵Sharp, H. of C. Deb. 5951, (April 16, 1970).

⁴⁶Gold, 27.

⁴⁷Including Pharand, "Oil Pollution Control in the Canadian Arctic", 54; Neuman, 353; Forget, 25.

⁴⁸St. Pierre, H. of C. Deb. 5969, (April 16, 1970).

⁴⁹Macdonald, Morris, and Johnston, 248.

⁵⁰Gotlieb and Dalfen, 212-13.

⁵¹Dellapenna, 397.

⁵²This 'hope and prediction' came from P.N. Swan, "International and National approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem", Oregon Law Review, L (Spring, 1971), 586, who in the same breath labels the Canadian position 'isolationist'.

⁵³The most comprehensive treatment of the 1968-1970 foreign policy review is Bruce Thordarson, Trudeau and Foreign Policy: A Study in Decision-Making (London: Oxford University Press, 1972).

⁵⁴Gotlieb, in Canadian Council on International Law: Proceedings of the First Annual Conference, held at the University of Ottawa, Canada, October 13-14, 1972. pp. 90-91.

⁵⁵Ibid., 84.

⁵⁶Beesley, ibid., 94.

⁵⁷Ibid., 127.

⁵⁸Ibid., 126.

⁵⁹Cohen, ibid., 120.

⁶⁰Ibid., 122. In support of this thesis one may mention the unilateral Canadian pronouncement of a 9-mile fishing zone contiguous to the territorial sea; An Act Respecting the Territorial Sea and Fishing Zones of Canada, 13 Eliz. II, Chapter 22, July 16, 1964.

⁶¹Ibid., 123.

⁶²Gotlieb, ibid., 124-25.

⁶³William V. O'Brien and Armando C. Chapelli, "The Law of the Sea in the 'Canadian' Arctic: The Pattern of Controversy (Part I)", McGill Law Journal, XIX, no. 3 (1973), 323.

PART II
CHAPTER I

THE LEGAL DEFENCE OF THE ACT

In its legal defence of the Arctic Waters Pollution Prevention Act, the Canadian Government has attempted to cover all the bases; while admitting that the "pollution legislation is without question at the outer limits of international law",¹ the Canadian argument is that "even if viewed from the perspective of the traditional law of the sea with all its deficiencies in terms of environmental preservation, the legislation finds support in both principle and practice".² Apparently it was felt that there existed in 1970 a "general basis in customary international law for the assertion of pollution control jurisdiction by the coastal state beyond the limits of the territorial sea (or the 12 mile 'contiguous zone' permitted under the relevant 1958 Geneva Convention)",³ though admittedly few, if any states actually exercised such jurisdiction. In short, the Canadian view amounted to a belief that "the right of self-defence and self-preservation may extend to reasonable extraterritorial action for purposes of environmental protection".⁴

The prime Canadian line of defence to United States' charges that "international law provides no basis for the proposed unilateral extensions of jurisdictions on the high seas",⁵ was to make forceful tu quoque counterclaims by

invoking numerous alleged American 'incursions' upon the principle of freedom of the high seas.

Alan Beesley cited the 1968 American threat to sink a Liberian vessel off its coast as an exemplification of the principle of 'defence of one's security', although he admitted that such action by a coastal state was permissible under the 1954 IMCO Convention.⁶

Beesley also made reference to the U.S. Water Quality Improvement Act of 1970, in which the United States asserts exclusive pollution control jurisdiction up to twelve miles from shore. The U.S. Act, however, is substantially different from the Canadian Arctic legislation, for as Beesley admits, the latter "provides not only for prohibitions, penalties and remedial measures but also for extensive preventive measures (and particularly denial of access). The respective areas of application of the two pieces of legislation are also of course quite different".⁷

In instituting Air Defense Identification Zones, the United States "established a contiguous zone well beyond twelve miles from its shore".⁸ The Canadian declaration that it "reserves to itself the same rights as the United States has asserted to determine for itself how best to protect its vital interests, including in particular its national security",⁹ is likely a veiled reference to these zones which extend 300 miles from the American coast, and

180 in the Canadian case, and within which foreign aircraft are required to identify themselves, file flight plans and make periodic reports.¹⁰

The Summary of the Canadian Note claimed that the 1935 U.S. Anti-Smuggling Act, which extended by fifty miles the potential jurisdictional limit within which a 1790 law had authorised intervention for customs purposes, was "in clear contradiction of applicable international law".¹¹

In 1962 the American Government initiated a quarantine of Russian ships transporting missile systems to Cuba via the high seas, and this instance of intervention has been mentioned by opposition members in Parliament¹² as well as a Canadian professor of international law.¹³ Ostensibly, the Canadian Government considers this instance of 'self-defence' to be included under the banner of 'national security' mentioned in the Summary of the Canadian Note.

The Arctic legislation, constituting a "lawful extension of a limited form of jurisdiction to meet particular dangers", was juxtaposed with the American appropriation of areas of the high seas for perilous nuclear tests - for example, in the 50-mile radius of Anchitka Island during the October 1969 blast.¹⁴

In 1966 the United States established a nine-mile fishing zone contiguous to her territorial sea,¹⁵ despite her protests two years earlier that such unilateral measures

as Canada had established were illegal.

Finally, Canada cited the Truman Proclamation of 1945, in which the United States claimed jurisdiction over the continental shelf, as an important instance in which customary international law is developed out of state practice.¹⁷

In spite of the Canadian Government's rejection of the American view of pollution control zones that "(i)nternational law provides no basis for these proposed unilateral extensions of jurisdictions on the high seas",¹⁸ and Canada's counterclaim that "(f)or many years, large numbers of states have asserted various forms of limited jurisdiction beyond their territorial sea over marine areas adjacent to their coasts",¹⁹ Canada pre-empted any attempt to have the legislation challenged in the ICJ by rescinding the Court's competence to deal with, among other things,

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or contamination of the marine environment in marine areas adjacent to the coast of Canada.²⁰

Criticism of Canadian action can be separated into three categories:

- 1 - the denial of the ICJ's competence
- 2 - the unilateral aspect of the Act
- 3 - the invocation of the concept of self-defence.

The proviso concerning the World Court has evoked strong reactions, mainly negative, since 1970, and it sheds insight into how Canada viewed the legislation in a legal sense.

Claiming that her new reservation "does not in any way reflect lack of confidence in the court but takes into account the limitations within which the court must operate and the deficiencies of the law which it must interpret and apply",²¹ the Canadian Government expressed anxiety that "the World Court would find itself obliged to find that coastal states cannot take steps to prevent pollution",²² and that "such a legalistic decision would set back immeasurably the development of law in this critical area".²³

In the words of Mitchell Sharp, Canada is

not prepared to litigate with other states on vital issues concerning which the law is either inadequate, nonexistent or irrelevant to the kind of situation Canada faces, as in the case of the Arctic. It is no service to the court or to the development of international law to attempt to resolve by adjudication questions on which the law does not provide any firm basis for decision.²⁴

Prime Minister Trudeau reaffirmed in the House of Commons on April 8, 1970 that "Canada strongly supports the rule of law in international affairs".²⁵ Outside the House, he stated that with respect to environmental pollution, "there is no law so we can't be taken to the courts",²⁶ thereby circumventing or at least deflecting strong charges of hypocrisy in the House.²⁷

Sharp's statement is misleading because a) it hedges as to which situation - inadequacy, nonexistence, or irrelevancy - actually characterises present international pollution law, and b) in stating that "the law does not provide a firm basis for decision", it ignores the fact that when convention and precedent are lacking, courts fall back upon general principles.

Trudeau's statement that 'there are no laws' is correct if the implication is that there are neither conventions nor well established customary law relevant to the specific point. As such, it would not contradict Beesley's somewhat vague assertion that "the legislation finds support in both principle and practice".²⁸

One of Canada's arguments for restricting the ICJ's competence was that a negative ruling would serve to set back the development of international law; however, a much more plausible explanation has been provided by Alan Beesley:

Why did we do what we did in the Arctic? Well I think it's pretty obvious, someone said we weren't sure that we would win. I think that's a pretty good answer.²⁹

With respect to fisheries closing lines, the effect was to simplify subsequent bilateral negotiations, for "it would have been quite a different thing negotiating with the knowledge that tomorrow you could be hauled into court, (rather than) negotiating strictly on the basis of two countries trying to work out an accommodation with no

litigation in the offing".³⁰

A number of scholars have branded the Canadian reservation irresponsible and unnecessary, Pharand opines that "the exclusion of the Court's jurisdiction was rather unfortunate",³¹ since the reciprocity clause could have been invoked against the United States' Connally reservation, under which the United States reserved acceptance concerning "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America".³²

Green, however, points out that had Canada resorted to a reservation of the Connally type, "she might well have found herself in dispute with a country which had not made (such a reservation), and against which there would therefore have been no automatic defense".³³ Pharand makes the counter-point that

if the United States had used the subterfuge of having another state, let us say Japan, to challenge the Canadian legislation in the World Court, it is submitted the Canadian Government ought to have sufficient confidence in the legal basis of its legislation and in the World Court to be ready to stand behind it.³⁴

Green has insinuated that the Court is biased:

...without intending any disrespect to the Court, it must be recognized that the judges are human beings who frequently reflect their background, their environment, and their national prejudice, so there is every likelihood that maritime prejudices and the like might have played more of a role in the determination of a dispute than objective legal principles.³⁵

Bilder also figures the Canadians "apparently viewed the Court as having an inherently conservative and legalistic bias, and unlikely

to approach the matter creatively or with sufficient flexibility to take into account relatively new and emerging national interests such as concern with pollution.³⁶

Pharand, on the other hand, finds that confidence in the Court is warranted, as the Court "has shown sufficient readiness in the past to develop international law in maritime cases, particularly in the Anglo-Norwegian Fisheries Case", and that "by invoking existing legal concepts, Canada could have convinced the Court to enlarge their scope and extend their application to this new situation".³⁷

There is logic in Green's argument that the adoption of a Connally type reservation would have been

- a) contrary to present trends with regard to the jurisdiction of the Court
- b) opposed to Canada's own beliefs in the international rule of law and the value of judicial settlement
- and c) far wider than the situation required, allowing any country with whom Canada might find herself in dispute a loophole through which to escape any judicial control.³⁸

However, there is evidence that Green himself has revised his opinions since 1970, and that the Canadian Government, far from demonstrating a willingness to accept public criticism, actually regrets having restricted the Court's competence.³⁹

An official of the United States Department of State has castigated the Canadians for refusing to submit to international arbitration, for it "leaves other nations no mode of challenging the legislation other than by defying it".⁴⁰

Cohen sees a "moderately arguable case"⁴¹ for reserving jurisdiction with respect to Arctic pollution, claiming that the reservation is "understandable if not wholly defensible",⁴² since a hearing before the Court would probably only come after widespread international acceptance of the legislation had developed.

Morin suggests there is little reason to fear the judgment of the Court, and terms the Canadian attitude "déconcertante".⁴³ Charles Bourne finds fault with a unilateral claim which is followed by an adjustment of the Court's jurisdiction "in order to prevent anyone from looking at it".⁴⁴

Myres McDougal "wouldn't have been afraid to take (the Canadian) case to the International Court of Justice",⁴⁵ on the assumption that a case might be made that claims were reasonable from the net, long-term point of view. This optimism cheers Gotlieb, but his attitude remains unchanged: "If I were advising the government, I'd still tell them to stay out of the Court because I think that they would have lost".⁴⁶

Cundick feels that while Canada freed its claims from binding international evaluation,

it did not effect removal of the claims from the decision-making process. It merely removed decision one step back to the world community itself, which is itself an authoratative decision-maker. All that has been accomplished is that Canada's motives and objectives are under closer scrutiny and are subject to more severe criticism, which does little to enhance the claim.⁴⁷

There is considerable support for the position that while one can readily "sympathise with Canada's reasons for enacting this legislation, in international law the action of a country must be judged not merely by the objective sought by the action, but also by the precedent that is being established".⁴⁸ Bilder expresses the misgivings of many, including the United States Government:

...the precedents established by the Act are clearly capable of widespread abuse by other, perhaps less responsible states, with potentially harmful consequences for traditional principles of freedom of the seas.⁴⁹

Canada, of course, underlines what she regards as the 'ground-breaking' aspect of her environmental legislation, and the positive impact it is expected to have upon the development of international law. The United States fears that the Canadian precedent may spur other countries to assert rights to "exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law".⁵⁰

Henkin explains why the United States is 'championing international law' at a time when 'freedom of the seas' is threatened:

(Canada) could say that pollution is different, even unique, and it seems to blame the United States for not seizing those differences to deny the Canadian action as a precedent to Latin America. But how do you prove or persuade, say, poor Peru that its interests in fish are less entitled to protection 'for mankind' than rich Canada's concern for its Arctic ecology?⁵¹

The fear of 'creeping jurisdiction' or 'Craven's Law', which postulates that "whenever a state enjoys exclusive offshore rights for some purposes, it tends to acquire further exclusive offshore rights for other and perhaps all purposes, jeopardizing regional, international and community interests in the freedom of the seas", can, according to Goldie, not reasonably be applied to Canada's pollution control zones, unless the necessary restrictions of purpose are lost sight of:

But if those limitations of purpose are lost sight of, the fault does not lie with Canada's claim, but with those who fail to identify the points of necessary distinction and find in 'creeping jurisdiction' an excuse for their own ineptitude or pusillanimity.⁵²

Legault refers to the Arctic's "very special case in geographic, climatic, legal, historical and environmental terms",⁵³ to refute charges of precedent setting, while Jennings, in partial reference to Canada's environmental initiative, notes that "to some extent at least, 'creeping

'national jurisdiction' on a functional basis has been helping to bring about that elaboration of international sea law that modern problems of ordering require of it".⁵⁴

There is an understandable necessity for international standards and regulations for tanker transit, and generally speaking there is a danger of having conflicting, incompatible specifications promulgated by coastal states; however, it is difficult to see how the uniqueness of the Arctic predicament can be denied, and the immediate necessity for action not appreciated. As Bilder notes,

(i)n the final analysis, 'an assessment of Canada's actions may depend, in large part, upon the optimism or pessimism with which one views the international legal system and its capacity to respond promptly and effectively to new challenges.'⁵⁵

Moreover, a legal evaluation of the Canadian Arctic Waters Act is hampered, from the outset, for as Julius Stone has written,

...it must remain a constant source of perplexity to distinguish departures from existing rules of international law which are merely outrageous breaches, from those which manifest inchoate legal change. But this is a perplexity with which, regrettably, we must learn to live.⁵⁶

One should not cling to the concept of 'freedom of the seas' as if it were some birthright accorded sanctity over time. In essence, it is a political régime which has run its course, and is in the process of being replaced. Canada's legislation is part of that impetus, but it is a

precedent only for what it does - prevent pollution.

There is a divergence of opinion as to whether the use of the concept of 'self-defence' affords maximum support for the Arctic Waters Pollution Prevention Act. In his 1973 book, Pharand concluded that "the right of self-protection had gained sufficient recognition by 1970,⁵⁷ in both conventional and customary law, to justify Canada's anti-pollution legislation as a unilateral measure pending adequate international conventions".⁵⁸ For Bilder, "Canada's legal characterization of its action as being justified under principles of 'self-defence' is particularly troublesome and capable of introducing new uncertainties into this already murky area of international law".⁵⁹ Green finds no such 'murky area'; rather, he finds the Canadian measure to protect her security and her interests "in accordance with the traditional rules of international law".⁶⁰ More precisely, he finds that "the statutory provisions are in no way beyond what is permitted to a state by international law in exercise of its right of self-preservation".⁶¹

The attitude of the United States State Department was predictable - that the concept of self-defence is being "unduly stretched, because although Canada is very seriously affected by oil pollution in the Arctic, it is not a matter that would really affect Canada's national security".⁶²

Before launching into an explanation of the different shades of meaning between the concepts of 'self-help', 'self-defence', 'self-protection', and 'self-preservation', an analysis of the options available to Canada in the pursuit of her goal of a pollution free Arctic is in order. Such an examination, though having the advantage of hindsight, is crucial to any worthwhile legal evaluation, particularly when the special concept of self-defence is invoked.

What, if any, were the alternatives open to Canada, resolved as she was to prevent maritime disasters in the Arctic? Cohen would have preferred an assertion of the 'priority of concern' doctrine instead of the fixed 100-mile line, although he appreciates the fact that it "might not have done more than improve international credibility without improving the short-run needs for urgent management of a potential disaster situation".⁶³ But surely, if as Cohen implies, the threat could be averted at least equally well through a 'priority of concern' approach, and there existed no ulterior motives in pronouncing the Act, then the former would have been chosen.

Cohen speculates that assertion of this doctrine would have averted much of the ~~dispute~~ with the United States.⁶⁴ This may be so, but one cannot deduce this from the relatively harmonious manner in which the entire Manhattan venture was conducted; it was the owners of the American vessel who

voluntarily accepted Canadian requirements while the ship was being fitted in port, thus avoiding any conflagration over the American policy of not recognising "any exercise of coastal state jurisdiction over our vessels on the high seas".⁶⁵

The inclusion of exceptional provisions for naval vessels does indicate a Canadian desire to obviate direct confrontation, and diplomatic consultations and negotiations (bilateral and multilateral) conducted since the passing of the Act, attest to the sincerity of Canadian intentions in effecting workable, internationally sanctioned measures for Arctic navigation.

Still, Henkin's idea that Canada

...might have dealt with the passage of oil tankers ad hoc and by negotiation, as others have done in regard to nuclear vessels passing through their waters, or sought limited, general agreements with the United States and the few other states that have Arctic interests....⁶⁶

deserves consideration. Any bilateral negotiations would have to include the United States, and the prospects for reaching agreement in 1970 would have been slim, for as Dellapenna bluntly notes, "(t)he interests of the United States and Canada in the Arctic are fundamentally opposed".⁶⁷ Even now, United States recognition of the 12-mile territorial sea is predicated upon global acceptance of free passage through international straits. Dellapenna feels that since there has been almost a complete failure to avert pollution

by joint Canadian-United States efforts where they were co-operating to achieve the same goals, it is unlikely they can cooperatively avert pollution where they seek to achieve antagonistic goals.⁶⁸ Multilaterally, Canada had of course been actively seeking effective environmental agreements, but was stymied. Granted, Canada's reception of the American proposal for a conference of Arctic States was 'cool' to say the least, but the Americans themselves may have soon reconsidered: in any case, the matter was not pressed.⁶⁹

During Prime Minister Trudeau's visit to the Soviet Union in October 1972, Canada sought Soviet participation in international environmental deliberations vis-a-vis the Arctic, but received no encouragement. From 1970 Canada sought bilateral agreements; her 1970 legislation gave her something to fall back on in the event that these negotiations should fail.

An archipelagic approach which, owing to the lack of a general theory combining coastal and oceanic geographies, would not necessarily be accepted by the international community, would involve the drawing of straight baselines, but would still omit some areas of Beaufort Sea, Arctic Ocean and Baffin Bay where navigation will take place (though it is also true that very little transport will occur in future which doesn't at some point enter the Northwest Passage), and might well call into question the whole matter of Canadian

control over the Arctic, which is precisely the issue on which the Canadian Government has been attempting to avoid contestation.

What the Arctic Waters Pollution Prevention Act achieved was to focus attention on Canadian activity in the Arctic (thereby attempting to defuse widespread demands for a proclamation on Arctic sovereignty), placate the feelings of environmentalists justifiably anxious about dangers to the Arctic ecology, emphasise the independence of Canada and the boldness of Canadian foreign policy,⁷⁰ and encase the whole sweep of considerations in a geographic limit which, with its specific purpose, reflects both the functional, 'non-sovereign' dimension of the Act, and its conformity with existing maritime legislation, albeit for more restricted measures.

One thing is clear - when the Government was framing the legislation it had more in mind than just the prevention of pollution in the North. An almost direct linkage was drawn between the failure to attain adequate conventions at Brussels in November, 1969 and the decision to act unilaterally in the Arctic. Canada believed "there was cause to hope that the nations of the world might join together to attack the problem of oil pollution on a broader front and to adopt more effective measures for its prevention and control".⁷¹ To her dismay, however, Canada found the degree of progress

at the conference "seriously disappointing".⁷² But before the conference even began, Canada unequivocally announced its intention to go the unilateral route, presumably irrespective of what would happen at Brussels.⁷³ Also, at that conference, perhaps presaging her April 7, 1970 reservation with the ICJ, "Canada did not favor binding international arbitration of claims which alleged that preventive measures exceeded what was reasonably necessary".⁷⁴

Ultimately, Canada can be said to have deliberately advanced a novel approach to environmental problems as a spur to development of law in that field. Beyond that, it cannot be denied that certain other considerations carried weight and that the Act served the interests of Canadian nationalism, sovereignty and independence. Similar considerations are reflected in the chilled response to the American protest.

The motives were multiple, and the Arctic legislation may have been intended as a cause célèbre, the rallying point for a plethora of issues, but ultimately it has to stand or fall on its own merits. Although opportunism cannot be discounted, it is of little relevance when the consideration is whether or not the legislation meets international standards.

Given the length of time between initial public announcement of the impending legislation (October 23, 1969)

and its introduction to the House of Commons (April 8, 1970), it is somewhat baffling that a more elaborate public defence of the bill was not fashioned. Doubtless, prudence and diligence were expended in the drafting of a thorough refutation of American charges which appeared in the note of April 15, 1970, for Canadian officials would surely have anticipated the sharp American reaction early along, particularly since in private consultations the Americans had displayed disapproval. Such thoroughness and elaboration is conspicuously absent in the Canadian reference to the more general concept of 'self-defence', which is inappropriately applied. One hypothesis is that the vagueness was deliberate in order to avoid specific challenges to the legislation. If this 'moving target' theory is correct, the strategy backfired, for as several scholars have pointed out, the self-defence concept can best be described as constituting

...a reaction of one State, by means which are unlawful per se, against an unlawful armed attack perpetrated by another State - or other States - and threatening the first State's vital rights or interests,⁷⁵

whereas in a situation jeopardizing vital interests, or rights, but not through the medium of armed attack, the 'doctrine of necessity' may conditionally be applied.

Strictly speaking, the right of self-defence has "little relevance to the problem of safeguarding the state's economic rights".⁷⁶ The term 'economic aggression' does

indeed have its value, but it is synonymous more with the notion of 'self-preservation' than self-defence.

Moreover, self-defence carries with it the temporal restriction that requires a prior attack before any measure of a defensive character is permitted: Article 51 of the United Nations Charter eliminates the possibility of anticipatory self-defence, and if the Canadian legislation is to be considered preemptive, it must fit into this category. Also, as McDougal and Feliciano have observed, "customary prescription has always required a high degree of necessity - specifically, in the case of an anticipated attack, a high degree of imminence to support the lawfulness of intense responding coercion".⁷⁷

Caflisch sees acts of self-defence and acts based on necessity as subdivisions of the more general category of 'measures of self-preservation', admitting that all three concepts are still ill-defined, and that frequently no distinction is made between 'self-defence' and necessity.⁷⁸

However, there is a distinction between the various concepts. For instance, the 1968 and 1969 Vienna Conference on the Law of Treaties considered whether the use of counter-measures could be justified under a theory of self-defence, but this notion was apparently rejected with the "vigorous, competent opposition"⁷⁹ of the Canadian delegation. This does not imply that the term "economic aggression" is

meaningless - it simply means, as Bowett puts it, "it has little relevance in international law as a term descriptive of conduct justifying the victim state in resort to self-defence".⁸⁰

Van Panhuys uses 'necessity', 'self-protection', 'self-preservation' interchangeably⁸¹ while Utton rightly notes that Article 51 of the U.N. Charter is impertinent to the Arctic since it refers to "intentional, hostile acts".⁸² Likewise, Kelsen wrote in 1948 that the right of self-defence is "self-help against a specific violation of the law, against the illegal use of force, not against other violations of the law".⁸³

Neuman terms the argument based on self-defence "weak and dangerous" in that "(b)roadening the base for defensive action, as a matter of unilateral interpretation, raises obviously disturbing possibilities".⁸⁴ Utton replaces it with Bowett's more appropriate term 'self-protection', which right he claims is grounded in customary international law: "Its basis is found in the general practice of states rather than the exceptional right of self-defence".⁸⁵

Bowett makes another differentiation, a "pre-condition of delictual conduct", such as a violation of the substantive right of territorial integrity, "which distinguishes self-defence from the 'right' of self-preservation and the 'right'

of necessity".⁸⁶ He finds it doubtful that 'self-preservation' has any meaning as a legal concept - that its appeal lies in the realm of ideology rather than of law, and as such may be utilised to justify conduct which, though unlawful, is "yet excusable".⁸⁷ Goldie too finds that 'self-preservation' may only spuriously be considered a legal right, since it is only an instinct.⁸⁸

Pharand, recognising the "restrictive application of self-defence as a legal concept", employs that of self-protection, which 'right' "is at the basis of most of the cases where coastal states have extended their jurisdiction unilaterally over ships on the high seas within a zone contiguous to their coast".⁸⁹ It is this concept which the author prefers.

The principle of 'freedom of the seas' has never been absolute. For example, the right to take action against pirates, and the right of hot pursuit, while having somewhat of a peripheral relationship with contiguous claims, "involve a limitation on the complete freedom of the seas, and to this extent, attest to the fact that, for many years, the high seas have not been regarded as being beyond any judicial order".⁹⁰ Moreover, there is a strong obligation upon users of ocean space not to 'abuse rights'.

In cases where the state cannot await the arrival of a danger to its security within its own territorial

jurisdiction, but must take measures to prevent that danger from materializing while still outside its territorial jurisdiction, "the state may claim a measure of 'protective jurisdiction' and use force in the exercise of that jurisdiction beyond the limits of state territory".⁹¹

This right also exists on the high seas, for "(t)he principle of the freedom of the high seas cannot be of any greater sanctity than that of territorial integrity".⁹² And since the Canadian Government's claim is that "a serious threat to the environment represents a threat to its security",⁹³ and more specifically, Canada regards the passage of any ship giving rise to a danger of pollution as constituting a "threat to the security of the state",⁹⁴ it remains to substantiate these charges.

It is unfortunate that the Canadian Government chose to base its legal defence on the concept of self-defence, for it "gives a new, somewhat artificial meaning to self-defense in a context where it has been used to mean military threats".⁹⁵ At least one observer found the "basis asserted for this type of action is far more alarming than the claim itself".⁹⁶ It has also led to ridiculous, convoluted charges by an official of the United States Government that Canada "committed an aggression within the meaning of the United Nations Charter".⁹⁷ Still, as Bilder recently noted, "the claim that states may justify wide-ranging unilateral

actions to prevent environmental harm on the grounds of self-defense constitutes an extremely broad expansion of that doctrine..."⁹⁸

O'Brien and Chapelli hold that "it would seem preferable not to add a non-military dimension to the exceptions presently related to self-defense",⁹⁹ especially if the necessary actions for environmental protection can be justified in another fashion.

The mixing of the two concepts, self-defence and self-protection, must be regarded as either a deliberate attempt to confuse the issue by blurring the distinction, or simply a bureaucratic slip. Alan Beesley used the two synonymously, citing the U.S. application of the self-protection principle written into the Truman Proclamation¹⁰⁰ and McDougal and Burke's allegedly broad interpretation of concepts of 'security and self-defence'. In actuality, even this supposed 'broad interpretation' is limited to defence against armed attack, and nowhere is self-defence even mentioned. Elsewhere, McDougal and Burke have in fact concluded that there is sufficient precedent for wide coastal jurisdiction in contiguous waters, but they never label these measures as acts of self-defence.

Even the air defence identification zones "cannot be regarded by even their most ardent advocates as a form of self-defence, but must rather instead fall into the much

broader category of 'self-protection', since they "do not purport to operate only in the event that the United States or Canada is attacked by armed force".¹⁰¹

As we shall see, 'self-protection' as a legal concept has its roots in the concept of self-defence, but by 1969 publicists had drawn a firm distinction between self-defence and self-protection, and the latter concept had already come to be an acceptable argument for preventive action on the high seas by littoral states. And, as Pharand notes, it "had gained sufficient recognition by 1970, in both conventional and customary law, to justify Canada's anti-pollution legislation as a unilateral measure pending adequate international conventions".¹⁰²

L.H.J. Legault, Head of the Law of the Sea Section of Canada's Department of External Affairs in 1970, has quoted Schwarzenberger at length to support the notion of self-defence.¹⁰³ Schwarzenberger is in fact the only major publicist who fails to distinguish between self-defence and self-protection for acts of intervention on the high seas, and in ignoring the difference he is quite clearly wrong.

As Rapporteur to the Institute of International Law in 1969¹⁰⁴ J. Andrassy estimated that the law of "auto-protection" had gained a certain recognition and had become developed as a principle of international law.

In the Rapport définitif, William Bishop wrote that "the idea of 'autoprotection' ~~is~~ probably the best theoretical base on which to justify action on the high seas".¹⁰⁵ Sir Francis Vallat felt that "(t)he general right of self-protection may be regarded as a broad justification for measures to be taken to combat pollution, but the modalities require careful examination and some elaboration in detail".¹⁰⁶ Similarly, Edward McWhinney favoured in 1969 the broadest possible extension of the right of self-protection, so as to authorise interventions on the high seas if necessary".¹⁰⁷

In the Rapport provisoire, however, in response to the question of whether

...une intervention en haute mer, mais a proximité des côtes d'un Etat menacé par la pollution, trouve sa justification en droit international existant, soit sur la base du droit de nécessité, soit sur celle du droit de légitime défense. Serait-il préférable de chercher une formule autorisant l'Etat intéressé à intervenir et à entériner celle-ci dans un accord international multilatéral?¹⁰⁸

Only eight of the eleven Commission members specifically addressed the question.¹⁰⁹ Of these, only four responded decisively,¹¹⁰ McWhinney and de Visscher replied in the affirmative,¹¹¹ whereas Bishop is doubtful and Rousseau finds multilateral efforts most appropriate.¹¹²

The creation of a twelve mile limit had the effect of avoiding sovereign claims over the entire Arctic, and of allowing pollution prevention measures at the same time.

The deficiency of this spatial extension, as in an archipelagic claim, is the lack of control it affords over navigation before it enters the twelve mile zone.

The paramount concern over Arctic ecology, and the frustrated attempts to gain support for viable coastal state jurisdiction via convention, point to the 'excusable' nature of the Canadian legislation with its 100-mile limit.

But is it lawful? Canada has invoked general principles to apply to a specific situation; in the process, it has vacillated and failed to firmly buttress its case. If it can first be argued that in the creation of a 'contiguous zone' for prevention of pollution, the predominant guideline in determining legitimacy is 'reasonableness' rather than mere distance as an exegesis for self-protection, then it only remains to be argued that the Canadian zone is in fact reasonable.

The following section examines the features of the concept of self-protection.

FOOTNOTES-PART II CHAPTER I

¹Trudeau, "Canada Leads Fight Against Pollution", 2.

²Beesley, "Rights and Responsibilities", 7. This appears to contradict his testimony of April 30, 1970 before I.A. & N.D., in which he said that "we do not find other examples of state practice on which to base the particular legislation before us. It represents a precedent". p. 8.

³Legault, "The Freedom of the Seas: A Licence to Pollute?", 219.

⁴Ibid., 220.

⁵Department of State Statement of April 15, 1970, reprinted in ILM, 605.

⁶Beesley, I.A. & N.D., no. 15 (April 30, 1970), 26. The case involved two Canadian-registered salvage tugs which were towing a burning Liberian oil tanker along the American west coast to Vancouver Island. The U.S. Coastguard warned that if they brought her within 50 miles of the American coast, they were prepared to sink her because she was a pollution hazard.

⁷Ibid.

⁸Dellapenna, 408.

⁹Summary of the Canadian Note, reprinted in ILM (1970), 608.

¹⁰ADIZ was directly mentioned in the House of Commons by Tommy Douglas, H. of C. Deb. 5944-45 (April 16, 1970), and St. Pierre, H. of C. Deb. 5965 (April 16, 1970).

Article 2 of the Geneva Convention on the High Seas includes under 'freedom of the high seas' the "freedom to fly over the high seas".

¹¹Summary of the Canadian Note, 606. This particular condemnation of the customs zone on technical grounds does not serve the Canadian cause well: 'we shall soon examine the test of 'reasonableness', which if it applies to the enforcement of the Canadian legislation, must surely also be

¹¹(Cont'd.)

an important consideration in a judgment of the legal merits of this particular American jurisdictional exercise.

¹²Eric Nielsen, H. of C. Deb. 6003 (April 7, 1970), and Jed Baldwin, H. of C. Deb. 7897 (June 9, 1970).

¹³L.C. Green, in Canadian Council on International Law: Proceedings of the First Annual Conference held at the University of Ottawa, Ottawa, Canada, October 13-14, 1972. p. 160.

¹⁴Summary of the Canadian Note, 608.

¹⁵16 U.S.C. 1091-94 (Supp. III, 1965-67).

¹⁶Proclamation No. 2667, 10 Fed. Reg. 12, 303, September 28, 1945. Self-protection is specifically referred to in the Proclamation on the Continental Shelf. The companion Proclamation With Respect to Coastal Fisheries in Certain Areas of the High Seas cites "the inadequacy of present arrangements for the protection and perpetuation of the fishery resource..." and the "potentially (sic) disturbing effect of this situation", as reason for the unilateral establishment of conservation zones. Reprinted in Urban G. Whitaker, Jr., Politics and Power, a Text in International Law (New York: Harper & Row, 1964), 332.

¹⁷See Canadian Note, ILM 607.

¹⁸U.S. Department of State Statement, ILM 605.

¹⁹Canadian Note, ILM 607.

²⁰Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, April 7, 1970, reprinted in ILM, 598-99, at 599.

²¹Canadian Note, ILM 612.

²²Trudeau, "Canada Leads Fight Against Pollution", 3.

²³Ibid.

²⁴Sharp, H. of C. Deb. 5952 (April 16, 1970).

²⁵Trudeau, H. of C. Deb. 5624 (April 8, 1970).

²⁶"Prime Minister's Remarks on the Proposed Legislation", April 8, 1970, reprinted in ILM, 600-604, at 604.

²⁷See the remarks of David Lewis in H. of C. Deb. 5625 (April 8, 1970). Tommy Douglas expressed milder criticism:

"My view happens to be that I think it might have been better to have allowed the matter to go before the International Court in order to bring it to a head."

H. of C. Deb. 5946 (April 16, 1970).

²⁸Beesley, "Rights and Responsibilities", 7.

²⁹Beesley, Canadian Council on International Law, 110.

³⁰Ibid., 112. Peyton Lyon has remarked that Canada 'snuck in' the fisheries reservation with the more understandable pollution reservation. Maxwell Cohen also feels that there is 'no case' for Canada's "denying the competence of the court to rule on 'undefined fisheries zones', there being really no sound argument for the Canadian argument here". 77.

³¹Pharand, The Law of the Sea of the Arctic, 236. Testifying in 1970, Pharand regretted the Canadian reservation "from a strict legal point of view". E.A. & N.D., no. 29, (May 13, 1970), 11.

³²61 Stat. 1218 (1946), quoted in Bilder, "New Stresses", p. 28, footnote 109.

³³Green, "International Law and Canada's Anti-Pollution Legislation", (Oral Proceedings), 490,

³⁴Pharand, The Law of the Sea of the Arctic, p. 236, footnote 54, emphasis added.

³⁵Green, Oral Proceedings, OLR, 490.

³⁶Bilder, "New Stresses", 28. This view is supported by Warren Allmand's statement that

"in recent years the world court has not been known for its liberal interpretation of

36 (Cont'd.)

international law. If anything, it has been a very conservative court and has interpreted whatever international law there is in a very restrictive manner."

H. of C. Deb. 5997 (April 17, 1970).

37Pharand, The Law of the Sea of the Arctic, p. 236, footnote 54. Morin likewise finds the Court adaptable to new circumstances and necessities, and also refers to the historic Anglo-Norwegian Fisheries Case of 1951. 247.

38Green, Oral Proceedings, OLR, 490.

39Green, Canadian Council on International Law, 161, makes a strong implication that Canada would have won the dispute at the Hague. Moreover, in his 1970 Canadian Bar Review article he levels strong charges at the Government, and in his 1971 Oregon Law Review article he admitted that in the area of international judicial regulation of the legislation, "criticism may rightly be levelled at the Canadian action". 489.

40Mr. Kirkpatrick, Oral Proceedings, OLR, 494.

41Cohen, 81.

42Ibid., 77.

43Morin, 247.

44Bourne, Canadian Council on International Law, 156.

45McDougal, Canadian Council on International Law, 147.

46Gotlieb, Canadian Council on International Law, 144.

47Cundick, 548.

48Kirkpatrick, Oral Proceedings, OLR, 494.

49Bilder, "New Stresses", 30.

⁵⁰U.S. Department of State Statement, ILM, 605, emphasis added.

⁵¹Henkin, 134. In a similar fashion, on the matter of Iceland's 50-mile fishing limit, Dr. Gordon W. Smith has commented to the author that "quite apart from whatever justice there may be in Iceland's own case, the same statement can be used to justify any such claim, no matter how unreasonable, unwarranted, extreme or ridiculous".

⁵²Goldie, 306.

⁵³Legault, "A Licence to Pollute?", 219.

⁵⁴Jennings, 48.

⁵⁵Bilder, "New Stresses", 32.

⁵⁶Julius Stone, "What Price Effectiveness? in Leo Gross, ed. International Law in the Twentieth Century (1969), 165, quoted in Gotlieb and Dalfen, 232, footnote 8.

⁵⁷Pharand appears to have reached a conclusion similar to this in 1970 itself. See E.A. & N.D., no.29 (May 13, 1970), 13.

⁵⁸Pharand, The Law of the Sea of the Arctic, 243-44.

⁵⁹Bilder, "New Stresses", 30.

⁶⁰Green, "International Law and Canada's Anti-Pollution Legislation", 490.

⁶¹Ibid., 485.

⁶²Kirkpatrick, Oral Proceedings, OLR, 494.

⁶³Cohen, 78.

⁶⁴Ibid.

⁶⁵Robert J. McCloskey, State Department representative, quoted in New York Times (April 10, 1970), at p. 13, col. 3.

⁶⁶Henkin, 135.

⁶⁷Dellapenna, 404.

⁶⁸Mr. Sharp recalled the total failure of the International Joint Commission to prevent the pollution and contamination of the Great Lakes. See H. of C. Deb. 5949-50 (April 16, 1970).

Nevertheless, in a speech given by J.J. Green, Minister of Energy, Mines and Resources, at Johns Hopkins University on April 23, 1970, it was reiterated that if real and lasting results are to be achieved in "maintaining the pristine purity of the northern ecology, we (Canada) must and should work with you (the United States) in bilateral or multilateral agreements and arrangements which will make pollution control effective". Quoted in The Law of Environmental Quality, Readings Collected and edited by Richard D. Abbot, Vol. 4, (Montreal: Canadian Council of Resource Ministers, 1971), p. XII, 53.

⁶⁹Bilder, for one, speculated that "(b)roader American interests in freedom of the seas might require that the United States not compromise on this issue", and that from the standpoint of United States policy, "it might be preferable that the conference not be held at all, rather than it be held simply to ratify the Canadian position". 37.

⁷⁰As Alan Beesley has said of the changing rhetoric of Canadian foreign policy, "(w)e simply don't take kindly any more to being lectured". Canadian Council on International Law, 105.

⁷¹Sharp, H. of C. Deb. 5950 (April 16, 1970).

⁷²Ibid.

⁷³"The Government will introduce legislation setting out the measures necessary to prevent pollution in the Arctic Seas (sic)." Speech from the Throne, H. of C. Deb. 3 (October 23, 1969).

⁷⁴Green, "International Law and Canada's Anti-Pollution Legislation", 472.

⁷⁵Carlsch, 18.

76Bowett, 113.

77M. McDougal and F. Feliciano, Law and Minimum World Public Order (1961), 237, quoted in Green, "International Law and Canada's Anti-Pollution Legislation", 481.

One may argue, as O'Brien and Chapelli have, that major publicists "concede the legitimacy of anticipatory self-defense where the threat is clear and present and the response proportionate", but beyond the spontaneous element, such an interpretation is weak in three areas:

- 1) it is complicated by the vagaries of threat perception;
- 2) it ignores Article 51's stipulation that self-defence is justified 'if an armed attack occurs'.
- 3) it applies almost exclusively to responses to military threats.

See William V. O'Brien and Armando C. Chapelli, "The Law of the Sea in the 'Canadian' Arctic: The Pattern of Controversy (Part II)", McGill Law Journal, XIX (December, 1973), 511.

78Caflisch, p. 18, footnote 40.

79J. Carter, Oral Proceedings, OLR, 497.

80Bowett, 113.

81Van Panhuys, 158.

82Utton, 224.

83Hans Kelsen, in AJIL, XLII (1948), 784. In other senses, self-defence and self-protection are similar: the classic application of self-defence when

"the delinquent state uses force or threat of force and the defending state's reaction in self-defence similarly involves force or the threat of force",

presupposes that the other requirements -

"the reality of the threat to the state's essential rights, the immediacy of the danger, lack of other means of protection, etc...are present."

Ibid.

84Neuman, 357-58.

⁸⁵Utton, 224. Bowett is actually referring more to a specific application of jurisdiction, namely customs and revenue enforcement, and not to the overall use of the concept of self-protection.

⁸⁶Bowett, 9. He does himself confuse the issue, however, by allowing for acts of self-defence when there is a threat of armed attack.

⁸⁷Ibid., 10.

⁸⁸Goldie, p. 298, footnote 49.

⁸⁹Pharand, The Law of the Sea of the Arctic, 239.

⁹⁰Hydeman and Berman, 187.

⁹¹Bowett, 66.

⁹²Ibid.

⁹³Beesley, "Rights and Responsibilities", 8.

⁹⁴Beesley, I.A. & N.D. no. 15 (April 29, 1970), 19.

⁹⁵Dellapenna, 410.

⁹⁶Ibid.

⁹⁷Jared Carter, Assistant Legal Adviser for Economic Affairs, U.S. Department of State, in Oral Proceedings, OLR, 494. Coming from a senior official of the nation that was engaged in warfare in Viet Nam, some 8,000 miles from the edge of its territorial sea, the further comment that "Whenever a nation starts diluting the concept of self-defense, and justifying certain possibly overreaching actions as being in self-defense, I think this can be threatening to international order," is stupefying.

⁹⁸Bilder, Unilateral Action, 35.

⁹⁹O'Brien and Chapelli, Part II, 517. The author concurs, but finds the argument that "(e)nvironmental protection is important but so is the special character of the

99(Cont'd.)

concept of self-defense", (p. 513) hollow if one accepts the already extremely broad range of applications O'Brien and Chapell grant to 'self-defense':

"From the standpoint of basic community policy, the inherent right of self-defense may be anticipatory, it may be addressed to non-military threats to territorial integrity, political independence - and, perhaps, to other vital interests - and it may be exercised by means other than recourse to military defensive measures." (p. 512)

100See supra, Part II, Section I, footnote 16.

101Ivan Head, "ADIZ, International Law, and Contiguous Air-space", Alberta Law Review, III (1964), 192.

102Pharand, The Law of the Sea of the Arctic, 243.

103In Lewis M. Alexander, ed. The Law of the Sea: The United Nations and Ocean Management, Proceedings of the Fifth Annual Conference of the Law of the Sea Institute, June 15-19, 1970 (Kingston: University of Rhode Island, 1970), 298;

"In circumstances in which the rules governing the principle of self defense justify preventive action, the rules underlying the principle on the freedom of the seas, like those governing any other of the fundamental principles of international law, are correspondingly limited. Provided that the condition on which the exercise of the right of self defense depends are fulfilled, such exceptional interference with the exclusive jurisdiction of the flag state appears fully compatible with the rules underlying the fundamental principles of international law.

104J. Andrassy, "Etude des mesures internationales les plus aptes a prevenir la pollution des milieux marins", Annuaire de l'Institut de Droit International, LIII (1969), Tome 1, pp. 547-711.

105Bishop, in Andrassy's "Rapport definitif", 674.

106Vallat, in the "Rapport definitif", 698.

¹⁰⁷McWhinney, in the "Rapport définitif", 687.

¹⁰⁸Andrassy, Tome 1, p. 611. Some of the opinions expressed in the Rapport provisoire differ from those expressed either by the authors themselves in the Rapport définitif or sentiments attributed to them by Andrassy. McWhinney is a case in point: Andrassy has him replying negatively (p. 553), whereas McWhinney himself is quite definitely in favour of broad usage (p. 629, p. 687).

¹⁰⁹Dupuy, O'Connell and Verzijl failed to respond.

¹¹⁰Koretsky, Münch and Muûls are evasive, while Vallat is non-committal.

¹¹¹In Andrassy, Tome 1, p. 629 and p. 652 respectively.

¹¹²Ibid., p. 615 and p. 643 respectively.

CHAPTER II

SELF-PROTECTION AS A BASIS FOR ACTION

An examination of the evolution of the concept of self-defence is instructive of the concept of self-protection. The locus classicus of the right of a nation to self-defence is the Caroline case which transpired between 1837 and 1842,¹ as justification for an attack upon an American vessel loaded with arms to be used against British territory in Upper Canada, Great Britain invoked the necessity of self-defence and self-preservation, while the American Secretary of State, Daniel Webster, asked for proof that necessity of self-defence had been "instant, overwhelming, leaving no choice of means, and no moment for deliberation".² The British supplied sufficient proof for the matter to be dropped.

Earlier, U.S. Chief Justice Marshall ruled in the famous Church vs. Hubbard case that it was a universally recognised principle that a state's "power to secure itself from injury may certainly be exercised beyond the limits of its territory".³ According to Pharand, this classic judgment marks the beginning of United States acceptance of the right of self-protection.⁴

The Caroline and Church vs. Hubbard cases are examples of a state's rights of self-help. Corresponding duties entrusted upon a state emanate from the Trail Smelter case⁵

and the Corfu Channel case.⁶ In the former, a special Arbitral Tribunal created by the United States and Canada declared that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein".⁷ In the Corfu Channel case of 1949, the ICJ ruled that every state is under an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states",⁸ thereby balancing previously accorded 'rights' with concomitant 'duties'. Also along this line, the Lac Lanoux Arbitral Tribunal⁹ of 1957, ruled that France, in altering the status of a body of water, one of whose tributaries flows into Spain, must take into account Spanish interests.

Admittedly, the Trail Smelter principle deals only with the use of territory, and refers only to air pollution, but, as Caflisch observes, "by way of analogy, its operation can be extended to certain cases of ocean pollution".¹⁰ Similarly, Green theorises that "what the Tribunal had to say about pollution by fumes applies equally to water pollution",¹¹ for the sea, being res communis, may not be used by any one state to the detriment or infringement of its use by another state. Thus, in essence,

...it can be contended that if a state is forbidden to use its own territory, which by international law is exclusively within its own jurisdictional competence and under its exclusive

control, in such a way as to cause injury to another state, there is even more reason why it should also be prevented from so using the sea.¹²

Moreover, one is inclined to concur with Sir Gerald Fitzmaurice's opinion that there is general agreement

...sur l'obligation, consacrée par le droit existant, pour tous les Etats de prendre des mesures afin de prévenir la pollution des espaces maritimes par des navires ou des personnes relevant de leur juridiction. Il s'agit de l'application du principe général posé par le Tribunal arbitral dans l'affaire de la fonderie du Trail.¹³

Beesley combines the Trail Smelter principle with its corollary, in enunciating that the Canadian position is based on, among other things, "the general principle that states have a duty not to use or permit the use of their territory or other areas beyond national jurisdiction in such manner as to cause injury in or to the territory or environment of another state".¹⁴ Legault also fashions a link:

In light of the Trail Smelter decision there seems little doubt that every state is obliged to prevent activities under its jurisdiction from damaging persons or property within the territory of any other state through pollution of the environment.¹⁵

Regrettably, there is no positive international law which specifically relates to preventive action on the high seas such as is delegated in the Canadian legislation. However, the judgment of the PCIJ in the Lotus Case, according to Klotz' interpretation,

...in considering the validity of Turkish legislation with supposed extraterritorial

effect, laid down the rule that an exercise of jurisdiction by a state will always be valid in the absence of a clear prohibitory rule of international law. Since the only prohibitory rule applicable is the so-called 'freedom of the high seas', and we have clearly seen that this rule is clearly subject to reasonable restrictions in the protection of legitimate State interests, the burden of those attacking Canadian action is heavy indeed.¹⁶

It might be argued that the 'freedom of the high seas' is indeed subject to 'reasonable restrictions in the protection of legitimate State interests', but that, contrary to Klotz, the burden of proof lies on the Canadian side, for invocation of the concept of self-protection, judicial restrictions aside, requires international scrutiny. Wilkes too, however, suggests that in the Canadian case, the burden lies with those who oppose the regulations and methods of control used, since a "firm norm exists in the world community favouring regulations of the activity, although no international ones exist".¹⁷ Moreover, "unilateral control measures are preferred to inaction in the face of absent effective international controls".¹⁸

What precisely are the legal régimes of the high seas as they relate to unilateral intervention? First, the term 'high seas' is imprecisely defined: there is the 'circular' reference to it in the Geneva Convention as meaning "all parts of the sea that are not included in the territorial sea or in the internal waters of a State",¹⁹

and Hyde's more complete definition of it as constituting "those waters which are outside of the exclusive control of any state or group of States, and hence not regarded as belonging to the territory of any of them".²⁰ McDougal and Burke rightfully note that "(w)hen the issue is whether certain waters or certain activities are or are not under the control of a state, such a definition is hardly helpful. The same circularity obviously infects the concept of 'freedom of the seas' when it is paired off against 'self-defense', 'contiguous zones' and so on".²¹

Historically, there is ample precedent for measures of self-protection within twelve miles of the coast. There is a consensus, reflected "in a pattern of mutual claim and reciprocal tolerance..."²² One is struck by the fact that "coastal states persistently make claims to control over access for the protection of many different values, and that for the most part other states refrain from protesting these claims unless they appear to be unreasonable".²³ Legault also reminds us of the trend in state practice towards coastal state "jurisdiction and control over foreign vessels beyond territorial waters in order to prevent injury to their territory, to ensure their self-preservation, and to enforce their laws".²⁴ Furthermore, his assertion that "(t)he exercise of protective jurisdiction, however, must be clearly distinguished from the assertion of exclusive

rights in the resources of the sea",²⁵ is born out by McDougal and Burke, who observe that "states need not, and surely do not, make claims to sovereignty over adjacent waters when they assert claims only to an occasional competence to prescribe for the protection of certain particular interests in specified contexts".²⁶

As Pharand states, "(t)he very concept of contiguous zone, incorporated in Article 24 of the Territorial Sea and Contiguous Zone Convention, is obviously based on the right of self-protection".²⁷ The Convention on Fishing and Conservation of the Living Resources of the High Seas also allows for self-protection when it allows coastal states to adopt certain unilateral measures, for "(a) coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea".²⁸ And, in fact, Canada has declared what amounts to a 'special interest' in the Arctic.²⁹ This has led Johnston to assert that "the coastal state exercising 'special interest' authority for protection of the marine environment should be guided by considerations similar to the criteria already applied to 'special interest' authority for fishery conservation".³⁰

Since Article 24 of the Convention on the High Seas, which states that

Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject,

does not "expressly forbid unilateral efforts" but does "recognize an obligation by states to prevent pollution, no taint of illegality automatically attaches to such efforts by a single nation."³¹ Furthermore, Draft Articles I, II and IV of the Institute of International Law resolutions adopted following the Edinburgh session of September 1969, would permit states to take individual action to prevent pollution of the seas, including measures which deny access to improperly equipped vessels. This right to prohibit access to a vessel which, failing to meet anti-pollution standards, is "considered a threat to the coastal state",³² would apply to the "territorial seas and contiguous zones",³³ and no outward limit is set for the latter.

Within twelve miles from its coast, then, and treating the provisions of the Arctic Waters Act as 'sanitary regulations', the coastal state is authorised to impose certain standards designed to protect itself from injury. Beyond twelve miles it is submitted that "the right to protect territorial integrity is more fundamental",³⁴ than the right of 'freedom of the seas', and that given an accepted twelve mile zone, "a pollution zone is no less acceptable because

of spatially less modest limits if these limits are wholly appropriate to the problems of pollution and the function of environment control".³⁵

As early as 1924, it was found that "littoral states may act in certain cases for the preservation of their safety and the protection of their laws over an undefined and indefinite stretch of coastal waters",³⁶ and that "the whole idea of a particular and definite marginal sea tends to be discredited".³⁷

In 1930, a member of the Committee of Experts for the Progressive Codification of International Law presented an amended draft at the Codification Conference, explicitly recognising that

...(b)eyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection.³⁸

And yet, the 1958 Convention, in placing a twelve mile ~~limit on~~ the unilateral exercise of jurisdiction in contiguous zones, not only flaunted existing practice, but made "no provisions for the intervening technological changes that have made the inflexible 12-mile limit inadequate to protect the vital interests of coastal states".³⁹

McDougal and Burke predicted in 1962 that it was "most improbable that states will abandon important contemporary claims, asserted much beyond a twelve-mile limit,

which they regard as indispensable to their security".⁴⁰

Of particular relevance for the Arctic, the two scholars suggested that

- the conditions which create in coastal states certain unique interests in the activities off their shores even beyond the territorial sea - have (not) so changed that states can reasonably be expected, or required, to forego their traditional competence.⁴¹

Two other considerations combine to make a 12-mile contiguous limit hopelessly obsolete and irrelevant: for oceanic-technological reasons relating to oil spills, "to deal effectively with the danger it is not practicable to differentiate between the high seas and the territorial sea";⁴² secondly, the tremendous variation in widths of territorial seas, within which limits a coastal state may legitimately take such measures to protect its peace, good order or security, creates an inequitable, intolerable situation "where one state, having taken excessive action on the high seas, would be accountable whereas a second state having an extensive territorial sea could under similar circumstances, hide under its sovereign cloak".⁴³

Having determined that there is sufficient basis in international law for claims of self-protection, it now becomes possible to detail the array of standards by which such a claim may be measured. Admittedly, there has been, historically, a "paucity of precedents in the field of

sanitary control",⁴⁴ beyond the territorial sea, owing mainly to lack of need for such controls. Hopefully, one will not commit the error of deducing from this that while "there is a right to exercise jurisdiction and control in contiguous zones to prevent customs violations...., there may not be a right to exercise jurisdiction and control to prevent violation of sanitary laws".⁴⁵ Hydeman and Berman postulated in 1960 that such a 'piecemeal approach', with its fixation on precedent as a justification for certain types of control, "may frustrate States in their efforts to take action to protect legitimate territorial interests".⁴⁶

Ultimately, in accepting Gidel's idea that each kind of contiguous claim must be tested separately and there is no general rule, one simply generalises that extraterritorial control of a State over foreign vessels does not necessarily violate international law, and that a plethora of accepted standards are employed in efforts to scrutinize each particular case.

The validation of the Canadian legislation hinges more on the evidence that action was 'reasonable and necessary' than on the toleration or acquiescence of other states.⁴⁷

FOOTNOTES - CHAPTER II

¹The details of the events leading up to and following upon the incident are recorded by Bowett, 58.

²Parl. Papers (1843) Vol. LXI; Brit. and For. State Papers, Vol. XXX, p. 193. Quoted in Bowett, 59.

³6 U.S. (2 Cranch) 187 at 234-5 (1804), quoted in McDougal and Burke, p. 81, footnote 177.

⁴Pharand, The Law of the Sea of the Arctic, 239.

⁵See Trail Smelter Question, Decision Reported on April 16, 1938, to the Government of the United States of America and to the Government of the Dominion of Canada by the Trail Smelter Arbitral Tribunal under the Convention Signed April 15, 1935. For an historical account of the lengthy proceedings which led to the eventual treaty establishing the Tribunal, see D.H. Dinwoodie, "The Politics of International Pollution Control: The Trail Smelter Case", International Journal, XXVII (1972), 219-236.

⁶The decision of the International Court of Justice was handed down on April 9, 1949.

⁷Reprinted in Carlisch, 14.

⁸Reprinted in Legault, 217.

⁹12 UNRIAA 281 (1957), reprinted in AJIL, LIII (1959), 156-70.

¹⁰Carlisch, 15.

¹¹Green, 477.

¹²Ibid., 478.

¹³Sir Gerald Fitzmaurice, Annuaire, LIII (1969), Tome II, 286.

¹⁴Beesley, "Rights and Responsibilities", 12, ⁶emphasis added.

¹⁵Legault, "A Licence to Pollute?", 217.

¹⁶Klotz, 714.

¹⁷Wilkes, "Due Process", 503.

¹⁸Ibid., 505.

¹⁹Convention on the High Seas, Article 1.

²⁰Charles C. Hyde, International Law Chiefly as Interpreted And Applied by the United States (2d. rev. ed. 1945), quoted in McDougal and Burke, p. 81, footnote 179.

²¹McDougal and Burke, p. 81, footnote 179.

²²Ibid., 585.

²³Ibid.

²⁴Legault, "A Licence to Pollute?", 218.

²⁵Ibid.

²⁶McDougal and Burke, 610.

²⁷Pharand, The Law of the Sea of the Arctic, 272.
Article 24 entitles a coastal state of "exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulation committed within its territory or territorial sea."

²⁸Article 6.

²⁹For instance, Jean Chrétien refers to the area encompassed by the Act as being "of direct and unique concern to Canada alone", H. of C. Deb. 5939 (April 16, 1970). Also, Beesley refers to "...the special characteristics of the Arctic waters and ice (which) combine to give them a special status - however defined - which implies special rights and responsibilities for the Arctic coastal states.

³⁰Douglas M. Johnston, "Canada's Arctic Marine Environment: Problems of Legal Protection", Behind the Headlines, XXIX (July, 1970), 5. The three criteria for 'special interest' would be:

- 1 - that there is a need for urgent application of unilateral measures in the light of the existing knowledge of the resource or environment imperilled;
- 2 - that the measures adopted are based on appropriate scientific findings and technological capability
- 3 - that the measures do not discriminate in form or in fact against foreign users of the resource or environment.

³¹Carnahan, 644.

³²Pharand, The Law of the Sea of the Arctic, 216.

³³Article VI, in ibid.

³⁴Utton, 225.

³⁵Macdonald et al, 249.

³⁶Pittman B. Potter, The Freedom of the Seas (1924), 103, quoted in Utton, 225.

³⁷Potter, 103-4.

³⁸McDougal and Burke, 616. The member was Professor Schucking.

³⁹Utton, 226.

⁴⁰McDougal and Burke, 607.

⁴¹Ibid., 619.

⁴²Cundick, 532.

⁴³Ibid., 533.

⁴⁴Hydeman and Berman, 237.

⁴⁵Ibid.

⁴⁶Ibid.

⁴⁷Ibid.

CHAPTER III

THE 'STANDARD OF REASONABLENESS' AND ITS APPLICATION TO THE ACT

As Jessup observes, "(r)egarding the peace-time acts of extraterritorial jurisdiction and control, as applied particularly to customs matters, foreign acquiescence has usually been forthcoming if such acts were reasonable".¹ This 'standard of reasonableness', imprecise as it may be, is the cornerstone for coastal state competence in international law to assert control in contiguous zones. Incorporated in Webster's prescription in the Caroline case, the coastal state has the burden of proof that it "did nothing unreasonable or excessive".² One may concur with Smith, who concludes that a reasonable claim in contiguous areas "may fairly be presumed to be in accordance with law and the burden of proving that it is contrary to law should be on the state which opposes the claim",³ but the onus nevertheless seems to be on the claimant state to show evidence of reasonableness.

Essentially, the debate focuses on the classic problem of defining law-creating procedures. One school of thought holds that unilateral acts are illegal under positive international law, and remain so until the international community gives its blessing to them. The contrasting opinion is that unilateral acts are based on evolving law which can only be overruled by communis opinio. The Canadian

position embraces the best of both worlds, claiming that the Arctic initiative is based on principle and practice, and also that it is novel procedure which is gradually gaining acceptance.

The 'standard of reasonableness' is inherent in the community policies which promote complementary policies of "on the one hand, inclusive use and authority and, on the other, important exclusive interests".⁴ The accommodation of conflicts resulting from this 'balancing' has been achieved from the standpoint of reasonableness, which includes an evaluation of

- 1) the interest sought to be protected
- 2) the significance of that interest to the coastal state
- 3) the scope of authority asserted
- 4) the relationship between claimed authority and the interest at stake
- 5) the nature and significance of the inclusive uses affected.⁵

Fundamental to a judgment of reasonableness is a "determination whether the protection of the exclusive interest is sufficiently important to outweigh the costs involved in the harmful effects upon inclusive use".⁶

Synonymous with 'reasonableness' is the requirement of proportionality, such that "any action taken must be proportional to the consequentiality of the threat posed".⁷ In determining the impact of any action, the frequency of

occurrence, the number of vessels being interfered with, and the intensity of the action must be assessed. In this sense, proportionality is a 'rule of reasonableness' which limits both an "excessive pre-emptive exercise of the freedom of the high seas by a ship engaged in polluting the ocean and the excessive remedial or abatement measures of a coastal state".⁸ Conceptually, it is measured by weighing

- (i) the probability of an injury being caused in the absence of such measures;
- (ii) the likelihood of such measures being effective;
- (iii) the extent of the injury which may be inflicted by such measures.⁹

In connection with propinquity and necessity, the opinion of Chief Justice Marshall in Church vs. Hubbard was that the means necessary for the protection of a state's rights "do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations".¹⁰

In 1924 Potter wrote that "(1) littoral states may act in certain ways for the preservation of their safety and the protection of their laws over an undefined and indefinite stretch of coastal water...", and that "...the whole idea of a particular and definite marginal sea tends to be discredited".¹¹

In 1929, Harvard Research on Territorial Waters found that, as regards authority in contiguous zones,

"(t)he distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and the acts performed on the high seas."¹²

The test as to whether or not the extent of jurisdiction is reasonable, is functional: 'real danger', rather than mileage, is the important factor.¹³ Thus, propinquity is a relative concept which hinges upon interest, "regardless of whether (hostile) acts occur within or beyond the limits of the territorial sea".¹⁴ In fact, not only does the rule of reasonableness "not appear to limit to any specific distance from its coast line the right of a State to assert protective jurisdiction", but "spatial limitations are contrary to the very concept of reasonableness".¹⁵

In the matter of defence against armed attack, "(c)ustomary prescription has always required a high degree of necessity - specifically, in the case of anticipated attack, a high degree of imminence to support the lawfulness of intense responding coercion".¹⁶ Normally, interference with the rights of other states, precipitated by immediate jeopardy to the coastal state's vital interests, may lead to invocation of the 'doctrine of necessity' or of 'rights of self-protection' if there is "a grave and imminent danger due to a behavior or situation which cannot be qualified as an unlawful armed attack".¹⁷ Presumably,

...(t)he more imminent the threat, the more serious it is, and the greater the necessity to take

protective action. Thus, this consequentiality factor not only contributes to determining what protective action may be taken but also when it may be taken, and where. If the threat is serious enough, anticipatory action is justifiably necessary. The response to the threat must not only be proportional in terms of intensity and magnitude to the consequentiality of the threat posed, but also the seriousness of the threat indicates when protective action may be taken.¹⁸

There is disagreement on the issue of whether 'self-protection' and the 'standard of reasonableness' permits preventive as well as punitive and remedial action. For Green, despite the limitations in the Brussels 1969 treaty, whereby action may only follow upon a maritime casualty, "a state still enjoys the right under customary law to take action even before a maritime incident has occurred".¹⁹ Caflisch, however, states that "danger has to be concrete and not merely theoretical and abstract: a maritime casualty must already have occurred or be imminent".²⁰ He attaches the further condition that "a State may not take measures against a ship, tanker or other device only on the ground that the mere existence of the latter constitutes a potential danger, and thus creates an emergency situation".²¹

Hydeman and Berman find that "(p)ractice is meager, on this point, but is sufficient to support a proposition that potential violations can be prevented by reasonable action where the mere threat of injury is significant".²² This notion is in line with Root's 1914 interpretation of the Monroe Doctrine as exemplification of "the right of every

sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself".²³ It is also consistent with Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, which, although far from explicit, "would appear to include local regulation concerning potential 'threats of injury'".²⁴

'Self-protection' offers sufficient grounds as a concept to be applied to the Canadian action in the Arctic. Thus, as McDougal and Burke have asserted in connection with contiguous zones, "(t)he more specific problem is, in all instances of claim, to identify and weigh the factors that appear to be relevant for deciding upon the reasonableness, and hence lawfulness, of the asserted exclusive authority".²⁵

There are five main factors which may be identified as combining to determine the 'reasonableness' of contiguous claims: all may properly be applied to the Canadian Arctic Waters Pollution Prevention Act, to provide a satisfactory answer to the question,

'Is the Act, and its justification by invocation of a right to 'self-protection', reasonable enough to find strong support in international law?'

This question may properly be asked because "a complete bar to any unilateral protective measures just would not make sense for the Northwest Passage".²⁶

The five main factors include

1) the interest sought to be protected

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- 2) the significance of that interest to the coastal state
- 3) the scope of authority asserted
- 4) the relationship between claimed authority and the interest at stake
- 5) the nature and significance of the inclusive uses affected.²⁷

The Arctic Waters Pollution Prevention Act is, for the most part, an exercise in self-protection: self-interest is the predominant concern of its provisions. The Act is designed to preserve the peculiar ecological balance of the Arctic, inasmuch as the welfare of the Inuit and other Canadians in the area is dependent upon a stable, harmonious ecology. The interest is primarily economic, not only in that it involves the livelihood of the native population, but also because the eventual removal, and transportation of the region's natural resources to the markets of the world requires sound planning which will ensure safe, navigable routes.

A case can also be made that the Canadian Government, in adopting its regulations, was acting in the community interest. For, quite aside from pollution of a certain portion of the high seas, the Arctic is a climatological 'source', and any serious disequilibrating rupture of the ecology could conceivably alter global weather patterns.

Klotz has inferred from the fact that the sea is res communis that "those who through their polluting

activities befoul 'the common heritage of mankind' are committing a crime against mankind".²⁸ This may be stretching it, but it remains true that 'freedom of the seas' is not licence to pollute, and 'abus de droit' must apply to maritime despoilers through ~~whatever~~ enforcement procedure practicable.

Prime Minister Trudeau has stated that "somebody has to preserve this area for mankind until the international law develops",²⁹ and that "(t)he disastrous consequences which the presence (of oil) would have upon the marine plankton, upon the process of oxygenation in Arctic North America, and upon other natural and vital processes of the biosphere, are incalculable in their extent".³⁰ It would therefore seem that Canada's action might be included in Van Panhuy's novel concept of an 'international law of emergency' in which "(f)irst and foremost, the envisaged measure must be clearly necessitated by the world emergency situation and must manifestly be taken to repel certain of its ill-effects".³¹

Emergency action in the Arctic may or may not jibe with Van Panhuy's 'working hypothesis' that "the world as a whole is threatened by an impending major catastrophe",³² but it most certainly cannot be found wanting simply on the basis of Bilder's skepticism towards any custodial action on behalf of mankind. Bilder feels that as regards Canadian use of self-defence in the common interest, or what he calls

'community defense', "there appears to be few' if any other supporting precedents".³³ But surely, if the practice of the United States, France and the Soviet Union in blocking off large chunks of the high seas for perilous nuclear tests, and euphemistically 'inviting' all vessels to stay clear, can be termed an exercise in the protection of the freedom of the seas, and fitting all the requirements of 'reasonableness' for custodial unilateralism,³⁴ it is at least equally arguable that the Canadian action in Arctic waters is fully 'reasonable' and in accordance with international legal principles, as well as founded on common policy. Still, one need not overly concern oneself with proof of involvement in "community interest", for, as has already been argued, the concept of self-protection by itself affords sufficient basis for justification of Canadian jurisdiction.

It is reasonable to assume that 'vital interests' are at stake in the protection of the Arctic, for even with the little scientific data that is available, it appears that a major maritime catastrophe involving oil would irreparably and irreversibly disrupt the northern ecosystem. There would thus appear to be sufficient grounds for considering a threat to the Arctic environment a threat to the security of the state. Use of the latter phrase grants to it an admittedly liberal interpretation, but there is no

more appropriate concept which may be employed to describe the intensity of the havoc which would be wrought from a spill or even a blowout. Furthermore, the word 'security' or any definition of the concept, was deliberately excluded from Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, as part of the list of valid bases for assertion of limited jurisdiction and control within the contiguous zone. Far from intending this to mean that control for such purposes was to be considered illegal, it is actually an indication that such claims are to be judged by general principles of international law, and thus might still be valid,³⁵ and are not to be set at any narrow limit such as twelve miles. In 1950, Gidel wrote that it would be neither possible nor desirable to make up a complete list of interests which may properly be protected in contiguous zones.³⁶

By any standard, the scope of authority asserted in the Arctic Waters Act is broad. However, to the extent that its provisions, including the right to board vessels, prevent access, and seize offending ships, qualify under 'due process', are non-discriminatory as between types and nationalities of offenders, and are non-acquisitive in nature, the legislation is reasonable.

Unanimous support for the Act and its so-called 'objective criteria' is lacking, with one publicist unequivocally claiming that "(t)he criteria whether to intervene

is totally discretionary, too vague, too broad, and cannot be sanctioned under international law".³⁷ In point of fact, to an appreciable degree an evaluation of 'reasonableness' is almost directly related to the interest one is protecting:

To a Canadian asked what his nation's officials must be allowed to do if there is to be the best chance to minimize harms from oil spills and other 'waste' incidents in the north, the Arctic Waters Act provisions will seem 'reasonable'. To a captain used to full command of his ship in peacetime, the investigative and protective reaches involved when he is outside Canada's territorial seas will appear 'unreasonable'.³⁸

Ironically, it is the 100-mile limit for pollution control zones, which represents an attempt to provide an objective standard supportable in international law, that may be criticised for being either a) too extensive b) too rigid, or c) not extensive enough. Those who cite it as being too extensive usually criticise it on the grounds of its lack of legal precedent; those who term it not extensive enough tend to adopt an environmental approach, while those who claim it is too rigid feel that the measures have support in law, but are only valid if they are purely functional and not dependent upon artificial boundaries.

While it is superficially correct to state that a fixed boundary is contrary to the very concept of reasonableness, it is nevertheless true that when safety inspections are made standard procedure, 'you have to start somewhere', and 100 miles provides such 'regularity' as well as being

quite functional, and "(i)n the case of a spill of oil or other hazardous substance, a distance of 100 miles could easily be characterized as 'proximate',³⁹ thus, "having regard to the possible catastrophic consequences and in the light of the well known precedents, a distance of 100 miles appears to be most reasonable".⁴⁰ Moreover, the area in which the Act applies is not treated as homogeneous hydrospace: the Regulations identify 16 zones, each with its own ice conditions and navigability, and consequently with differing standards. The 100 miles is simply the perimeter for a multiplicity of zones of varying dimensions.

The Canadian action to prevent pollution is given strong support, albeit in an indirect fashion, by the 1969 Brussels 'public law' Convention which stated that the limitation of the Convention to oil would not abridge "any right of a state to protect itself against any other agent".⁴¹ As Cundick puts it:

If the right of a state to protect itself against pollutants other than oil exists apart from convention law, it is difficult to argue that the right to protect against pollution by oil does not also exist independently.⁴²

In short, the Convention cannot be considered as overriding customary international law.

It will be useful to apply Caflisch's three yardsticks for measuring the proportionality of acts to the threatened injury. They are,

- (i) the probability of an injury being caused in the absence of such measures;
- (ii) the likelihood of such measures being effective;
- (iii) the extent of the injury which may be inflicted by such measures.⁴³

The probability of (i) is very high, as past practice has shown, and owing especially to the extremely hazardous navigation conditions in the Arctic. The likelihood of the Act's provisions being effective is undoubtedly far greater than the likelihood of no regulations at all being effective. The extent of the inconvenience and injury which may be inflicted by such measures is certainly minimal in comparison to the potential for disaster from the vessel itself. Actually, in that ill-equipped vessels are to be denied access to 'shipping safety control zones', the inspection measures reduce the potential for injury to vessels and not only from vessels.

These three considerations, plus the intensity of the threat to the Arctic ecology, point up the relativity and temporality of the notion of 'imminence', and suggest that a redefinition of the concept is in order. 'Imminence' and 'gravity' are correlative - the greater the potential for destruction, the more imperative early detection and prevention becomes. Imminence, more than sheer temporality, involves 'time multiplied by risk', a situation in which

risk increases as time shrinks and contracts. Gravity operates at the other end of the continuum, amounting to 'destruction multiplied by time', time indicating in this equation the period in which the after-effects continue to be felt.

Thus, the proportions evidenced in the Arctic scenario are abnormal, inflated, largely immeasurable, and even imponderable. The Arctic environment does not so much redefine 'imminence', which is taken to mean "about to happen; impending; threatening;" rather it elasticises the concept to suit its application in the Arctic. The trans-mogrification is reasonable and requisite - the greater the threat, the earlier it is that action is called for. It is not at all unreasonable to consider the passage of VLOCs through the Northwest Passage as inherently non-innocent and, as with air defence identification zones, spatial limits are functions of time and risk more than simple distance.

Operating on this somewhat heuristic level of macro-time and macro-disaster, it becomes logical to extend the analogy to account for the necessity of 'immediate action on a larger time-scale', along the lines of the AWPPA, given

- a) the woeful inadequacy of existing (1970) preventive regulations internationally
- b) the unlikelihood of any suitable conventions being adopted within the next few years,
- and c) the 'imminence' of mammoth tanker penetration of the Northwest Passage.

Inclusive uses of Arctic waters by foreign vessels are affected by the Act's regulations, and there is the problem of uniformity of standards, whereby even Norwegian or Danish specifications may not comply with Canadian ones. To avoid such conflicts, the Canadian Government has made serious attempts to conclude bilateral and multilateral agreements.⁴⁴ In this sense, she has discharged her rights and responsibilities well:

the mere possibility of such inconsistencies imposes a duty on Canada and on each littoral state as well, to try to reach accord on a single set of rules for tankers using the North West Passage. Further, since each littoral nation has an equal right to protect its interests along the Passage, the only "agreeable solutions will be those which afford the maximum protections any one state desires, not those which offer some compromise."⁴⁵

Sooner or later, "essentially world-wide agreement will be demanded on safety factors in construction of tankers to serve in the Arctic".⁴⁶

The inclusive interests at stake in the Arctic are numerous, and effect a multitude of actors. O'Brien and Chapelli isolate eight 'base value positions' which the actors (Canada and the United States in their model) seek to maintain and enhance: power; wealth; enlightenment; well-being; skill; solidarity and rectitude.⁴⁷

Pivotal to the overall objective of well-being, which "can be defined broadly to include the social, political and physical welfare of the people",⁴⁸ and which therefore

embraces all other interests, is the satisfactory maintenance of the Arctic region's delicate ecological balance. Both states share interests and responsibility in this respect; "Canada's stake, however, is much more direct and of greater magnitude".⁴⁹ Moreover, the sense of immediacy in the Arctic archipelago cannot be perceived by the United States, whose interests in the area are indeed substantial, but whose territorial integrity is by no means threatened.

In summary, there were many reasons why the Canadian Government decided to act as it did in legislating against pollution in Arctic waters. Ulterior motives aside, the provisions and regulations of the Act are entirely consistent with administrative due process, do not discriminate between Canadian and foreign subjects, are not restricted to vessels bound for Canadian ports, are considered as temporary, pending satisfactory international accord,⁵⁰ and are within the bounds of customary international law, under the banner of 'measures of self-protection'.

Elements of 'sovereignty', 'nationalism', and 'independence' are evidenced in the decision to legislate, the process of legislative debate, and the ensuing reaction from all sources. Archipelagic claims, limits to territorial seas, status of internal waters and straits, and rights of

'innocent passage' are all affected by the Arctic Waters Pollution Prevention Act, and undoubtedly some or all of these considerations influenced the drafting of the legislation. Still, as an example of 'enlightened unilateralism' in the emerging field of environmental protection, the Act serves as a model.

While it adds to the confusion of conflicting, overlapping claims in the Arctic, the Act is nonetheless explicit and specific in its application to threats of marine pollution.

It is regrettable that Canada decided to restrict the competence of the International Court of Justice, though perhaps not if one only considers the overall sloppiness with which the defence of the unilateral action was handled.

Placing itself in the predicament of denying the jurisdiction of the World Court, Canada lay itself open to "the challenge that it is not because the law is not clear - it never is in a contested case - that this retreat from the rule of law has been undertaken, but because Canada has no confidence in the legal validity of the stance it has assumed".⁵¹ Such a posture contradicts Trudeau's 1969 declarations that, first,

Le droit maritime est une matière complexe qui peut donner lieu, cela se conçoit, à quelques divergences d'opinions. Bien entendu, de telles divergences doivent être réglées non pas de façon arbitraire, mais en respectant scrupuleusement les principes établis en droit international.⁵²

and second that

Neither states nor individuals should feel free to pick and choose, to accept or reject, the laws that may for the moment be attractive to them.⁵³

What Carnahan had to say in 1971 applies equally well in mid-1974:

Until a maritime regime is created which will accommodate all contemporary interests in the use of the seas, the international community must expect a continuation, if not an acceleration, in the quantity of unilateral assertions of control over the oceans.⁵⁴

Some claims will doubtless prove unwarranted, but others, like the Canadian claim in the Arctic will reflect the reasonable interests of littoral states in protecting valid national and international interests.

Thus, "(e)ven granting that the Canadian Government has conferred upon itself rather great powers over a large area, the nature of the problem dictates the sweep of the claim".⁵⁵

The Arctic Waters Pollution Prevention Act is reasonable, there is a compelling need for protective action, and the chosen methods of action are proportional to the seriousness of the threat. Employing Masterson's 'theory of interests',⁵⁶ the Act is certified as permissible, since a proper balance is struck between the welfare of the community and the interests of the actor state.

FOOTNOTES-CHAPTER III

¹Quoted in McDougal and Burke, 585.

²Reprinted in Goldie, 299.

³H.A. Smith, The Law and Custom of the Sea (3d. ed. 1959), p. 29, quoted in McDougal and Burke, 603.

⁴McDougal and Burke, 579.

⁵Ibid., 579-80.

⁶Ibid., 581.

⁷Utton, 227. Van Panhuys, p. 18, also writes of measures which are "proportionate in their importance to the rights or interests which are being threatened".

⁸Cundick, 523.

⁹Caflisch, 20.

¹⁰Marshall, in Pharand, The Law of the Sea of the Arctic, 239.

¹¹Potter, 103.

¹²Research in International Law, Harvard Law School, Nationality, Responsibility of States, Territorial Waters (1929), quoted in McDougal and Burke, p. 9, footnote 25.

¹³See Potter, in Cundick, 524.

¹⁴Sullivan and Burke, The Law of the Sea: Offshore Boundaries and Zones (1967), 229, quoted in Cundick, 524.

¹⁵Hydeman and Berman, 238, emphasis added.

¹⁶McDougal and Feliciano, in Green, 481.

¹⁷Caflisch, 18. Significantly, the AWPPA utilises the phrase 'grave and imminent danger', but only when referring to ships which have passed the standards but are nevertheless in a situation in which they are likely to pollute. Sect. 15 (3)c.

¹⁸Utton, 227.

¹⁹Green, 484.

²⁰Caflisch, 20.

²¹Ibid. Caflisch supports this view with Sorensen's opinion that

"...cette extension des attributions doit être limitée à l'hypothèse d'un danger imminent et ne saurait servir de fondement à un droit de réglementation unilatérale et permanente dans des matières telles que la construction de navires étrangers."

Annuaire, LIII (1969), Tome II, 266.

²²Hydeman and Berman, 239. Reference is made to "(t)he seizures in Church V. Hubbard, the Virginus, the Miasarancko, and the case involving the Yugoslavian vessel carrying arms to Casablanca" as being based on mere threats of violation: "(i)n addition, some domestic laws, such as certain of the United States and United Kingdom hovering legislation, provide for penalty in case of a threat of specified conduct". p. 239, footnote 391.

²³Elihu Root, "The Real Monroe Doctrine", AJIL, VIII (1914), 432.

²⁴Hydeman and Berman, 241.

²⁵McDougal and Burke, 579.

²⁶Wilkes, "Due Process", 525.

²⁷McDougal and Burke, 579.

²⁸Klotz, 716.

²⁹Trudeau, "Canadian Prime Minister's Remarks on the Proposed Legislation", April 8, 1970, ILM, 601.

³⁰Trudeau, "Canada Leads Fight Against Pollution", 2, emphasis added.

³¹Van Panhuys, 159.

³²Ibid., 158.

³³Bilder, Unilateral Action, 20.

³⁴See McDougal and Burke, 9 and 771-73.

³⁵These interpretations are attributed to the International Law Commission by Hydeman and Berman, 243.

³⁶Gilbert Gidel, United Nations Secretariat, Memorandum on the Regime of the High Seas (U.N. Doc. No. A/CN.4/32) (1950), 28-29, in McDougal and Burke, 602.

³⁷Cundick, 548.

³⁸Wilkes, "Due Process", 525.

³⁹Utson, 231.

⁴⁰Pharand, The Law of the Sea of the Arctic, 241.

⁴¹Cundick, 525.

⁴²Ibid.

⁴³Caflisch, 20-21.

⁴⁴See Beesley, I.A. & N.D., no. 10 (April 1, 1971), 10.

⁴⁵Wilkes, "Due Process", 528.

⁴⁶Ibid., 529.

⁴⁷Most of these interests are straightforward. Of the others, 'enlightenment' is defined as the acquisition and furtherance of scientifically gathered knowledge; 'skill' is the acumen and technology required for navigation and other activity in the North; 'solidarity' involves the stated commitment of both Canada and the United States to the process of interaction in the Arctic, and to the common purpose of all nations in the world's oceans; 'rectitude' refers to a nation's perception of its own and other's behavior in moral terms. See O'Brien and Chapelli, Part I, 334-47.

⁴⁸Ibid., 342.

⁴⁹O'Brien and Chapelli, Part I, 343.

⁵⁰On November 24, 1970, Donald Jamieson stated that the Government would not hesitate to withdraw the AWPPA in order to implement in its domestic legislation the provisions of a new convention which would meet Canada's needs as a potential victim of pollution. See Minutes of Proceedings and Evidence, Special Committee on Environmental Pollution, no. 6 (November 24, 1970), Appendix C, 37.

⁵¹Green, "Canada and Arctic Sovereignty", 775.

⁵²Declaration concernant l'archipel de l'arctique, le plateau continental et les eaux intérieures, H. of C. Deb. 8720 (May 15, 1969).

⁵³Trudeau, H. of C. Deb. 38-9 (October 24, 1969).

⁵⁴Carnahan, 646.

⁵⁵Ibid., 647.

⁵⁶William E. Masterson, Jurisdiction in Marginal Seas, (1929), 381, quoted in McDougal and Burke, 600.

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