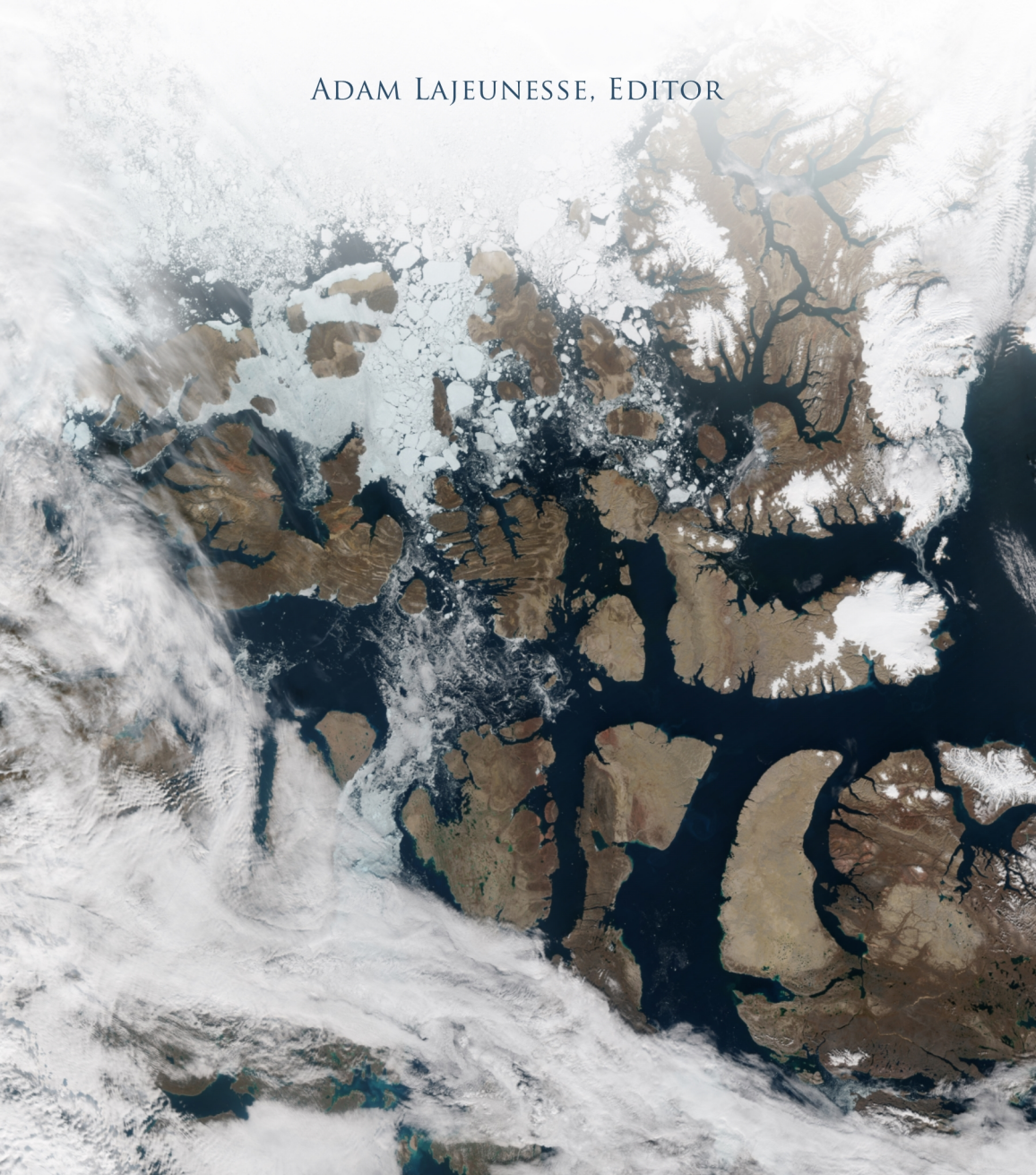


DOCUMENTS ON CANADIAN ARCTIC MARITIME SOVEREIGNTY

ADAM LAJEUNESSE, EDITOR



DOCUMENTS ON CANADIAN ARCTIC SOVEREIGNTY AND SECURITY

**Documents on Canadian Arctic
Maritime Sovereignty
1950-1988**

Documents on Canadian Arctic Sovereignty and Security

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Adam Lajeunesse, Editor

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Documents on Canadian Arctic Maritime Sovereignty 1950-1988

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Number 13

Edited by
Adam Lajeunesse

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Note on Sources

This volume is intended to present a selection of the most relevant government documents relating to Canadian Arctic maritime sovereignty, as a means of demonstrating the evolution of Canada's policy and position in that area. Legal documents, treaties, and conventions relevant to Canada's Arctic waters have been intentionally excluded; these documents will appear in a companion volume in this series in 2019. Additional documentary sources on this subject can be found in Canada's *Documents on Canadian External Relations* and the American *Foreign Relations of the United States*.

Certain sections within this volume are marked as illegible. This is the result of poor document preservation which has left certain sections destroyed, or smudged print that rendered elements untranscribable.

Several of the documents within this collection contain redactions, and notations have been made to indicate these classified sections – the vast majority of which occur under section 15(1) of the *Access to Information Act*.

Section 15 is a discretionary injury exemption, which allows the government of Canada to except information from being disclosed if it believes that information may prove injurious to:

1. the conduct of international affairs;
2. the defence of Canada or any state allied or associated with Canada;
3. the detection, prevention or suppression of subversive or hostile activities

This section reads as follows:

15 (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

- a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;
- b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;
- c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;
- d) obtained or prepared for the purpose of intelligence relating to
 - (i) the defence of Canada or any state allied or associated with Canada, or
 - (ii) the detection, prevention or suppression of subversive or hostile activities;
- e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;
- f) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;
- g) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad

Given these limitations, this volume remains a work in progress and will be expanded as new material is released.

Certain files within this collection have also been reproduced with no archival finding information attached. These documents come from the collection of Dr. Rob Huebert, who received them directly from government officials.

Readers should note as well that spelling and other errors found in the originals have been retained in the transcriptions.

Introduction

In September 1985, Secretary of State for External Affairs Joe Clark announced to the House of Commons the establishment of straight baselines around the Arctic Archipelago, defining those straits and passages within as historic internal waters of Canada and under full national sovereignty.¹ “The policy of this government is to maintain the natural unity of the Canadian Arctic archipelago” Clark declared, “and to preserve Canada’s sovereignty over land, sea, and ice undiminished and undivided.” (Document 68). This was the first time Canada had delineated its Arctic maritime space, clearly defining in legislation those waters over which it had sovereignty. It was an important clarification, as Canada had claimed and exercised sovereignty for decades without ever stating with precision where that sovereignty began and ended. In the assertion of sovereignty, precision is important. As the American geographer Isaiah Bowman once said, a boundary line “has to be here, not hereabouts.”²

While this definition was an important clarification it did not fundamentally change the Canadian approach to its Arctic waters. In making this announcement Clark was not staking a claim, rather he was making official what Canada had long assumed and practiced. In so doing, he marked the culmination of decades of political and legal discussions, negotiations, and debate. It was the logical conclusion to a

¹ These baselines took effect January 1, 1986.

² As quoted in: Gordon Smith, “Sovereignty in the North: The Canadian Aspect of an International Problem,” *The Arctic Frontier*, R. St. J Macdonald ed. (Toronto: University of Toronto Press, 1966), 225.

lengthy political and legal evolution, by which Canadian sovereignty came to be defined and asserted in the way that it ultimately was in 1986.

This volume is a documentary history, charting the evolution of Canada's Arctic maritime sovereignty through government memoranda, notes, communiqués, and other primary source material. In so doing, it offers as unfiltered a look as possible at the political thinking, legal analysis, and international discussions that defined Canadian Arctic policy during its formative period. The material included is necessarily limited and selective – drawn from tens of thousands of pages of archival documents on the subject. These documents were included for several reasons: some are important government studies which shaped policy making, some are records of discussions or communications which illuminate important decisions, while others were selected for the context they provide at key moments in Canadian policy making.

The period covered in this compendium stretches from 1950 to 1988 and is, in some respects, artificial. Canadian policy makers certainly considered the question of Arctic maritime sovereignty in the years before 1950, but it was never a pressing consideration, nor was any real policy formed. To reproduce material from this period would also be redundant, duplicating as it inevitably would the thorough collection compiled by Janice Cavell in her 2016 *Documents on Canadian External Relations* volume on Arctic sovereignty and P. Whitney Lackenbauer and Peter Kikkert's excellent volume in the DCASS series.³ This volume has also avoided reproducing material in Whitney Lackenbauer and Peter Kikkert's 2010 book *The Canadian Forces & Arctic Sovereignty*, which examines armed forces documents on this subject.⁴

This volume ends in 1988, not because the Mulroney government's declaration of straight baselines – and the Canada-US negotiations which followed – ended discussion on the matter but because, by that point, the internal Canadian debate over the precise nature and extent of Canada's claim had been settled. Documents 69-74 extend this

³ Janice Cavell Ed., *Documents on Canadian External Relations: The Arctic, 1874-1949* (Ottawa: Global Affairs Canada, 2016) and P. Whitney Lackenbauer and Peter Kikkert, "Legal Appraisals of Canada's Arctic Sovereignty: Key Documents, 1905-56," *Documents on Canadian Arctic Sovereignty and Security* v. 2 (Calgary: CMSS/AINA, 2014).

⁴ P. Whitney Lackenbauer and Peter Kikkert, *The Canadian Forces & Arctic Sovereignty: Debating Roles, Interests and Requirements* (Waterloo: LCMSDS Press of Wilfred Laurier University, 2010).

volume to 1988 to provide some insight into how Canada's new policy was received both internally and internationally. From a logistical perspective, documentary material on this subject also becomes nearly impossible to secure after this date – even through the Access to Information Act, the vehicle by which the lion's share of this collection was secured.⁵

The focus of this volume is on Canadian government material; however, certain key documents from the United States National Archives and Records Administration (College Park, MD) and the *Foreign Relations of the United States*⁶ series have also been included. This American material provides context to Canada's decision making and offers researchers a glimpse at how crucial Canadian policy initiatives were received by the country's most important partner – and sometimes opponent – in this field.

Ultimately, the purpose of the *Documents on Canadian Sovereignty and Security* is to facilitate new research and new interpretations which can add to, improve, and challenge the existing literature. This collection should provide academics, students, and policy makers with the research foundation to launch new inquiries into the field. Undergraduate students can use this collection as a substitute for extensive primary research, while graduate students and scholars can employ it as a ready jumping off point to undertake more thorough archival work.

Historic Waters

The question of maritime sovereignty is complex, far more so than the assertion of sovereignty over land. For much of the 20th century, Canada claimed and exercised this sovereignty within a legal environment that made asserting such a claim very difficult. In the early twentieth century, a state's maritime sovereignty was limited to three nautical miles in all but the most exceptional circumstances. Such exceptional claims were normally confined to areas defined as historic waters – strategically or economically important bodies of water closely tied to the land, such as bays or inlets. This legal definition is important in the Canadian case since Canada claims the

⁵ On this point see the acknowledgements.

⁶ *The Foreign Relations of the United States* (FRUS) series presents the official documentary historical record of major U.S. foreign policy decisions and significant diplomatic activity, <https://history.state.gov/historicaldocuments>

waters of the Arctic Archipelago as historic and, as these documents demonstrate, has done so for much of the past hundred years.

For most of the 20th century, the restrictive use of this principle made its application to the Northwest Passage problematic. The relationship between this doctrine and straits connecting two areas of the high sea⁷ (such as the Northwest Passage) remained undeveloped and uncertain. The question of whether a strait could be considered historic waters went before the Hague Conference in 1930 but no clear conclusion was arrived at. Likewise, the international community was unable to agree on the status of waters lying within an archipelago, whose entrances and exits are closed by an overlap of territorial waters.⁸ The international community was, likewise, unable to agree upon a definition for the term historic waters at any of the three UN law of the sea conferences (1958, 1960, and 1973-82).

There is however a general agreement of the basic principles involved. Legal scholar L.J. Bouchez offers one of the best definitions in *The Regime of Bays in International Law*, stating that “historic waters are waters over which the coastal state, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.”⁹ This definition reflects three generally agreed upon and basic requirements:

- (i) the exclusive exercise of state jurisdiction,
- (ii) a long lapse of time, and
- (iii) general acquiescence by foreign states.

In a detailed memorandum, produced by the Department of External Affairs in 1959, historic title was given a definition drawn from Philip Jessup’s 1927 work *The Law of Territorial Waters and Maritime Jurisdiction*, which was largely in agreement with that offered by Bouchez. According to External Affairs, historic waters were those “where a state has over a period of years asserted jurisdiction over an area of water as if it were a part of its territorial

⁷ Later, the UN Law of the Sea Convention added the provision that an international strait may also connect two Exclusive Economic Zones.

⁸ J.E. Read, “Memorandum Relating to Territorial Waters,” December 1, 1932, LAC, RG 25, vol. 2, file 10600-B-40.

⁹ L.J. Bouchez, *The Regime of Bays in International Law* (Leyden: Sijthoff, 1964). As quoted in Donat Pharand, “The Arctic Waters and the Northwest Passage: A Final Revisit,” *Ocean Development and International Law* 38:1 (2007), 7.

sea or internal waters and where such assertions has the general acquiescence of the international community (Document 32). At the time this memorandum was authored, the Canadian notion of control centered upon the jurisdiction historically exercised by southern Canadians (and their British predecessors), including legislative acts, expeditions, and treaties (Document 32).

While Canada had a long history of unchallenged occupation, meeting the high standards for historic waters was considered difficult. While most of the region had been discovered and charted by British explorers (with this claim passed on to Canada in 1880), none of this activity was directed towards the waters. Legal scholar Donat Pharand notes that British claims in the area were unquestionably confined to newly discovered lands.¹⁰ There were no claims to the Arctic waters and Canada inherited no such rights. In fact, there was no recognized principle within international law that would allow a state to claim sovereignty over water or ice by right of discovery.

Canadian activity in the region was limited, given the high costs of operating in the North. Still, it was assumed that this limited degree of control over the Arctic waters was enough, given the relative absence of activity there. While the official Canadian footprint was small, it was exercised strategically. In the early 20th century, Canada licenced foreign fishing and whaling activity and, during the 1940s and 1950s, Ottawa regulated the heavy American shipping activity associated with continental defence projects.¹¹ One External Affairs memorandum assumed that this element of control may have been enough to invoke the general legal principle of *quista non movere*, the historic consolidation of title with a “reasonable chances of success” (Document 63). As the documents in this volume demonstrate, however, generations of Canadian policy makers considered a claim on this basis to be an uncertain proposition.

In addition to the element of state control, a claim to historic waters must also meet the criteria of being of ‘long standing.’ Complicating the situation, the actual meaning of the term ‘long standing’ has never been agreed upon. One vague definition was offered by the International Court in 1982, which stated that: “historic titles must enjoy respect and be preserved as they have always been

¹⁰ Pharand, “A Final Revisit,” 9-10.

¹¹ On the level of control exercised over American vessels see: Adam Lajeunesse, *Lock, Stock, and Icebergs: The Evolution of Canada's Arctic Maritime Sovereignty*. Vancouver: University of British Columbia Press, 2016, Chapter 4.

by long usage.”¹² “Well established usage,” “continuous usage of long standing,” “immemorial usage,” and “usage continu et séculaire” have also been employed to frame the temporal requirement of the principle.¹³ It is a relative question and highly dependent on the situation but, according to Pharand, the length of time must be “substantial” if not necessarily “immemorial.”¹⁴ Concern over Canada’s ability to meet this criterion appears frequently in this volume (for instance: Documents 32; 34; 61; and 63) and was one of the reasons for the country’s reluctance to make its long-assumed and exercised control of the Arctic waters official through legislation.

Importantly, some of the last documents in this volume demonstrate a shift in Canadian policy vis-à-vis the concept of usage. While discussions within External Affairs during the 1950s and 1960s focused on the country’s ability to show *government* activity in the North, Donat Pharand and David Vanderzwaag note that, by the early 1980s, Canadian policy makers were starting to incorporate Inuit occupancy into their statements and policy.¹⁵ This shift is borne out in the documents. In announcing straight baselines to the House of Commons in 1985, Joe Clark made it clear that Canadian sovereignty was buttressed by this usage: “from time immemorial Canada’s Inuit people have used and occupied the ice as they have used and occupied the land” Clark said (Document 68). Talking points guiding government publicity in 1986 emphasized this point further, stating that the Arctic waters “have been used and occupied like the land itself by Canadian Inuit people from time immemorial [underlining in original] (Document 68).”

This history is based on archeological evidence and oral histories, well documented by the 1976 Inuit Land Use and Occupancy Project, funded by the Department of Indian and Northern Affairs.¹⁶ Pharand and Vanderzwaag show the importance of Inuit usage and suggest that this history of occupation goes a long way towards validating Canadian sovereignty over those areas.¹⁷ The documents in this collection take a similar position. Document 65, for instance, is a

¹² Tunisia/Libya Case, [1982] I.C.J. Rep., at 73, cited in Pharand, “Final Revisit,” 7.

¹³ Pharand, 7.

¹⁴ Ibid.

¹⁵ Donat Pharand and David Vanderzwaag, “Inuit and the Ice: Implications for Canadian Arctic Waters,” *Canadian Yearbook of International Law* 21:53 (1983), 53.

¹⁶ Canada, Indian and Northern Affairs, *Inuit Land Use and Occupancy Project* (Ottawa: DINA, 1976).

¹⁷ Pharand and Vanderzwaag, “Inuit and the Ice,” 70.

detailed study of the issue of Arctic maritime sovereignty from 1982; it clearly states that:

The Inuit's historic occupation of the ice between the Arctic islands, as well as the land, is well documented and contributes to Canada's claim of historic title to the waters of the Archipelago. The Inuit have been encouraging the Government to clearly claim these waters as internal.

The ability of the Inuit to transfer this claim to the Canadian government was uncertain for much of the period covered by this volume. Historically, international law has tended to treat indigenous peoples as something less than international entities capable of transferring title. The 1926 American and British Claims Arbitration Tribunal set a precedent against such a transfer of rights when, in assessing the legal status of the Cayuga Nation, it described that group as "not a legal unit of international law" and unable to transfer sovereignty.¹⁸ The 1928 *Island of Palmas* case saw the ICJ reach a similar conclusion:

...native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may in international law, arise out of treaties."¹⁹

In a ruling closer to the Canadian Arctic, the Permanent Court of International Justice reiterated this view in its decision on the *Legal Status of Eastern Greenland*. A different precedent can be found, however, in the far more recent ICJ decision in the *Western Sahara* case of 1975. Vanderzwaag and Pharand point to an important shift here, in which the court states that: "territories inhabited by tribes are not *terrae nullius* (lands belonging to no one)."²⁰

If Canadian Inuit can transfer rights, the question remains whether they ever enjoyed sovereignty over maritime space in the first place. Acquiring sovereignty over waters is, after all, far from straight forward. Canada's case is likely helped by the fact that the Arctic is unique. Because ice has historically enabled – rather than prevented – travel, use, and occupancy, the Inuit have long regarded and treated it

¹⁸ Vanderzwaag and Pharand, "Inuit and the Ice," 80

¹⁹ Ibid.

²⁰ Ibid, 81.

as land. In its 2008 report *The Sea Ice is our Highway*, the Inuit Circumpolar Council (Canada) states:

When defining our “land”, Inuit do not distinguish between the ground upon which our communities are built and the sea ice upon which we travel, hunt, and build igloos as temporary camps. Land is anywhere our feet, dog teams, or snowmobiles can take us.²¹

During the early Cold War, the reluctance to rely on Inuit title to reinforce Canadian sovereignty stemmed not only from the legal uncertainty of aboriginal title but Canada’s lack of a comprehensive land claims agreement with the Inuit. The shift in Canadian policy in the 1980s was likely tied to the commencement of land claims negotiations with the Tunngavik Federation of Nunavut in 1982. At the time, Inuit organizations highlighted the connections between their people’s history of usage and Canada’s historic claim (document 65). As such, the prospect of a comprehensive land claims agreement would certainly have encouraged the federal government to approach the question of sovereignty with a different perspective.

In addition to long usage, a claim to historic waters also requires a degree of acquiescence by the broader international community – particularly those whose interests are most affected. The nature of acquiescence is debated by legal scholars and its precise definition is undetermined. There has always been a school of thought which holds that consent must be explicit. For French lawyer Paul Fauchille, acquiescence means express consent.²² Similarly, Professor Alf Ross, who mentions consent first among the circumstances which “exclude the normal illegitimacy of an act,” emphasizes the qualification that “in all cases ... there should be real consent and not merely passivity in the face of inevitable facts.”²³

Alternately, acquiescence could be implied from a lack of any challenge – the notion that *I qui tacet consentire videtur* – silence implies consent. In his work on the subject, D.H.N. Johnson believes

²¹ Inuit Circumpolar Council Canada, *The Sea Ice is our Highway: An Inuit Perspective on Transportation in the Arctic* (ICC Canada, 2008), 2.

²² Paul Fauchille, *Traité de Droit International Public* 8th, vol. 1, pt. 2 (Paris: Rousseau & Co., 1925), 382, in: I.C. MacGibbon, “The Scope of Acquiescence in International Law,” *British Yearbook of International Law* 31:143 (1954), 144.

²³ Alf Ross, *A Textbook of International Law* (London: Longmans, Green and Co, 1947), 243.

that consent can be either “express or implied.”²⁴ Likewise, Iain MacGibbon states that “the presumption of consent ... may be raised by silence.”²⁵ Donat Pharand agrees that acquiescence need not be explicit; in his seminal work on the subject, “The Arctic Waters and the Northwest Passage: A Final Revisit,” he writes: “acquiescence need not amount to actual consent or recognition; otherwise, history would cease to play its role as the root of title.”²⁶

The American Factor

This is an important point for Canada. No foreign state has ever offered its express recognition of Canada’s historic waters claim; however, what may be deemed a ‘general toleration’ can be drawn from the absence of any real challenge. In the case of Canada’s Arctic waters, this effectively meant seeking recognition – or at least avoiding an express challenge – by the United States, the one foreign state which operated in those waters and had an interest in their status. Securing implicit American recognition of Canadian claims was, therefore, an important theme in the country’s decades-long endeavour to solidify its maritime sovereignty.²⁷ As such, America’s position on the Arctic was very important to Canada, as historian Elizabeth Elliot-Meisel wrote, it never “took more than a perception of a United States challenge to Canadian sovereignty to bring the issue to the forefront.”²⁸

From the late 1940s to the end of the 1950s the United States was driven by the developing Cold War to spend considerable sums establishing civilian and military facilities in the Canadian Arctic. While never intended as a challenge to Canadian sovereignty, this activity worried governments in Ottawa. The presence of large numbers of American civilians and servicemen in a region with few Canadians, and even less government presence, brought into question what historian Shelagh Grant called Canada’s *de facto* sovereignty.²⁹ This concern became acute in the late 1940s with the construction of

²⁴ D.H.N. Johnson, “Acquisitive Prescription in International Law,” *British Year Book of International Law* 27 (1950), 347.

²⁵ MacGibbon, “The Scope of Acquiescence,” 143-44.

²⁶ Pharand, “Final Revisit,” 7.

²⁷ Lajeunesse, *Lock, Stock, and Icebergs*, 89.

²⁸ Elizabeth Elliot-Meisel, *Arctic Diplomacy: Canada and the United States in the Northwest Passage* (New York: Peter Lang Publishing Ltd., 1998), 3.

²⁹ Shelagh Grant, *Sovereignty or Security?* (Vancouver: University of British Columbia Press, 1988), 185.

the Joint Arctic Weather Stations Program (JAWS) – established between 1947 and 1950.³⁰ Even more concerning was the construction of the Distant Early Warning (DEW) Line from 1954-1957.

The DEW Line was a massive undertaking to build a string of early warning radar stations from Alaska to Greenland and involved hundreds of American flagged vessels entering Canada's Arctic waters.³¹ Exercising control over these ships in the Northwest Passage was a complicated issue, given that Canada had made no official claim to any waters in the Arctic beyond its internationally recognized three-mile territorial sea. Canada naturally exercised control over these ships once they began to unload on a Canadian beach, but there remained the political need to be seen exercising control over the entire region – even areas which the United States considered international waters.

One method, outlined in Document 52, was to have the United States apply for a waiver from the provisions of the *Canada Shipping Act* for vessels operating in the area. These waivers meant different things to the Canadian and American governments.³² Since they applied only to cabotage (coastal trade) a waiver might have been technically necessary, and this was the American view. Given the importance of American implicit recognition of its control over these waters, Canada chose to interpret these waivers as an implied recognition of its sovereignty. This is illustrated in Document 16 where, in response to a question about whether the US recognized the Northwest Passage Canadian "as territorial waters"³³ Prime Minister St. Laurent replied:

I do not know whether we can interpret the fact that they did comply with our requirement that they obtain a waiver of the provisions of the Canada Shipping Act as an admission that these are territorial waters, but if they were not territorial waters there

³⁰ Grant, *Sovereignty or Security*, Chapter 9 and Daniel Heidt and P. Whitney Lackenbauer, *Joint Arctic Weather Stations: Science and Sovereignty in the High Arctic, 1946-1972* (forthcoming book).

³¹ For more on the DEW Line see: Joseph T. Jockel, *No Boundaries Upstairs* (Vancouver: University of British Columbia Press, 1987).

³² Lajeunesse, *Lock, Stock, and Icebergs*, 94-95.

³³ In the 1950s the term 'territorial waters' was used in the way the term 'internal waters' would be used in the 21st century. The *Customs Act* of 1928 illustrates this by defining the phrase "territorial waters of Canada" as "the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion." *Canada Customs Act*, 158 (7), 1928.

would be no point in asking for a waiver under the Canada Shipping Act. (Document 16)

Large-scale American activity in the Northwest Passage was short-lived. Once the DEW Line was built, that traffic gave way to smaller annual re-supply missions. While quantifying any precise effect on Canadian sovereignty is impossible, historians largely agree that the friendly working relationship left Canada's position unchallenged. In support of that assertion, Elliot-Meisel highlights statements by men like former Deputy Minister of Northern Affairs and Natural Resources, and ACND Chairman, Gordon Robertson, which describe this activity as being *beneficial* to Canada, given the unchallenged control exercised by Ottawa over American operations.³⁴ The United States never sought to deny Canadian sovereignty in the Arctic, Elliot-Meisel argued, even if Washington could be insensitive at times.³⁵ This view is shared other historians, including P. Whitney Lackenbauer, Peter Kikkert, and this author.³⁶ Historian Shelagh Grant offered a slightly different interpretation in her 1988 book *Sovereignty or Security?*, arguing that Canada's northern sovereignty was endangered by its need to cooperate with the United States on Arctic security projects – with sovereignty and security being opposing forces between which Canada was forced to choose.³⁷

The Sector Theory and Straight Baselines

The American presence in the region during the 1950s sparked serious discussion within the Canadian government on maritime sovereignty. During the early 1950s, official conversations focused on the potential application of something called the sector theory (or sector principle). This principle assumed the use of meridians as national borders, running from a state's eastern and western extremes

³⁴ Elliot-Meisel, *Arctic Diplomacy*, 12.

³⁵ Ibid, 34.

³⁶ David Bercuson, "Continental Defense and Arctic Sovereignty, 1945-50: Solving the Canadian Dilemma." *The Cold War and Defense*, Keith Neilson and Ronald G. Haycock eds. (New York: Praeger Publishers, 1990); Lajeunesse, *Lock, Stock, and Icebergs*; P. Whitney Lackenbauer and Peter Kikkert, "Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68," *Serving the National Interest: Canada's Department of Foreign Affairs and International Trade, 1909-2009*, Greg Donaghy and Michael Carroll eds. (Calgary: University of Calgary Press, 2011).

³⁷ Grant, *Sovereignty or Security?*

to the Pole. All territory bracketed by these lines, discovered or not, supposedly belonged to that country.

The sector theory was first used in a quasi-official manner in 1904 when the Department of the Interior published a map showing the nation's western boundaries as the 141st meridian of west longitude extending to the Pole and the eastern boundary as the 60th meridian of west longitude extending north from just east of Ellesmere Island.³⁸ The theory gained more mainstream prominence in 1907 when Senator Pascal Poirier proposed a resolution in the Canadian Senate to make a formal declaration of sovereignty based on the theory.³⁹ This motion was never seconded or voted upon and never received any official recognition. But neither was it explicitly rejected. Reference to the sector can be found throughout the documents in this volume, with serious discussions on its applicability in Documents 3, 4, 5, and 7. Within this context, there was also consideration of Canada's right to control ice islands (large, flat blocks of multi-year ice) within its sector (Documents 3, 4, 7, and 18).

These exaggerated claims never enjoyed much official support and were largely set aside by the mid-1950s.⁴⁰ Studies, conducted in 1954 and 1955 by the Departments of National Defence and External Affairs dismissed the notion that Canada could claim floating ice islands (Documents 3 and 7). At around this time the sector theory was also tacitly abandoned as a serious means of defining Canada's sovereignty. Advice to Cabinet in 1960 recommended that the principle be placed "in reserve," not disavowed *per se*, but not actively employed (Documents 18).

These broad claims were replaced in the mid-1950s by a more specific assertion that Canada's Arctic sovereignty should be limited to the waters within the Arctic Archipelago (Document 12, 32, and 49). This policy was supported by shifts in the law of the sea, specifically the 1951 ICJ ruling in the *Anglo-Norwegian Fisheries Case*. This ruling affirmed Norway's right to enclose waters landward of straight baselines as internal. The *Fisheries Case* seemed to offer Canada a more clear-cut legal vehicle for enclosing its own Arctic waters and, in

³⁸ Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), 5.

³⁹ Canada, *Senate Debates*, February 20, 1907, 10th Parliament, 3rd session, 266.

⁴⁰ A more favourable view of the sector as a vehicle for sovereignty assertion (at least in its applicability to land) can be found in: Janice Cavell, "The Sector Theory and the Canadian Arctic, 1897-1970," *The International History Review* (2018), 1-26.

1952, External Affairs commissioned noted jurist and professor of law George Curtis to survey Canada's options (Documents 9, 32, and 34).

In the mid-1950s the Norwegian precedent supplanted the sector principle in government discussions as the best option for expressing its claim to the Arctic waters. Reflecting this, the government of Louis St. Laurent made the decision in 1956 to base its maritime policy on the *assumption* that Canada's Arctic waters were those falling within straight baselines around the Arctic Archipelago (Document 12 and 48). This was a working definition, since the position was not made public. Indeed, as late as 1959, the Advisory Committee on Northern Development admitted that "the Canadian position regarding sovereignty over the Arctic waters has ... never been clearly formulated" (Document 34). In light of this uncertainty, from 1958 to 1959 the ACND also undertook a study of the issue, soliciting input from across government departments and the Canadian military (Documents 23-27 and 29-31).

This study arrived in Cabinet in March 1960 (Document 38) and, while no decision was made, the bureaucracy continued to operate along the lines laid out in 1956 – that Canada's Arctic waters were those:

... within a line starting at Resolution Island, southeast of Baffin Island, and running from headland to headland in a rough triangle north to the top of Ellesmere Island and thence southwest to Banks Island and the Arctic coast of Canada" (Document 49).

Policy Assessed

The emerging clarity and consistency of Canada's internal policy discussions was not matched by its public pronouncements. This ambiguity in its communications is a clear theme emerging from the documents since, into the late 1950s, the Canadian government seemed unsure of the legal applicability of straight baselines to the Arctic. Coupled with persistent concerns over the prospect of a legal and political confrontation with the Americans, successive Canadian governments kept the precise nature of their position in the Arctic hazy. Rather than employing specific legal terminology, politicians employed general terms expressed with more nationalist fervor than legal precision. For instance, when answering questions about the extent of Canadian claims, Prime Minister John Diefenbaker told the

House of Commons in 1958 that his party subscribed to “the Canadian theory of sovereignty.”⁴¹ No explanation of what that meant was offered.

This ambiguity was noticed abroad. Document 8, for instance, demonstrates an American attempt to make sense of Canadian Arctic policy in 1955. Documents from the United States show that, until the Canada-US negotiations of 1963 at least, the Americans remained uncertain as to what Canada considered to be its waters in the Arctic and on what basis it made that claim.⁴²

Lackenbauer and Kikkert have credited this ambiguity to the Canadian desire to keep the peace between itself and its ally during the early Cold War – allowing, as it did, both sides to comfortably ignore the details of what exactly Canadian sovereignty was.⁴³ Clarity was required, however, when Canada sought more express American acceptance of that sovereignty. Discussions with the United States revolved around this point in the mid-1960s (Documents 45-48), the late 1960s and early 1970s (Document 52), and again in the mid-1980s (Documents 69-70). On each occasion, Canada sought first to secure American acceptance of the Northwest Passage as historic, internal waters of Canada. When those attempts failed, Canadian negotiators pushed their American counterparts to at least refrain from openly challenging that Canadian claim.⁴⁴

During the 1950s and 1960s Canada was able to secure a certain degree of implicit recognition. American activity in the Canadian North was regulated and, in some respects, managed by the Canadian government. While there was no explicit American acceptance of Canadian sovereignty, neither was there a challenge and, in working cooperatively with Canada, the US seemed to be implying some measure of recognition of Canada’s right to regulate and control the

⁴¹ Canada, House of Commons, *Debates*, March 29, 1960, 24th Parliament, 3rd session, 2577.

⁴² Lajeunesse, *Lock, Stock, and Icebergs*, 98-100.

⁴³ Lackenbauer and Kikkert, “Sovereignty and Security,” and Lajeunesse, *Lock, Stock, and Icebergs*.

⁴⁴ For a detailed account of these negotiations in the 1960s see: Lajeunesse, *Lock, Stock, and Icebergs*, Chapters 6; for the 1970s negotiations see: John Kirton and Don Munton, “The Manhattan Voyages and their Aftermath,” *Politics of the Northwest Passage* Franklyn Griffiths ed. (Kingston: McGill-Queen’s University Press, 1987) and Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 7. On the 1980s negotiations see: Christopher Kirkey, “Smoothing Troubled Waters: The 1988 Canada-United States Arctic Co-operation Agreement,” *International Journal* 50:2 (Spring, 1995) and Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 11.

Northwest Passage.⁴⁵ Writing in 1963, Ivan Head – then a foreign service officer with the Department of External Affairs and future advisor to Prime Minister Pierre Trudeau on the Arctic sovereignty file – summed up this policy, succinctly: “As the years pass and as occupation becomes more effective, always in the absence of any foreign claim, the title assumes those characteristics of continuity and peaceful lack of disturbance which international law requires to be present in valid territorial claims.”⁴⁶

How effective this policy of seeking implicit recognition actually was is a matter of debate. Historians P. Whitney Lackenbauer and Peter Kikkert suggest that this gradual process was ultimately successful – leading to the assertion of more functional jurisdiction in the 1970s and the straight baselines drawn in 1985.⁴⁷ That assessment was challenged by this author, who pointed to the ambiguity of Canada’s policy as an “Achilles heel,” which prevented the establishment of the kind of precedent that Kikkert and Lackenbauer assumed was accumulating.⁴⁸

What is agreed upon is that successive Canadian governments spent decades avoiding the use of the terms ‘internal’ or ‘historic’ waters, in part due to uncertainty over Canada’s legal position and, in part, to avoid a conflict with the United States. It was only in the wake of the SS *Manhattan’s* controversial voyage through the Northwest Passage, that the government’s position was stated clearly.

In mid-April 1970, Secretary of State for External Affairs Mitchell Sharp told the House of Commons that: “obviously we claim these to be Canadian internal waters [referring to the Arctic Archipelago].”⁴⁹ The 1971 White Paper on National Defence put the term into print when it described the Northwest Passage as Canada’s “Northern inland waters”⁵⁰ and this claim was repeated by the Department of Justice in 1973, when it stated that the waters of the archipelago are internal, even “if they had not been declared as such by any treaty or

⁴⁵ For a comprehensive study of this relationship see: Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 4.

⁴⁶ Ivan Head, “Canadian Claims to Territorial Sovereignty in the Arctic Regions,” *McGill Law Journal* 9:3 (1962–63), 225.

⁴⁷ Lackenbauer and Kikkert, “Sovereignty and Security.”

⁴⁸ Lajeunesse, *Lock, Stock, and Icebergs*, 96.

⁴⁹ Canada, House of Commons, *Debates*, April 16, 1970, 28th Parliament, 2nd session, 5953.

⁵⁰ Canada, Department of National Defence, *Defence in the 70’s* (Ottawa: Queen’s Printers, 1971), 1.

by any legislation.”⁵¹ This assertion was repeated two years later by the Secretary of State for External Affairs, when speaking to the Standing Committee on External Affairs and National Defence.⁵²

The ambiguity of Canada’s position prior to this clarification has led historians and political scientists to attack Canada’s Arctic policy as a jumble of contradictions. Jack Granatstein borrowed a phrase from Prime Minister St. Laurent and entitled a 1976 article on the subject “a fit of absence of mind.” In it, he argued that Canada’s Arctic policy has always been a confusing shambles of contradiction and uncertainty.⁵³ Historian Elizabeth Elliot-Meisel writes that it is a history of “fits and starts ... nebulous at best, timid and irresponsible at worst, and nearly always reactive instead of proactive.”⁵⁴ Political Scientist Franklyn Griffiths defined Canadian policy as reactive and lacking any overriding sense of purpose, while John Honderich and Harriet Critchley have both called this policy uncertainty a form of “national schizophrenia.”⁵⁵

The most significant and disruptive reinterpretation to this ‘national schizophrenia’ narrative came in a 2011 chapter by historians P. Whitney Lackenbauer and Peter Kikkert. In it, they lay out a convincing case that the development of Canadian policy was neither schizophrenic nor disastrous but rather a careful and deliberate program. According to this interpretation, the ambiguity of Canadian policy did not represent a ‘fit of absence of mind;’ instead, it was a necessary and well thought out precaution, designed to avoid a direct challenge from the United States to Canada’s ownership over waters that Washington considered international.⁵⁶

⁵¹ Statement for the Bureau of Legal Affairs (Ottawa: Queen’s Printers, December 1973) reproduced in: John Honderich, *Arctic Imperative: Is Canada Losing the North?* (Toronto: University of Toronto Press, 1987), 52 and Elizabeth Elliot-Meisel, “Still Unresolved after Fifty Years: The Northwest Passage in Canadian-American Relations, 1946-1998,” *The American Review of Canadian Studies* 29:3 (Fall 1999).

⁵² Memorandum for Cabinet, May 12, 1976, LAC, RG 12, vol. 5561, file 8100-15-4-2, pt. 3.

⁵³ J.L. Granatstein, “A Fit of Absence of Mind: Canada’s National Interest in the North to 1968,” *The Arctic in Question*, E.J. Dosman ed. (Toronto, 1976), 28-9.

⁵⁴ Elliot-Meisel, *Arctic Diplomacy*, 8

⁵⁵ Honderich, *Arctic Imperative*, 15 and Franklyn Griffiths, “Where Vision and Illusion Meet,” *Politics of the Northwest Passage*, Franklyn Griffiths ed. (Kingston: McGill-Queen’s University Press, 1987), 16 and Harriet Critchley, “The Challenge of Canada’s Arctic and its Place in Canada’s Future,” *NIOBE Papers: Maritime Defence Strategy and Resource Development in Canada’s Arctic*, Fred R. Fowlow and Fred Crickard eds. (Canada: Naval Officers’ Association of Canada, 1990), 9.

⁵⁶ *Ibid.*, p. 3.

In response, this author has asserted that “the truth of the matter lies somewhere in between these competing schools of thought.”⁵⁷ In the 1950s, the bureaucracy had developed a relatively clear and defensible legal and political position, which was maintained and refined during the 1960s and 1970s. This was, however, an internal discussion and the consistent and rational approach developed by the bureaucracy was rarely articulated in public statements. As such, Canada’s position was publicly characterized by confusion, contradiction, and ambiguity.⁵⁸

The Broader Context

This confusion and ambiguity was due, as Lackenbauer and Kikkert point out, to concern over an American rejection of any formal claim. This is certainly evident in the documents found within (for example: Documents 18 and 29). Yet, an additional complicating factor was the unsettled state of international law. In part, the ambiguity of the system accounted for the ambiguity of Canada’s position. Prior to the 1950s, international law seemed to offer no clear or easy path forward for a claim to Arctic waters beyond the then accepted three-mile territorial sea. By the late 1950s international maritime law had fallen into a state of flux as states around the world began to reject that traditional limitation and a dizzying array of heterogeneous extended maritime claims started to crop up. The failure of the 1958 and 1960 United Nations Law of the Sea Conferences to reach agreement on the breadth of the territorial sea left Canadian policy makers unsure of what kind of jurisdiction they might ultimately be able to assert in the Arctic (Document 32), and hesitant to push the issue until they had a clearer picture of what international law would ultimately look like (for example: Documents 2; 16; and 51).⁵⁹

The state of the broader international legal environment concerned policy makers for several reasons. It certainly made fitting Canada’s Arctic position into established law harder, but the principal concern was the impact that a direct claim to Arctic sovereignty would have on Canada’s broader position on the law of the sea. Edgar Dosman notes this connection in his 1976 book *The Arctic in*

⁵⁷ Lajeunesse, *Lock, Stock, and Icebergs*, 7.

⁵⁸ *Ibid.*

⁵⁹ On this point see also: Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 3.

*Question*⁶⁰ while this author's 2016 book *Lock, Stock, and Icebergs* was even more emphatic that this connection "was one of the most important elements in determining the country's approach to the Arctic."⁶¹

Until 1969 the principal maritime concern of every government was the question of Canadian sovereignty over what were dubbed the "special bodies of water." These were the Gulf of St. Lawrence and the Bay of Fundy in the Atlantic and Hecate Strait, Dixon Entrance, and Queen Charlotte Sound in the Pacific. During the years surrounding the 1958 and 1960 UN Law of the Sea Conferences, External Affairs was wary of introducing any element which might distract from its drive to secure agreement on these more important issues, or which could be seen by other states as injecting a highly destabilizing element into a delicate and complex diplomatic situation. External Affairs knew this would raise speculation that Canada was "prejudicing" these conferences and any chance of concluding an acceptable agreement on the territorial sea and fishing zones could have been lost (Document 34).

The focus on the special bodies of water is found throughout these documents. Document 1, for instance, demonstrates External Affairs' willingness to postpone questions of Arctic sovereignty until these more pressing matters are resolved. Document 46 shows how the Arctic was de-prioritized in negotiations with the United States. Discussions on maritime jurisdiction with the United States during the 1950s and 1960s tended to avoid the Arctic question to prioritize these other areas. The documents reproduced herein show that the question of Arctic maritime sovereignty was first raised directly in 1963 by the Liberal government of Prime Minister Lester Pearson, in the context of much broader discussion surrounding the legal status of the special bodies of water (Documents 46).⁶² Then Secretary of State for External Affairs Paul Martin suggested to the Americans that the Arctic be considered historic internal waters, as a means of excluding Soviet vessels from the region. This proposal was rejected by the United States and Martin soon backtracked and "deferred" Canada's claim. This manoeuvre was a failed attempt to leverage the Arctic for

⁶⁰ Edgar Dosman, "The Northern Sovereignty Crisis," *The Arctic in Question*, Edgar Dosman ed. (Toronto, 1976), 36.

⁶¹ Lajeunesse, *Lock, Stock, and Icebergs*, 10.

⁶² These documents come from American sources since the related files in Canadian custody remain restricted.

American support for Canada's claims to the special bodies of water (Document 47-48).⁶³ This was not an abandonment of Canada's Arctic claim, merely a tactical deferral, on the understanding that the resolution of those other issues must take priority.

Canada's decision to defer its Arctic claim in 1964 was followed by several years of negotiation with the United States over the status of the special bodies of water and fishing rights in the Atlantic Ocean. This period also saw a decrease in military activity in the Far North. The Soviet development of intercontinental ballistic missiles reduced the importance of the DEW Line and the pace and scale of Canadian and American military exercises decreased significantly. With the stressors of the American military presence gone, and political focus elsewhere, Edgar Dosman described the 1960s as the "golden tranquil years."⁶⁴

The Voyage of the *Manhattan*

This tranquility was interrupted in 1969 by the voyage of the SS *Manhattan*, an icebreaking supertanker, owned by the American company Humble Oil to test the feasibility of shipping Alaskan crude to the US eastern seaboard.⁶⁵ The *Manhattan's* transit through the Northwest Passage was not intended as a challenge to Canadian sovereignty. In fact, the Canadian government supported the development of a shipping route in the North, in the hopes that it would open Canadian oil and gas reserves and kick-start Northern development.

The Canadian and American coast guards worked closely on the operational requirements for the *Manhattan's* voyage and there was widespread agreement that the two countries could accomplish more by working together.⁶⁶ Despite this, the voyage soon morphed into a political controversy. In the summer of 1969, popular fears of an Arctic oil spill merged with more traditional sovereignty concerns and newspaper editorials, opposition politicians, and academics started

⁶³ These negotiations are examined in Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 6.

⁶⁴ Dosman, "The Northern Sovereignty Crisis," 34-5.

⁶⁵ For the best account of the *Manhattan's* voyage see: Ross Cohen, *Breaking Ice for Arctic Oil* (Fairbanks: University of Alaska Press, 2012).

⁶⁶ Memorandum to the ACND, July 23, 1968, LAC, RG 22, vol. 1859, file 87-3-1, pt. 8.

calling for a more aggressive response to what was increasingly perceived as an American challenge.⁶⁷

In March 1969, the ACND and the Interdepartmental Committee on Territorial Waters submitted their joint review of Arctic sovereignty (Document 51). Here, the government was offered what the ACND considered to be its only three options. 1) Assert Canada's Arctic claims using straight baselines; 2) abandon the claim and allow unimpeded foreign transit; or 3) try to maintain the *status quo*. The first option was rejected as being too dangerous and the second as political suicide. Maintaining the *status quo* proved impossible in the face of the public attention that the voyage was attracting.

The solution was environmental protection legislation. The *Arctic Waters Pollution Prevention Act* (AWPPA) unilaterally granted Canada jurisdiction to regulate navigation in waters out to 100 nautical miles. These regulations applied to such things as hull and fuel tank construction, navigational aids, safety equipment, qualification of personnel, time and route of passage, pilotage, icebreaker escort, and other elements deemed essential to protecting the pristine Arctic environment.⁶⁸ Speaking to the press, Trudeau described this legislation as an innovative approach in a changing world, and one that would ultimately benefit the entire planet. The AWPPA was not a claim to sovereignty, but rather an extension of jurisdiction. Still, it granted Canada many of the powers normally associated with sovereignty.

In seeking to situate Canada's pollution prevention legislation into the sovereignty framework, most scholars have placed the AWPPA into what defence expert Andrea Charron called the "sovereignty to the side" school of thought.⁶⁹ This assumes that a government might be willing to look past the issue of sovereignty to reach practical solutions to more immediate problems. Franklyn Griffiths, John Kirton, and Don Munton, for instance, considered the practical requirements of pollution control, rather than sovereignty, to be the government's primary objective throughout the crisis.⁷⁰ In 1976 Griffiths even bemoaned what he described as the government's retreat from

⁶⁷ Kirton and Munton, "The Manhattan Voyages," 74-75 and Lajeunesse, *Lock, Stock, and Icebergs*, 174-48.

⁶⁸ Canada, *Arctic Waters Pollution Prevention Act*. R.S., c. 2 (1st Supp.), s. 1, 1970.

⁶⁹ Andrea Charron, "The Northwest Passage: Is Canada's Sovereignty Floating Away," *International Journal* (Summer 2005), 831-48.

⁷⁰ Franklyn Griffiths, "Canada's Sovereignty and Arctic International Relations," *The Arctic in Question*, E.J. Dosman ed. (Toronto: Oxford University Press, 1976).

sovereignty and its policy of sacrificing its Arctic claims for these lesser functional objectives.⁷¹ Offering a different perspective, Christopher Kirkey points to the connection between environmental protection and the sovereignty agenda. In his 1995 article on the subject, Kirkey cites Ivan Head – one of the primary architects of the AWPPA – as Head situates the legislation within a sovereignty framework. “Step by step, fiber by fiber,” said Head, “we were weaving a fabric of sovereignty in the north.” In this interpretation, the new environmental concern was the latest fiber in the sovereignty fabric.⁷²

The Northwest Passage as an International Strait

From a legal and political perspective, the legacy of the *Manhattan* voyage was the official refusal by the United States government to request Canadian permission to transit the Northwest Passage⁷³ and the fact that Washington began referring to the passage as an international strait.⁷⁴ The idea that the Northwest Passage might be defined as such concerned the Canadian government since it had long sought to avoid the application of that term to the region (Document 51).

An international strait is a body of water which connects two parts of the high seas or EEZ (or the high sea and a state’s territorial sea), which passes through a state’s territorial sea, and which is used for international navigation. Under the rules laid out in the UN Convention on the Law of the Sea (1982), a right of transit passage exists through such straits and, should the Northwest Passage be defined as such, Canada’s ability to regulate shipping, enforce its laws, and institute certain pollution prevention measures would be restricted. Prior to the 1970s, the US avoided using this term, in large part, because Canada’s three-mile territorial sea left a section of high-seas through the centre of the passage. After Canada’s adoption of a 12-mile territorial sea (legislated in 1970) sections of the passage were covered by territorial sea, thus applying new restrictions on

⁷¹ Ibid, 143. It should be noted that Griffiths has since parted ways with “his former self” and taken a more functional approach in his recent work. On this see: Franklyn Griffiths, “The Shipping News: Canada’s Arctic Sovereignty Not on Thinning Ice,” *International Journal* (Spring, 2003).

⁷² Christopher Kirkey, “The Arctic Waters Pollution Prevention Initiatives: Canada’s Response to an American Challenge,” *International Journal of Canadian Studies* 13 (Spring, 1996), 44.

⁷³ Dosman, “The Northern Sovereignty Crisis,” 47.

⁷⁴ Kirton and Munton, “Manhattan Voyages,” 76.

shipping, in keeping with the innocent passage provisions of Section III of the Convention on the Territorial Sea and the Contiguous Zone (1958).

Although no precise calculation has ever been made of the amount of traffic required to render a strait international, the basic criteria was established by the ICJ in the 1949 *Corfu Channel Case*.⁷⁵ Here, the court ruled on the status of the small Corfu Channel, which lies between Albania and the Greek island of Corfu. In its landmark ruling, the ICJ determined that the channel constituted an international strait, the decisive criteria of which was the “geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation.”⁷⁶ These two criteria: the geographic (meaning that a strait must connect two bodies of high seas) and functional (meaning that it must have been a useful route for international traffic) are most commonly used to describe and define international straits.

The task of defining a strait in conventional law fell to the United Nations Law of the Sea Conference, which began proceedings in New York in 1973. The process of modernizing the law of the sea lasted until 1982 and, during that time, the Canadian delegation endeavored to have straits defined as those which have been “customarily (or traditionally)” used for international navigation – since this would obviously exclude the Northwest Passage.⁷⁷ Canadian negotiators failed to achieve the wording they desired; however, conference delegates were unable to arrive at any firm definition and, as such, the final convention contained no *specific* usage requirements for a strait – referring instead only to “straits used for international navigation.”⁷⁸ What “used for navigation” meant was not clearly explained or quantified.

Whether or not the Northwest Passage can be defined as such a strait has remained hotly contested since the 1970s. Pharand states that the Northwest Passage clearly meets the geographic criterion, however it does not meet the functional standards of use.⁷⁹ Since this standard was never clearly defined, jurists often come back to the

⁷⁵ For a detailed legal review of the Corfu Channel Case see: Pharand, “A Final Revisit,” 34-42.

⁷⁶ International Court of Justice, *Corfu Channel Case*, Judgment of April 9, 1949: I.C.J. Reports, 1949, *Merits*, 28.

⁷⁷ Lajeunesse, *Lock, Stock, and Icebergs*, 212.

⁷⁸ United Nations, Convention on the Law of the Sea (1982), Part III, Section 1, Article 34.

⁷⁹ Pharand, “A Final Revisit,” 37-39.

Corfu Chanel Case for guidance. There, shipping numbers were given to the court from April 1, 1936 to December 31, 1937 amounting to 2,884 transits by vessels of various states having put into Corfu while passing through (this excluded transiting ships that did not put into the port).⁸⁰ This is light traffic, yet it dwarves the six foreign vessels that had transited the Northwest Passage in the years leading up to 1970. These six voyages were also not normal international navigation. They were made by the small Norwegian sloop *Gjoa* from 1903-6; the US Coast Guard ships *Storis*, *Spar*, and *Bramble* in 1957; and the US submarines *Seadragon* and *Skate* in 1960 and 1962 respectively.

Until at least the end of the Cold War American nuclear submarines continued to operate in the Northwest Passage, however they were there as part of joint continental defence plans and with the permission of the Canadian government. In a 2013 article, this author argues that these considerations, coupled with the secret nature of the voyages, make it difficult to see how they could ever set a precedent.⁸¹

A small, but influential, group of American experts have historically disagreed with the Canadian interpretation, that the lack of activity in the Northwest Passage precludes it from being considered an international strait. American jurists often view the functional criteria as implying that a strait need only possess the potential for use, rather than a history of actual usage. Richard J. Grunawalt, Professor of international law at the US Naval War College, encapsulates the American view very well. In 1987 he wrote:

Some nations take the view that an actual and substantial use over an appreciable period of time is the test. Others, including the United States, place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation. The latter view has the greater merit. Otherwise, the 1982 LOS Convention would be akin to a stop-action photograph, fixing forever all patterns of international navigation.⁸²

⁸⁰ ICJ, *Corfu Channel Case*, 29.

⁸¹ Adam Lajeunesse, "A Very Practical Requirement: Under-Ice Operations in the Canadian Arctic, 1960-1986." *Cold War History* 13:4 (November 2013), 18.

⁸² Richard J. Grunawalt, "United States Policy on International Straits," *Ocean Development and International Law* 18:456 (1987), 456.

The Voyage of the *Polar Sea*

Defining the Northwest Passage through legislation was not a high priority in the aftermath of the *Manhattan*, as both Canada and the United States preferred to minimize the political fallout from the transit and the Canadian adoption of the AWPPA. For the remainder of the 1970s, Canada worked through the Law of the Sea Conference to advance its interests.⁸³ As was the case in the 1950s, Canadian governments deferred the country's claim until there was a clearer idea of what the law of the sea would look like after the Convention was signed. Document 59, a memorandum to cabinet, makes this clear, recommending that "the drawing of baselines around the perimeter of the Arctic Archipelago be deferred until the international climate, in particular developments at the Law of the Sea Conference" are "more propitious" to Canada. Documents 58-62 offer considerable insight into Canadian policy discussions during the mid-late 1970s and demonstrate the continued interest in advancing a claim to the Arctic waters.

The Convention on the Law of the Sea was signed in 1982, removing much of the uncertainty that had long pervaded the legal and political climate in the field. Document 65, a lengthy and detailed memorandum to cabinet from External Affairs, examines the impact of the signing of the Convention on Canadian thinking. The new law of the sea, coupled with a widespread perception that the Arctic was poised to see increased shipping, compelled the department to revisit the question of sovereignty and recommend swift action. This document makes many of the arguments which External Affairs, the ACND, and other government bodies had been developing since the 1950s in favour of drawing straight baselines and offers a snapshot of the state of Canada's position in the years leading up to the *Polar Sea* crisis.⁸⁴ This new push to draw straight baselines was, however, delayed by further study and the ever-present concern of American reaction.⁸⁵

These debates were interrupted by the voyage of the US Coast Guard icebreaker *Polar Sea* through the Northwest Passage in the

⁸³ For an account of this process see: A.L.C. de Mestral and L.H.J. Legault, "Multilateral Negotiation – Canada and the Law of the Sea," *International Journal* 35:47 (1979-80).

⁸⁴ For the most comprehensive work on the voyage of the *Polar Sea* see: Rob Huebert, *Steel, Ice and Decision-Making: The Voyage of the Polar Sea and its Aftermath: The Making of Canadian Northern Foreign Policy*, Ph.D. Dissertation, Dalhousie University, 1993.

⁸⁵ Lajeunesse, *Lock, Stock, and Icebergs*, 242-55.

summer of 1985, sparking the last major sovereignty crisis to catalyze significant policy change in Ottawa. Political scientist Rob Huebert did the first in-depth work on the *Polar Sea's* transit in 1993 and makes a convincing case that this voyage was operational in nature and in no way intended as a challenge to Canadian sovereignty. According to Huebert, it was merely the result of an overtaxed American Coast Guard having to be in too many places at once.⁸⁶ Most historians now agree, painting this voyage as fundamentally inoffensive, and the political crisis which sprung from it the result of public misunderstanding.⁸⁷

To assuage Canadian sovereignty concerns, the United States involved Canadian planners and agreed that the voyage would take place without prejudice to either state's legal position.⁸⁸ The official note sent to Canada in May 1985 could hardly be seen as anything but a proposal for a friendly and inoffensive operation:

The United States believes that it is in the mutual interests of Canada and the United States that this unique opportunity for cooperation not be lost because of a possible disagreement over the relevant judicial regime ... The United States believes that the two countries should agree to disagree on the legal issues and concentrate on practical matters.⁸⁹

While this is the consensus that has come to dominate the historiography, it was built with the benefit of hindsight. At the time, many expert commentators painted the mission in a less generous light. Franklyn Griffiths, a political scientist at the University of Toronto, captured a great deal of attention with an opinion piece in the *Globe and Mail* which warned that the transit posed a real danger to Canadian sovereignty.⁹⁰ Griffiths even implied that the mission was a purposeful attempt on the part of the US government to undermine that sovereignty, writing: "we appear to be faced with a carefully calibrated move, not with an attempt to undo the Canadian position in

⁸⁶ Huebert, *Steel, Ice and Decision Making*, 208-09 and Ted McDorman, "In the Wake of the Polar Sea," *Marine Policy*, 10:4 (1986), 243.

⁸⁷ See for instance: Lajeunesse, *Lock, Stock, and Icebergs*, Chapter 11; Huebert, *Steel, Ice and Decision Making*; Kirkey, "Smoothing Troubled Waters," 403; McDorman, "In the Wake of the Polar Sea," 624.

⁸⁸ McDorman, "In the Wake of the *Polar Sea*," 250-51.

⁸⁹ United States, Department of State, 85 State Telegram 151842 (172114z – May 1985); 85 Ottawa telegram 03785 (211810Z, May 1985), in Huebert, *Steel, Ice and Decision Making*, 214.

⁹⁰ Franklyn Griffiths, "Arctic Authority at Stake," *Globe and Mail* (June 13, 1985).

a single act.”⁹¹ Professor Gerald Morris told *Maclean’s* that “[it] is obviously the opening move in a large campaign by the USA to challenge Canada’s Arctic claims.”⁹² In his 1987 book, *Arctic Imperative*, John Honderich claimed that the voyage was “more than a prod at the Canadian flank; it was yet another in a series of carefully calculated moves to show the flag and reassert the U.S. view that the right of innocent passage must be guaranteed through international [sic] waters.”⁹³

Like the *Manhattan* crisis 16 years earlier, the voyage of the *Polar Sea* led many Canadians to assume that the country’s Arctic sovereignty was being challenged, leading to an outpouring of criticism of the government by the press, the opposition, and others.⁹⁴ The result was Joe Clark’s speech to the House of Commons in September 1985 (Document 68) and the Mulroney government’s declaration of straight baselines.

Following that announcement, Canada spent several years negotiating with the US government to secure American recognition of Canadian sovereignty. Documents surrounding these discussions remain largely classified, however Documents 69 and 70 provide some insight into the process.⁹⁵

The result of this process was not the recognition that Canada sought, but it was something close. The *Agreement on Arctic Cooperation* (Document 71) was signed in 1988. It recognized the importance of cooperation in the Arctic and sought to minimize the friction caused by American icebreaker activities in the Northwest Passage. The most important passage in this document reads: “The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.” Importantly, this subsection falls within section three, concerning icebreaker operations and maritime research.

This connection between “consent” and “maritime research” stems from Article 245 of the Law of the Sea Convention which clearly states

⁹¹ Ibid.

⁹² Quoted in McDorman, “In the Wake of the *Polar Sea*,” 253.

⁹³ Honderich, *Arctic Imperative*, 41.

⁹⁴ Kirkey, “Smoothing Troubled Waters,” 404.

⁹⁵ More detail can be found in: Lajeunesse, *Lock, Stock, and Icebergs*, 268-80 and Huebert, *Steel, Ice and Decision Making*. Additional insight can also be expected from a forthcoming book on this subject by Rob Huebert based on his pioneering early historical research [publication date TBD].

that, in the territorial sea and on the continental shelf, maritime research “shall be conducted only with the express consent of and under the conditions set forth by the coastal state.”⁹⁶ If the United States requests consent to transit, *while conducting scientific research*, then both nations secure that which is most important to them. Canada has its political victory, since Ottawa can legitimately claim that the Americans are requesting Canadian consent to transit. Meanwhile, the Americans can say that such permission do not represent recognition of Canadian sovereignty, since conducting research along the way necessitates such a request under Article 245 of the Law of the Sea Convention. As was the case with American clearance requests during the 1950s, the two countries are free to interpret this as they see fit.

The final document in this compendium is a note from the US to the Canadian government in October 1988 (Document 74). This document requests Canadian consent for the transit of the USCGC *Polar Star* through the Arctic Archipelago under the terms laid down in the *Arctic Cooperation Agreement*. The Canadian government approved this request and the American icebreaker transited the Northwest Passage without incident or fanfare. This framework for US icebreaker voyages has functioned effectively since that time, enabling American icebreaker operations to proceed while avoiding a recurrence of the kind of political crises that accompanied the voyages of the *Manhattan* and the *Polar Sea*.

Conclusions

Since the late 1980s there has been no significant change in Canadian Arctic maritime policy, or in the dispute which persists between Canada and the United States over the legal status of the Arctic waters. The issue may not have been settled by the Mulroney government's 1985 policies and the 1988 *Arctic Cooperation Agreement*, however it was effectively put on ice. In the 21st century, this *modus vivendi* is under new pressure. Melting sea ice is lengthening the Arctic shipping season and opening the possibility of international travel through routes which promise significant savings

⁹⁶ United Nations, Convention on the Law of the Sea (1982), Part XIII, Section 3, Article 245.

in time and fuel.⁹⁷ This new activity has even led some commentators to suggest that Canada's limited resources will prevent it from properly regulating the influx and that this new shipping might create the precedent of regular usage required to define the passage as an international strait. Canadian sovereignty may therefore be on "thin ice."⁹⁸

For years these fears have proven groundless and no such threat has materialized. The "purveyors of polar peril,"⁹⁹ as Griffiths dubbed those academics warning of impending crisis, have proven incorrect. While activity in the Arctic waters has increased, the actors involved have all operated within Canada's legal and regulatory framework. Nor does a renewed international dispute over the status of the Northwest Passage appear to be on the horizon.

Despite this relative tranquility, it behooves Canadian scholars and policy makers to not lose sight of the importance and changeability of Canada's Arctic relationships. After all, few foresaw the crises brewing in 1969 or 1985. Careful diplomacy and nuanced language has also been essential to maintaining the peace. An American leader obsessed with 'winning' at diplomacy and unable to recognize nuance in foreign relations may also blow-up the careful political balance achieved by past governments in search of short-term, superficial victories.

Maintaining a deep understanding of the nature of the country's Arctic maritime sovereignty, its origins, and evolution is therefore essential. Evidence-based policy starts with such understanding and this volume aims to facilitate that. The documents contained within offer as unfiltered a picture as possible of Canada's Arctic maritime sovereignty and how it came to be what it is today. They tell the story of how the Arctic waters became Canadian and offer valuable lessons for the future.

⁹⁷ Many authors have written on the potential benefits of Arctic shipping routes. See for instance: Frédéric Lasserre, *China and the Arctic: Threat or Cooperation Potential for Canada?* Canadian International Council, China Papers 11 (June 2010), 6.

⁹⁸ Michael Byers and Suzanne Lalonde, "Our Arctic Sovereignty is on Thin Ice," *Globe and Mail* (August 1, 2005) and Rob Huebert, "The Coming Arctic Maritime Sovereignty Crisis," *Arctic Bulletin* 2:4 (July 2004), 24.

⁹⁹ Franklyn Griffiths, House of Commons Standing Committee on National Defence (NDDN), Evidence, October 6, 2009, 0905.

1. Letter from H.H. Ellis to P.E. Trudeau, January 9, 1950

LAC, RG 25, vol. 1, file 10600-B-40

P.E. Trudeau Esq.,
Secretary, Inter-departmental
on Territorial Waters,
Privy Council Office,
East Block,
Ottawa, Ont.

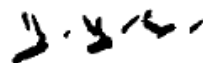
Dear Sir:

Referring to the Minutes of the first meeting of the re-constituted Committee held on November 9th, 1949, and your note to me dated November 14th, 1949, I have seen a memorandum prepared by the Royal Canadian Mounted Police, and wish to associate myself and this Department with the views expressed.

At the same time, I should like to direct the attention of the Chairman to the desirability of not confining the thoughts of the Committee to the question of the Gulf of the St. Lawrence alone. The Police have pointed out in discussions I have had with them that probably their most pressing problem relates to the waters surrounding the French Islands of St. Pierre Miquelon, and that the whole outside coast of Newfoundland is of importance from their point of view. There is also a question regarding Machias Seal Island, with which I am not familiar, but which may be of some importance, and there remain to be dealt with at all the whole Pacific Coast, Hudson Bay and Strait, and Arctic waters other than Hudson Bay and Strait, as to which the former committee recommended that no action be taken, at the time its report was made.

From the Police point of view the question of the waters surrounding Newfoundland is the urgent one, but the other questions alluded to above should not be lost sight of.

Yours very truly,



H.H. Ellis
Legal Advisor

2. Canada, House of Commons, *Debates*, December 8, 1953, 22nd Parliament, 1st Session, 700

Right Hon. L.S. St. Laurent (Prime Minister) ...

[Speaking on the creation of the Department of Northern Affairs and National Resources.]

There is another aspect which makes it necessary for us to give more attention to these northern territories and that is the fact that the Canadian northland lies between the two greatest powers in the world at the present time, namely, the United States of America and the U.S.S.R., and our own security is probably made more difficult to provide for by the fact that this northland of ours is between these two great world powers. There will, no doubt, have to be joint measures taken for the security of the North American continent. It is a continental problem that presents itself for solution by that mere fact of geography. I am not going to say any more about it than was said by the Minister of National Defence (Mr. Claxton), but all these joint undertakings are carried out under the principle which the President enunciated from the head of the table here only three or four weeks ago. They are implemented with full respect for the sovereignty of the country in which they are carried out.

We must leave no doubt about our active occupation and exercise of our sovereignty in these northern lands right up to the pole.

...

3. Memorandum, "The Sector Theory and Floating Ice Islands," May 20, 1954

LAC, RG 25, vol. 4, file 9057-40

SECRET

THE SECTOR THEORY AND FLOATING ICE ISLANDS IN THE ARCTIC¹⁰⁰

This memorandum is an examination of the legal validity of the sector principle in present day international law with particular reference to the question of floating ice islands. The essential problem is whether Canada is entitled to exercise jurisdiction over such islands, as and when required from the mere fact of their presence in the Canadian Sector of the Arctic.

THE SECTOR THEORY

The origin of the sector principle can be traced back to the Anglo-Russian Convention of February 28, 1825 defining the boundary between Canada and Alaska, which provided that the line of demarcation between the territories of the contracting parties should be the meridian line 141° West "dans son prolongement jusqu'à la Mer Glaciale." This definition could be interpreted as referring only to the land boundary. However, when Russia ceded Alaska to the United States in 1867 the treaty stated that the western limit of the territory passes through a point in Behring Strait on the parallel of 60°31 North Longitude ... and proceeds due north, without limitation, into the Frozen (Arctic) Ocean and inferentially, a similar extension of the eastern limit was implied. In a United States Note of 1896 on the Behring Sea controversy it was argued that the negotiators of the 1825 treaty intended to effect a simple division of territory by prolonging the 141st degree of longitude into the Arctic Ocean - east of this line the territory was to be British and west of it Russian. The British case before the Behring Sea Arbitration Tribunal of 1893, which was upheld by the tribunal, had deduced from the 1867 treaty that U.S. sovereignty was not extended over the sea east of the line forming the western limit of Alaska but merely over any islands in that sea which might afterwards be discovered. A British Parliamentary Paper prepared at the time concluded that "the line drawn through Behring Sea between Russian and United States possessions was thus intended and regarded

¹⁰⁰ There are several drafts of this report, each with slight variations.

merely as a ready and definite mode of indicating which of the numerous islands in a partially explored sea should belong to either Power ... It is therefore very clear that the geographic limit thus projected towards the north could have been intended only to define the ownership of such islands, in any, as might subsequently be discovered."

The principle of allocation thus recognized in the case of Alaska was tacitly assumed in the case of the neighbouring territories of Canada and Siberia. The Canadian Government interpreted in this sense the Order in Council of July 31, 1880, annexing to Canada "all British territories or possessions in North America not already included with the Dominion of Canada and all islands adjacent to any of such territories or possessions." In 1907 Senator Poirier, in a speech before the Canadian Senate, advocated polar sectors for states with territories bordering on the Arctic. In 1916 the Russian Ambassador in London sent a Note to the U.K. Government announcing the annexation of certain islands in the Arctic Ocean north of Siberia as forming an integral part of the Russian Empire because they constituted a northern extension of the continental land mass of Siberia.

In the later dispute concerning Wrangel Island, north of Siberia, the Canadian Government originally maintained that this island was part of Canadian territory on the basis of occupation. However it was later decided not to press the Canadian claim in order to avoid similar claims in the Canadian sector.

Canada has never claimed a sector by any express declaration. The Canadian claim to the sector from 60°W to 142°W has been indicated in many ways, however, from the publication of maps showing this sector as Canadian to the 1925 statement to the House of Commons by the Hon. Charles Stewart, Minister of the Interior, that Canada claimed as Canadian all territory "right up to the North Pole". This was followed in 1926 by Order in Council P.C. 1146 of July 19 which created various Arctic Preserves bounded by these sector limits and required trading companies, prospectors and trappers to obtain permission of the R.C.M.P. before engaging in any commercial activity in these regions.

The Russian Government in its decree of April 15, 1926, formally claimed as Soviet territory all lands and islands, discovered or to be discovered, lying between the northern coast of the U.S.S.R. and the North Pole between 32°4'35"E and 168°49'30"W which were not at that date recognized as belonging to a foreign state. This decree states the sector principle in its most explicit form – that of a claim to any land that may exist, known or unknown, within the triangle of two meridians of longitude at the eastern and western extremities of

territory already held by the Power concerned and continuing to the Pole.

The two other countries concerned with the question in the Arctic – the United States and Denmark – have never specifically declared their adherence to the sector principle.

In the Antarctic, sectors have been claimed by the United Kingdom, Australia, New Zealand, France, Norway, Chile and the Argentine.

The validity of the sector principle as a mode of acquiring sovereignty over territory in polar regions has never been tested before an international tribunal. Arctic sectors are usually justified as being northerly extensions of continental land masses which project into the Arctic circle. In essence they are applications of the principle of geographical proximity and contiguity of territory. Lakhtine, in supporting the legality of the Soviet sector, uses the phrase, “a region of attraction.”

It is very doubtful if the sector theory can by itself be a sufficient legal root of title at the present time. Even when the sector claims of Canada and the U.S.S.R. were first formulated effective occupation was considered to be necessary in order to acquire sovereignty over uninhabited or very sparsely inhabited territory. Nor does the later development of the law relating to title to territory afford any support for a claim to title based on the sector principle alone. The three leading decisions, the Island of Palmas Case (1928), the Eastern Greenland Case (1931) and the Clipperton Island Case (1932) are in harmony in holding that the true tests of sovereignty by effective occupation are the intention and will to act as sovereign plus some actual exercise or display of state authority in relation to the region. In the Island of Palmas Case Judge Huber stated flatly that “the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law”. Contiguity, in his view, when invoked as a justification for territorial claims apart from effective occupation, is devoid of legal basis and is at bottom a political claim of the sphere of interest type.

[This section remains classified under: s.15(1)]

In fact, however, as Dean MacDonald points out, a claim to sovereignty under the sector principle “would involve a claim to precisely the region which can be claimed successfully by right of effective occupation. The recent unanimous judgment of the International Court of Justice in the Minquiers and Ecrehos Case, declaring that sovereignty over these channel islets belonged to the

United Kingdom in virtue of its long and continuous display of state functions over the group, upholds and applies the principles laid down in the previous cases dealing with Eastern Greenland and the Palmas and Clipperton Islands. These judgments, which have placed the law relating to title to territory on a firmer basis than almost any other branch of customary international law, confirm the wisdom of Dean MacDonald's final recommendation that Canada's title to its Arctic territories should be asserted and maintained "upon the ground of effective occupation alone as the chief and most satisfactory ground of reliance."

Professor Waldeck of Oxford University, in his valuable study of Disputed Sovereignty in the Falkland Islands Dependencies (1948 British Yearbook of International Law), examines the legal basis for sector claims in both the Arctic and Antarctic and reaches the firm conclusion that sector claims have no legal significance as a basis of title independently of an exercise of state activity in regard to the sector areas. Within the principle of effective occupation, Professor Waldeck believes proximity may nevertheless operate to raise a presumption of fact that a state is exercising sovereignty over outlying territory in which there is no noticeable impact of its state activity. In his view, when there is a clear intention to exercise sovereignty over a geographical area evidenced by a display of sovereignty, the contiguity of the outlying territories, by raising a presumption of an actual intention and ability to control those outlying areas, operates to give the claimant state the benefit of the rule that effective occupation need not make an impact in every nook and cranny of the territory.

FLOATING ICE ISLANDS

The floating ice islands which have been discovered in the Arctic are composed of ice so hard and thick that they retain their shape and general appearance for years. T-3, for example, is about 31 miles in circumference and 5 miles across at its narrowest part. Holes which were bored into the island in 1952 revealed many separate layers of dirt. Ice islands, like icebergs, follow the currents of the ocean and are not to be confused with ice floes, which are moved by wind pressure.

Thus far international law has not recognized the right of a state to establish sovereignty over ice islands whether floating or permanently fixed. Such areas have generally been regarded as solidified portions of the high seas and not capable of effective occupation. With the increasing ability of states to establish and maintain control over such ice masses international law may in time recognize the ability to acquire sovereignty over them. A fixed ice mass, for example, which is permanently above high water mark and on which installations can be

built and continuously maintained would seem to partake of the nature of territory. The case of floating ice islands is more doubtful. In recent years there have been suggestions that artificial structures erected on piles driven into the seabed should be regarded as subject to state jurisdiction but these proposals have never included floating works. The International Law Commission's draft articles on the Continental Shelf would give the coastal state the right to construct and maintain on its continental shelf installations necessary for the exploration and exploitations of natural resources. The draft articles specifically provide, however, that "such installations, though under the jurisdiction of the coastal state, do not possess the status of islands." Thus while they would not be of the true nature of territory the installations would be under the coastal state's jurisdiction for the purpose of maintaining order and of the civil and criminal competence of its courts.

The chief defect of floating ice islands, from the point of view of their occupation and use, is their relative lack of permanence and transitory movement. An island which is here today and gone tomorrow is not of the nature of territory and cannot be subjected to the control which is possible over a structure erected on piles driven into the sea-bed. At the present time, therefore, it is very doubtful whether floating ice islands can be appropriated and subjected to sovereignty. If, as is suggested, such islands are not capable of appropriation under existing international law, the Soviet aircraft which recently flew over T-3 did not violate Canadian airspace by flying over the island and did not infringe any rules of international aerial navigation. Likewise, the movement of an ice island with a Soviet scientific establishment into the Canadian sector of the Arctic would not entitle Canada to exercise jurisdiction over the island simply because such islands cannot be considered to be the object of sovereign claims by any state as the law now stands.

CONCLUSIONS

This review of the sector theory indicates that while the principle was of considerable value to Canada as the original basis of our claim to control all the land areas north of the Canadian mainland to the Pole, the need for reliance on this doctrine has progressively diminished as our effective occupation of these northern territories became more and more firmly established. At the present time it is believed that the Canadian title to all, or nearly all, of our Arctic territories can be asserted on the basis of effective occupation, both in respect to intention and in the actual display of sovereignty over these regions.

Nevertheless the sector theory may be still of value to Canada in the following ways;

- a) It is a clear indication of Canada's intention to exercise sovereignty over any territories susceptible of occupation north of the Canadian mainland between 60°W and 141°W. Our intention to act as sovereign in this regard has been demonstrated in official statements, maps, orders in council and other forms of state activity.
- b) By affording a convenient geographical area within which our intention to exercise sovereignty over territory is evident to all and the actual display of Canadian sovereignty increasingly effective, the sector theory operates to give Canada the benefit of the rule that effective occupation need not be felt in every nook and cranny of the territories claimed.
- c) If permanently fixed or floating ice masses are ever recognized as capable of appropriation the sector principle would afford evidence of our intention to exercise sovereignty over any such ice masses within the Canadian sector.

The sector theory was originally developed as a method of allocating territories, [this section remains classified under: s.15(1)]. It is true that for purposes of game conservation Canada has in the past established Arctic preserves coextensive with the entire area of the Canadian sector. However, such jurisdiction and control has been claimed only for purposes of conservation and did not purport to change the character of the waters as high seas. It seems most unlikely that any claims to sovereignty over portions of the polar seas based on the sector principle would be recognized at the present time. Nor would Canada wish to assert a claim which would be at variance with the general principle of the freedom of the high seas which we support.

Under existing international law it is very doubtful if floating ice islands can be subjected to the sovereignty of any state. The solution of this problem, as in the case of artificial structures erected on the continental shelf, lies in international regulation. Until some international rules are established in this regard Canada's right to exercise exclusive jurisdiction over floating ice islands from the mere fact of their presence in the Canadian sector of the Arctic cannot be firmly grounded in law. Instead of attempting to assert a legal title to these ice islands it would appear preferable to exercise constant surveillance over them by aircraft, set up Canadian stations on some of them, T-3 for example, and, if necessary, reaffirm our intention to claim

sovereignty over any territories within our sector, whatever their nature, which are capable of appropriation, now or in the future.

Department of External Affairs
August 30, 1954

4. Memorandum, “Russian Activities on the Canadian Side of the Pole,” October 8, 1954

DHH, 2002/17

SECRET

MEMORANDUM

HQS 9395-34/342 TD
4-279 (JAG/g)

8 Oct 54

DMO&P

Russian Activities on the Canadian side of the Pole
Paper DRBS 135-590-327-1 (Arct) dated 12 Aug 54

1. The Department of External Affairs has recently made an exhaustive study of the sector theory and floating ice islands in the Arctic. A copy of the legal paper prepared on the subject is attached.¹⁰¹
2. The following conclusions may be drawn from External's paper:
 - a) It is doubtful if the sector theory can by itself be a sufficient legal root of title at the present time.
 - b) As yet international law has not recognized the right of a State to establish sovereignty over ice islands whether floating or permanently fixed.
 - c) Canada has not expressly claimed a sector but has in the past hinted that on the basis of the sector theory Canada had sovereignty over all territory from 60°W to 141°W. For example official maps of Canada prepared show this sector as Canadian.
 - d) Effective occupation is a sufficient basis on which to claim title and sovereignty though such occupation need not “make an impact in every nook and cranny of the territory.”
3. It seems to follow that the status of the floating ice islands in the Arctic presents a two-fold difficulty, viz. the dubious quality of title based on the sector theory and the doubt as to whether floating ice

¹⁰¹ This study is attached as Document 3.

islands can in law be considered the object of sovereign claims by any State.

4. The USSR has officially adhered to the sector theory and would have to base any protest against Canadian air reconnaissance on the claim of effective occupation of the floating ice islands and deny the validity of the sector theory when such ice islands enter the Canadian sector. External Affairs has expressed the opinion that Canada could not protest air reconnaissance by Russian aircraft over floating ice islands in the Canadian sector. External Affairs suggests that air reconnaissance by Canada in the Canadian sector would strengthen her claim by joining sector theory with the active surveillance to indicate an intention to exercise sovereignty within the Canadian sector.

5. It is suggested that the Department of External Affairs should be informed before any decision with respect to DRB's recommendations 1 and 2 is taken. This suggestion is based on the real possibility that Canadian air reconnaissance might give rise to an international air incident if the USSR decided to actively interfere with such [illegible].

Memorandum, "Russian Activities on the Canadian Side of the Pole," October 14, 1954

DHH, 2002/17

MEMORANDUM

HQS 9395-34/342 (FIS)
SECRET
14 Oct 54

DMO & P

Russian Activities on the Canadian Side of the Pole
Comments

1. Reference is made to DRBS 135-590-327-1 (Arct) dated 12 Aug 54 entitled "Russian Activities on the Canadian Side of the Pole" and your memorandum HQS 9395-34/342 (DMO & P Coord) dated 6 Oct 54.

2. In some respects, the DRB paper has been overtaken by events since the RCAF photographed the Drift Station known as NORTH POLE 3 on 20 Sep 54. The Chairman of the Chiefs of Staff Committee was briefed on the results of this reconnaissance.

3. With regard to the paper under reference, scientific activities in the extreme North may be divided into two broad groups:

- a) Meteorological.
- b) Other activities such as study of ice, hydrography, study of marine life, and of magnetic conditions.

In the meteorological field:

- a) The USSR has an extensive network of meteorological stations throughout the Northern USSR. This includes stations on the edge of the polar seas and on the islands between those seas and the Arctic Ocean.
- b) Norway has meteorological stations on SPITZBERGEN and BEAR ISLAND.
- c) Denmark has a ring of stations around GREENLAND, one of which lies in the extreme NE corner of the island.

- d) the United States has a number of stations on Greenland, participates in the Canada-US joint weather programme, has a number of stations in Alaska and the USAF has made weather reconnaissance flights to the NORTH POLE regularly two or three times a week since at least 1948.
- e) Canada has a number of stations on the [illegible]. These stations take normal weather observations both surface and upper atmosphere up to 55,000 ft. The Soviet Union programme is the largest.

5. The Soviet Union is the only country which has undertaken long term systematic research in the Arctic Basin. The Chief Administration of the Northern Sea Route was formed in 1932 to develop an Arctic shipping lane between the Atlantic and Pacific Oceans and it immediately became apparent that to be successful it would have to obtain detailed knowledge of the ice, weather and hydrography of the Central Arctic Basin.

6. Between 1935 and 1941, four drift expeditions on ships and one on ice were carried out and three landings made on unprepared sea ice. Drift work was suspended during the Second World War.

7. From the beginning, the air services of the Chief Administration of the Northern Sea Route were made responsible for reconnaissance to support both short term and long term ice forecasts. Landings on unprepared sea ice were also made. This activity continued throughout and after the War. One of its discoveries was the LOMONSOV RANGE which runs between the NEW SIBERIAN ISLANDS and ELLESMERE ISLAND and GREENLAND and divides the Arctic basin into two distinct parts.

8. Early in 1954, the Soviet Government undertook a programme of research in the Central Arctic Basin which is the largest attempted so far. According to the Soviet press, the purpose is to complete the exploration of the region in order to ensure the maximum development of the Northern Sea Route. A major feature of the programme is the decision to attempt observations on a broad, long term basis rather than the "expeditionary" basis of the past.

9. The 1954 operation mounted jointly by the Soviet Academy of Sciences and the Chief Administration of the Northern Sea Route consists of four parts; two drift stations, a scientific expedition and a regular series of flights by one or more flying laboratories to make meteorological, aerological and ice observations. The drift stations are

obviously intended to function over a period of many months and possibly several years. The Soviet press has revealed that almost all known Arctic specialists are engaged in the programme. It is not believed that any unusual instruments are being used and, as far as can be determined, very high (up to 50,000 ft) air soundings are not being taken.

10. Advances claimed so far include:

- a) That ice conditions East of the LOMONSOV RANGE are the key to ice conditions all along the Northern Sea Route.
- b) That the theory of a polar cap of cold air and fairly permanent area of high pressure is wrong with consequent effects on the forecasting of [illegible].

11. The full purpose of this year's expanded programme is not clear yet. Its connection with the Northern Sea Route is obvious since it is 4650 miles long and its use reduces the journey from LENINGRAD or ARCHANGEL to VLADIVOSTOK by more than half. It will also contribute much new basic knowledge. Other possible purposes are:

- a) Collection of magnetic data for use in the employment of guided missiles.
- b) Mapping of the floor of the Arctic Ocean to enable it to be used by submarines. The importance of this is more than is apparent since pack ice, the most prevalent form of ice is only about ten feet deep and German submarines operated in the KARA SEA during the Second World War.
- c) Use of ice islands as staging bases in time of war.

12. Other countries scientific efforts may be summarized as follows:

- a) The US having carried out Exercise SKI JUMP in 1950, 51 and 52. Working out of POINT BARROW, four stations were set up between there and the NORTH POLE and some oceanographic work was done.
- b) Ice Island T3 was occupied between Mar 52 and May 54. Some research was carried out but it was not systematic.
- c) Groups of scientists from Canadian Government Departments, universities, the US Government and a few foreign universities

go into the Canadian North each year. As is obvious, they have neither the scope nor scale of the Soviet effort.

(Sgd) Sarantos, Lt Col
for EE.S. Tate
Colonel
Director of Military Intelligence

5. 569th Meeting of the Chiefs of Staff Committee, October 28, 1954

DHH, 2002/17

HQS 9395-34/342 (DMO&P Coord)

Prepared by: DMO&P
In consultation with: DMI
JAG

SECRET

Recommended by: DGPO

569 MEETING OF CHIEFS OF STAFF COMMITTEE ITEM NO. 4

RUSSIAN ACTIVITIES ON THE CANADIAN SIDE OF THE POLE
(DRBS 135-590-327-1 (ARCT) d/12 Aug 54, passed by CSC 7-17 TD
971 d/4 Oct 54)

BACKGROUND

1. The subject paper, submitted by the Chairman, Defence Research Board describes suspected Russian scientific activities on an "ice island" in the Arctic basin. Since, on 12 Aug 54, the path of the "island" as was predicted to be such that the island, bearing the Russian party would shortly enter waters within the Canadian sector, CDRB recommended that the RCAF conduct an immediate reconnaissance to establish the location of the "island" to be followed by further reconnaissance whilst the island remained in the Canadian sector. From such reconnaissance it was hoped to determine the scope of Russian activities on the Canadian side of the pole and to develop information for the use of the Department of External Affairs.

COMMENT

2. However, in some respects, the DRB paper has been overtaken by events as the RCAF conducted a photographic mission on 20 Sep 54 and established the position of the "island" in reference as approximately 88°36'N, 55°25'W. (Flag A). Since the eastern extremity of the so-called Canadian sector is 61°00'W, the "ice island" was, on 20 Sep 54, actually located within the Danish sector.

3. More recently (26 Oct 54) a representative of the Arctic Section, DRB, stated informally that more recent information on the ice formation indicates that it is considerably shallower than had been estimated earlier, and is, in fact, an "ice floe." This representative further stated that recent information indicates that the "ice flow" is more likely to continue to drift [illegible].

5. In view of the relative vastness of the Soviet research effort in the Arctic, and the possible related developments, it is considered advisable that Canadian authorities keep informed regarding Soviet activities, particularly in the vicinity of the Canadian sector.

6. Although there is little possibility of exercising control, or otherwise objecting to Soviet activities in the Canadian sector, External Affairs has suggested that Canadian claims to sovereignty in the sector might be strengthened by active surveillance of the area – Flag C para 4. A legal paper, prepared by External Affairs, on the Sector Theory is attached as Flag D.¹⁰²

RECOMMENDATIONS

7. I recommend that the Chiefs of Staff Committee support the principle of following Soviet research activities in the Arctic by various means, including air reconnaissance as a means of acquiring information regarding projected Soviet capabilities.

¹⁰² Reproduced as Document 3.

6. Extract from 569th Meeting of the Chiefs of Staff Committee, "Russian Activities on the Canadian Side of the Pole," November 3, 1954

DHH, 2002/17

(SECRET)

RUSSIAN ACTIVITIES ON THE CANADIAN SIDE OF THE POLE

21. The Committee had for consideration a paper prepared by the Arctic Section, Defence Research Board, outlining recent Russian activities in the Canadian arctic. The paper specifically recommended that reconnaissance of a Russian Polar Drift Station be made to determine the scope of Russian activities on the Canadian side of the North Pole.

(CSC 7-17 TD 971 of 4 October, 1954)

22. The Chief of the Air Staff reported that the existence of the drift stations had come to the attention of the Director of Air Intelligence early in September. A reconnaissance of the drift station had been made by 408 Photographic Squadron on 20 September, 1954. It had been determined that the "ice island" referred to was not in Canadian waters. Various photographs and observations had been made, as a result of which the following conclusions have been reached:

- a) From visual observation it was concluded that the basic purpose of the site was as declared by the Soviet press, namely that it was mainly concerned with meteorology, aerology, oceanography and zoology. This conclusion was further substantiated through photographic interpretation of the drift station.
- b) Aerial installations are normal and appropriate to the type of communications activity that had been attributed to the drift station.
- c) The matter of resupply was not fully resolved at the time, because neither visual observation nor photographic interpretation indicated the presence of a landing strip. However, as a result of information now available from a later reconnaissance it has been concluded that there must be an

airstrip in the vicinity. The possibility exists that the airstrip was within one hundred mile radius of the main drift station.

23. The Associate Under Secretary of State for External Affairs expressed the view that as Canada had not subscribed to the Sector Principle with regard to the waters in the arctic, it would be inappropriate to pursue the matter further through diplomatic channels.

24. It was agreed to note the report of the Chief of the Air staff and the views expressed by the Associate Under Secretary of State for External Affairs.

7. ND-116, "Sovereignty in the Canadian Arctic," January 14, 1955

LAC, RG2-B-2, file 6181

MEMORANDUM FOR THE ADVISORY COMMITTEE ON NORTHERN DEVELOPMENT

SOVEREIGNTY IN THE CANADIAN ARCTIC

Introduction

During the past few months the U.S.S.R. has established two or more scientific parties on the ice in the Arctic Ocean. On 20 September, 1954, one of these stations was very near the north geographical pole at approximately 89° 26'N and 55° 0'W, between Greenland and the pole. This situation has given rise to a re-examination of the sector theory, the status of ice islands (semi-permanent ice masses of great thickness which drift in the Arctic Ocean) and the possible implications of the presence of a Russian scientific party in the Canadian sector.

The Sector Theory

The origin of the sector theory can be traced to the Anglo-Russian Convention of 1825 defining the boundary between Canada and Alaska along the 141 meridian "dans sa prolongement jusqu'à la Mer Glaciale." Since then the concept has gone through various stages of refinement. In its present form it constitutes a claim to any land that may exist, known or unknown, in the area enclosed by two meridians of longitude at the eastern and western extremities of territory already held by the state concerned. In the Arctic the countries mainly concerned are the U.S.S.R., the United States, Denmark, and Canada. The Soviet Government in its decree of April 15, 1926, formally claimed as Soviet territory all lands and islands, discovered or to be discovered, lying between the northern coast of the U.S.S.R. and the North Pole between 32° 4' 35" E and 168° 49' 30 W which were not at that date recognized as belonging to a foreign state. Soviet writers have subsequently expressed the view that sovereignty would extend over both the fixed and floating ice within the sector and the arctic seas, such as the seas of bay type along the Siberian coast, should be considered internal waters under the complete jurisdiction of the littoral states. The United States and Denmark have never specifically declared their adherence to the sector principle. Canada has never claimed a sector by any specific declaration but has indicated unofficial adherence to the theory in

several ways. These include publication of maps showing a Canadian sector, the establishment of Arctic game preserves bounded by the sector limits, and statements by government representatives and officials.

The validity of the sector principle as a means of acquiring sovereignty over territory in the polar region has never been tested before an international tribunal but there is some doubt that it could by itself be a sufficient legal claim to territory. Decisions by international tribunals since 1928 indicate that the true test of sovereignty over uninhabited or very sparsely inhabited territory is by effective occupation i.e. the intention and will to act as sovereign plus some actual exercise or display of state authority in relation to a region.

Dean Vincent MacDonald in his 1950s "Report of Canadian Sovereignty in the Arctic" concluded that the sector principle had a weak foundation in international law and doubted that it constituted a sound argument for Canada's claim to sovereignty in the Arctic. He believed that it should be used, if at all, only where our claims to important areas in the Arctic had not yet been encompassed by the demonstrable effectiveness of our occupation. He concluded his report by advising that Canada's title to its Arctic territories should be asserted and maintained "upon the ground of effective occupation along as the chief and most satisfactory ground or reliance."

Floating Ice Islands

The ice of the floating ice island is so hard and thick that they retain their shape and general appearance for many years. The one known as T-3 is about 31 miles in circumference and 5 miles across. The islands drift with the currents of the ocean but unlike ice floes are not moved by wind pressures. The ice islands constitute a unique problem in international law now that countries have developed the ability to establish and maintain control over them by means of parties living on the ice. The islands are large enough to be compared with an ordinary island over which sovereignty can be exercised. However their transitory nature and relative permanence make it difficult to consider them as of the true nature of territory, and it is very doubtful if they can be appropriated and subjected to sovereignty. If this is the case the Soviet aircraft which recently flew over T-3 did not violate Canada air space and did not infringe any rules of international aerial navigation.

Conclusion

1. A review of the sector theory indicates that while the principle was of considerable value to Canada as the original basis of our claim to control all the areas north of the mainland to the Pole, the need for reliance on this doctrine has progressively diminished as our effective occupation of those territories has become more and more firmly established. At the present time it is believed that Canadian title to all or nearly all of our Arctic territories can be asserted on the basis of effective occupation both in respect to intentions and in the actual display of sovereignty over these regions.

2. Under existing international law it is very doubtful if floating ice islands can be subject to the sovereignty of any state.

3. Because of the doubtful legal basis of the sector theory and the fact that ice islands apparently cannot be claimed as sovereign territory by any state, Canada would have little or no grounds for complaint if a Russian station on an ice island or pack ice drifted into the Canadian sector. There is no reason, however, why Canada cannot maintain regular air surveillance over the station. If some action is thought to be necessary to counterbalance the Russian activities a Canadian party could be established on T-3 and a statement could be made reaffirming our intention to claim sovereignty over any territories in our sector which are capable of appropriation, now or in the future.

8. Letter from Jean E. Tartter, Third Secretary of the US Embassy, Ottawa to the Department of State, "Canadian Sovereignty in the Arctic Archipelago," March 10, 1955

NARA, RG 84, Entry UD 2195C, box 26

Transcribed to include only sections relevant to maritime sovereignty

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Summary

By 1880, Great Britain had transferred to Canada all her territorial claims in the Arctic above the mainland of Canada. These were based on discovery by Spanish explorers and partial occupation. Until 1903, when Canada began efforts at effective occupation of the Arctic islands, her claims in several areas were weak on account of Norwegian discoveries and United States discoveries, exploration and occupation. From 1922 onwards, Canada attempted to maintain order in the area through the establishment of permanent Royal Canadian Mounted Police stations at several points and RCMP patrols covering most of the islands. However, the northern or Queen Elizabeth group still has almost no inhabitants except the personnel of the five weather stations, who are both United States and Canadian citizens.

Although an official representative of the Canadian Government in 1909 laid claim to all the territory within a Canadian sector up to the North Pole, the Canadian Government did not officially adopt this view until 1925. In 1954, evidently reluctant to risk any controversy with the USSR, Canadian officials ceased referring to a Canadian sector, and early in 1955 stated that Canadian sovereignty went only as far north as the northern tip of Ellesmere.

After World War II, several Canadian officials indicated that Canada would claim jurisdiction of polar ice in the Canadian sector north of the Arctic islands. But in statements in early 1955, the Canadians clearly backed away from this position. Whether Canada intends to claim jurisdiction of the straits more than six miles wide between the Arctic islands has not been made plain.

...

Sector Theory

It is not clear just how Canadian adherence to the sector theory arose; in fact, it is still not clear that Canada fully supports the sector theory. Speaking to an officer of the Embassy in 1954, Gordon Robertson, Deputy Minister for Northern Affairs and National Resources and Commissioner of the Northwest Territories, said the original sector claim was made by a cartographer in 1903, who “evened things off” by extending the 60°-141° parallels of longitude up to the North Pole in delineating the Canadian area. Cartographers have since followed this principle. In 1951 a new map of Canada was issued which included the north Pole and the Canadian Sector at 60°-141°. However, at a meeting of the Arctic Circle club in Ottawa on February 2, 1955, Northern Affairs Minister Lesage would not commit himself on the sector principle, observing that the official maps were produced by another department than his.

No mention is made of the sector theory in the aforementioned King Report. The earliest reference to it that has been found is in 1907 when a resolution was moved in the Canadian Senate that “the time has come for Canada to make a formal declaration of possession of the lands and islands situated in the north of the Dominion, and extending to the North Pole.

The Government spokesman opposed this notion on the grounds that it might not be of any practical advantage to assert jurisdiction quite that far north. “...while negotiations are going on and while the Governments are sorting themselves, it might not be the part of policy to formally proclaim any special limitation ...”

In the expedition of 1909, Captain Bernier, acting as official agent of the Government, took possession of the Arctic Archipelago on behalf of Canada, erecting a cairn at Winter Harbour (Melville) that claimed the “whole Arctic Archipelago lying to the north of America from longitude 60°W to 141°W up to latitude 90°, i.e., to the North Pole.

In the Canadian Year Book (an official publication) up to and including 1924, the following statement was part of the description of the Canadian boundary:

“...Northern boundaries have yet to be fixed by further exploration but Cape Columbia in north latitude 85°5’ is the most northerly known point of land in the dominion...”

On June 1 1925, the Minister of the Interior introduced a bill requiring licenses for scientists and explorers in the Northwest Territories. He said this would “assert our ownership over the whole

northern archipelago ... possibly there may arise a question as to the sovereignty over some land they may discover in the northern portion of Canada, and so we claim all this portion ... right up to the North Pole." This appears to have been the first official statement acknowledging Bernier's claim of 1909.

Then, in Canada Year Book 1925, the following Statement appeared:

"...in regards the far north, Canada includes all the lands in the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere islands to the 60th meridian of longitude, following this longitude to the pole..."

On numerous occasions since 1925, the Government has at least by implication accepted the sector theory. Recent editions of the Canada Year Book, for example say:

"...Northward Canada extends to the North Pole and includes the Arctic Archipelago between Devon Strait, Baffin Bay and the connecting waters northward to and along the 60th meridian on the east and the 141st meridian on the west." (Canada Year Book, 1954).

And on December 8, 1953 in introducing a bill to rename the Department of Resources and Development by calling it the Department of Northern Affairs and National Resources, the Prime Minister said "We must leave no doubt about our active occupation and exercise of our sovereignty in these northern lands right up to the Pole."

However Mr. Lesage's remarks of February 2, 1955 stated Canada's claims in a more modest way. He said then that Canada does not by statute adhere to the sector theory, nor for that matter, to the theory of occupation. But "we might adopt both theories because we would be safe on both." He then said Canada claimed sovereignty to the three-mile territorial waters beyond Ellesmere Island, about 500 miles from the North Pole.

Jurisdiction Over Polar Ice

The first reference that can be found to a possible claim by Canada to jurisdiction over permanent polar ice beyond the three-mile limit is found in the King Report. King says:

"The case of the northern straits is different. They are not used for purposes of navigation merely. Although some of them, like

Lancaster Sound and Barrow Strait may be said in a certain sense to lead through to the open sea beyond, yet they are blocked by ice during a great part of the year. A navigator, therefore, using them, if such could be the case, with the intention of passing through from sea to sea, must be prepared to have at least a half-formed intention, or expectation, of wintering there. A ship frozen in the ice is as effectually attached to the land as if she were in a harbour."

"All nations maintain the right to prevent vessels from landing except at specified ports. This right in the present case cannot be effectually exercised unless by prohibiting vessels altogether, without special permission, from frequenting these straits, that is, by considering the waters territorial."

"therefore Canada may reasonably claim that the maintenance of her national rights, as such rights are universally understood, demands that their northern waters be considered territorial."

After World War II, statements by two Canadian officials gave the plain impression that Canada would adopt the extreme position that the polar sea, not only within straits, but within the entire Canadian sector, was Canadian territory. In an article for *Foreign Affairs* of July 1945, Lester Pearson, then Canadian Ambassador to the United States, wrote:

"A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries, extended to the North Pole."

In a speech on May 14, 1949, H.L. Keenleyside, Deputy Minister of Mines and Resources, said:

"The Arctic and sub-Arctic regions of this country can be defined roughly as consisting of the Yukon Territory, the Northwest Territories, including the Arctic Islands and their waters, the northern half of Quebec and Labrador, and that segment of the ice-capped polar sea that is caught within the Canadian sector." (lecture entitled "Recent Developments in the Canadian North" given by H.L. Keenleyside, Deputy Minister of Mines and Resources, at McMaster University, May 14, 1949.)

In a conversation with an Embassy officer in 1954, Northwest Territories Commissioner Gordon Robertson said that this point had never been clearly settled by the Government. He felt that the various

statements, particularly that by the Prime Minister on December 9, 1953 (see above) claimed sovereignty only in all lands contained in the Canadian sector. The polar ice question had been discussed by Cabinet, but no decision had been reached. A minority felt that Canada should claim polar ice while a majority including the Prime Minister felt that Canada would not attempt to do so. The Prime Minister was said to feel such a claim might lead to unnecessary quarrels; e.g. if a Russian-occupied ice island floated into the Canadian sector.

Talking to this officer in January 1955, Minister Lesage said firstly that Canada made no claim to polar ice within its sector. In his statement of February 2, 1955 quoted above, Mr. Lesage similarly indicated that Canada made no claim to the polar ice.

As has now been made public, a Soviet-occupied ice island did, in fact, float into the Canadian sector at one time. It is thought likely that this may be responsible for the apparent change in attitude on the polar ice question since 1949, and it may have been in Mr. Lesage's mind when he carefully limited Canada's jurisdiction to the territorial waters above Ellesmere in his recent remarks.

When newspapermen questioned officials of Northern Affairs about the Russian-occupied ice islands, they were told that Canada had no right to claim frozen seas. It was pointed out to them that Canada had never taken action in the form of notes to foreign powers to claim a Canadian sector.

U.S. Recognition of Canadian Claims

Canadian officials are extremely sensitive of the fact that the United States never explicitly recognized Canada's claims to the Arctic islands, and that it does not accept the sector principle. However, they have frequently stated that by obtaining consent of the Canadian Government before sending official parties into the islands, the United States tacitly recognizes Canadian sovereignty. Similarly, the fact that private American citizens have purchased hunting permits since these were required in 1925 strengthens the view that the United States has implicitly recognized Canadian claims.

In his article in Foreign Affairs for July 1946, Mr. Pearson pointed out that in the 1944 Arctic Manual of the United States War Department described the Canadian Arctic as including all the islands to the north of the mainland of Canada.

The Arctic Weather Stations were established in 1946-49 in the Queen Elizabeth Islands as a joint US-Canadian project with Canadian commanders at each station. No formal agreement exists for this

project; a draft exchange of notes specified that these stations were in the "Canadian Arctic," however the exchange was never made effective. The formal basis for the weather station project seems to lie in the minutes of the meetings held each year by representatives of the various Canadian departments, and representatives of the U.S. services and the Weather Bureau. It has always been the understanding at these meetings that the stations were on Canadian territory. For example, in the meeting of March 11, 1949, a Canadian delegate said, without contradiction from the U.S. side, that "the selection of sites for the Prince Patrick and Isachsen stations would be made jointly by the U.S. and Canadian representatives, but the final decision rested of course with the Canadian officials since the programme was taking place in Canadian territory."

Although the United States at first assumed most of the responsibility for supplying the stations, the Canadians have taken over as much as they could handle, so that now only Alert on northern Ellesmere is supplied by the United States. The Canadians have said in the past that they planned to man the stations with Canadian personnel exclusively as soon as they can find the meteorologists needed. In addition, two all-Canadian stations are expected to go into operation shortly.

The United States has not, so far as is known, acknowledged any possible Canadian claim to the polar ice by obtaining clearance for vessels proceeding more than three miles from land in the Arctic Archipelago. In 1954, the Beaufort Sea project, involving two United States Navy ice breakers, was given clearance by the Canadians, but merely to travel in Canadian territorial waters without specifying what these might be. The ice breakers did enter within the three-mile zone and, indeed, landings were made in Melville Sound.

For the Ambassador:

Jean E. Tartter
Third Secretary of the Embassy

cc: BMA

Department: Please forward 10 copies
this dispatch to Embassy,
Ottawa

9. Memorandum to Cabinet, "Canadian Policy on Territorial Waters and the Continental Shelf," March 2, 1956

LAC, RG 25, File 9057-40

Transcribed to include only sections relevant to maritime sovereignty

...

(f) Arctic Waters

The Interdepartmental Committee has also been for some time studying the status of the waters in the so-called "Canadian sector" of the Arctic, and particularly of those waters within baselines drawn from headland to headland about the perimeter of the Arctic Archipelago. The definition of "Northwest Territories" in the Northwest Territories Act, Ordinances and so forth is not very helpful, in that Canadian waters in the area are not defined. Officers of the Department of External Affairs, in consultation with Mr. Curtis, are currently preparing a study of territorial waters in the Canadian Arctic. It is recommended that no formal action be taken regarding possible Canadian claims to water areas in the north at the present time but that all departments be cautioned that they are to take no action that would compromise a later claim by Canada that the waters of the Arctic Archipelago are Canadian inland waters.

...

Summary of Recommendations

...

g) To direct all departments that no action is to be taken which may compromise a later claim by Canada that all the waters bounded by baselines surrounding the Arctic Archipelago are Canadian inland waters.

10. Letter from Jules Leger to Deputy Minister, Northern Affairs and Natural Resources, March 29, 1956

LAC, RG 25, file 9057-40

The Deputy Minister
Department of Northern Affairs
and Natural Resources,
Ottawa

Location of Soviet Occupied Ice Islands in "Canadian Arctic Waters"

As you know the following question was asked in the House of Commons on Orders of the Day for March 22: "Are any Russian airfields established on ice floes and presently in Canadian Arctic waters, known as severnyi-polyus No.6 and severnyi-polyus No.4?"

2. The factual information contained in the draft answer, a copy of which is attached, was obtained from open sources through intelligence agencies in the Department of National Defence. More precise information, particularly concerning the position of these ice islands is known and on the basis of this I understand there is no doubt that the ice islands are located outside the so-called Canadian sector. I am confirming this understanding with the Deputy Minister of National Defence and at the same time seeking his concurrence in the draft answer.

3. With regard to the last sentence it is considered that it is appropriate to reply using the same terminology as the question. Since Canadian claims to water areas in the Arctic have not been defined and since none of the positions are in the so-called Canadian sector the expression "Canadian Arctic waters" is capable of being construed to include as much of the waters of the sector as one might think are Canadian. However, it is thought that the main purpose of the question is not concerned with the extent of Canadian claims in the Arctic but rather with the possible proximity to Canada of floating ice islands with Soviet airbases on them. To try to dispel any possible ambiguity might lead to a request that Canadian Arctic waters be defined. It is true that in statements by Mr. Lesage and yourself before the Special Committee on Estimates (Proceedings No. 15, Wednesday, March 23, 1955 Department of Northern Affairs and National Resources), the inference is quite clear that Canada has never formally claimed water

and ice in the so-called Canadian sector. This could be reiterated but it is considered that to do so might very well give rise to supplementary questions concerning the extent of Canadian sovereignty over ice and water areas in the Arctic. The only reply which could be given at the moment, which was not based on more than tentative conclusions, would be that the whole question is under study.

4. I should be grateful if you would let me know whether you concur in the draft answer. May I please have your reply in time for the answer to be made by Mr. Pearson, if he so wishes, on Monday, April 10, when the House is to reconvene?

Jules Léger
Under-Secretary of State
for External Affairs

RUSSIA – POSSIBLE ESTABLISHMENT OF ICE AIRFIELDS

Draft Answer to question asked
in the House of Commons
on March 22, 1956

Several ice islands occupied by Soviet personnel and drifting in Arctic waters have come to our attention. They appear to be used only as weather stations and for other scientific purposes. They are supplied by transport aeroplanes and they also make use of helicopters. According to recent reports the Station S.P. 4 is located somewhere near 87.5 N 175.6 W. The station S.P. 5 is located somewhere near 86.3. N 95.8 E. Soviet authorities have announced the mounting of a new station S.P. 6 to go into operation this spring. None of these ice islands is in Canadian Arctic waters.

11. Memorandum to the Minister, "Question in the House Regarding Location of Soviet Occupied Ice Islands in Canadian Arctic Waters," April 9, 1956

LAC, RG 25, vol. 6, file 9057-40

SECRET

April 9, 1956

MEMORANDUM FOR THE MINISTER

Question in the House Regarding Location of Soviet Occupied Ice Islands in Canadian Arctic Waters

As you know, Mr. W.B. Nesbitt, M.P., asked the following question on Orders of the Day for March 22: "Are any Russian airfields established on ice floes and presently in Canadian Arctic waters, known as severnyi-polyus No. 6 and severnyi-polyus No. 4?" I am attaching a draft of an answer which might be given to Mr. Nesbitt's question. This reply is concurred in by the Departments of National Defence and Northern Affairs and National Resources.

1. There are two ice islands presently occupied by Soviet personnel: S.P. 4, and S.P.
2. Ice island S.P. 3 which did drift into the Canadian sector a year or so ago has now broken up.
3. The Soviet Government has announced their intention to establish S.P. 6. We expect it will be launched in about a fortnight. The Soviet authorities have made conflicting announcements as to its proposed location, and we cannot say exactly where it will be. No announcement, however, suggests that it will be in the "Canadian sector." The approximate positions of S.P. 4 and S.P. 5 could be given, based on information from unclassified sources. The Deputy Minister of Northern Affairs and National Resources, with the concurrence of Mr. Lesage, suggests that they be omitted since listing them may lead to a request for the definition of the extent of Canadian Arctic waters either in the House or from the press. He considers that it would be preferable to avoid such an enquiry, if possible, since the policy on territorial waters in the Arctic is still under examination.

4. Actually none of the ice islands is at the present time located in the so-called Canadian sector. Therefore, the expression "Canadian Arctic waters" is capable of being construed to include as much of the waters of the sector as one might think are Canadian. However, it is thought desirable to use this expression since this is the language in which the question is couched. Furthermore, the main purpose of the question appears not to be concerned with the extent of Canadian claims in the Arctic but rather with the proximity to Canada of floating ice islands with Soviet airbases on them. It is true that in statements by Mr. Lesage and Mr. Gordon Robertson before the Special Committee on Estimates (Proceedings No. 15, Wednesday, March 23, 1955 Department of Northern Affairs and National Resources), the inference is quite clear that Canada has never formally claimed water and ice in the so-called Canadian sector. To try to dispel any possible ambiguity, which in the context of the question does not seem necessary, would almost certainly lead to a request that Canadian Arctic waters be defined.

for M. H. J.
J.L.

[Jean Lesage]

12. Under-Secretary of State for External Affairs to Canadian Embassy, Copenhagen, Denmark, "Arctic Territorial Waters," April 30, 1956

LAC, RG 25, vol. 6, file 9057-40

On March 15 the Government considered certain recommendations regarding Canadian policy on territorial waters and the continental shelf. It was decided among other things that since a study of the status of the waters in the Arctic, and particularly of the waters of the Arctic Archipelago, had not been completed that no formal action should be taken regarding possible Canadian claims to waters in the Arctic at the present time. However, it was recommended that all Departments should be cautioned to take no action that might compromise a later claim by Canada that the waters of the Arctic Archipelago are Canadian inland waters. For present purposes these waters might be taken as those lying within a line commencing at Resolution Island, south east of Baffin Island and running from headland to headland in a rough triangle north to the top of Ellesmere Island and thence south west to Banks Island and the Arctic coast of Canada.

2. This advice is for your own information only. You will be informed in due course of the other decisions taken by the Government on territorial waters and the continental shelf.

G. SICOTTE

for the

Acting Under-Secretary of State
for External Affairs

13. Memorandum for the Minister, "Soviet Drifting Research Stations in the Arctic," May 28, 1956

LAC, RG 25, file 9057-40

On May 22, in the External Affairs Committee, Mr. Fleming asked whether the Department is aware that the Soviet Union has recently mounted a new drifting station on an "ice island" called North Pole Six, which is the third such station now maintained by the Russians, and whether this station is in Canadian territorial waters or waters over which Canada asserts sovereignty. You gave an interim reply saying "We do learn from time to time about Russian stations being established in such places for scientific purposes; the Russians sometimes announce it. None of these ice islands, as they have been called, is situated as far as I know in Canadian territory. There is a little doubt as to what constitutes territory in permanently frozen seas; the question has not yet been established in international law. But this is a matter of some importance and I would like my answer to be exact in all its details, so perhaps we should prepare a statement indicating what is happening and how important it is to us."

I attach a draft of a statement concerning Soviet drifting stations which you might wish to make in the Committee as a follow-up to your interim reply. This statement is based on the latest unclassified information available in JIB and on what you said in the House on April 9 in reply to a question by Mr. Nesbitt (Oxford).

The suggested reply is really the short answer to Mr. Fleming's question, that is that we are aware of the mounting of the new station and of the other two stations to which Mr. Fleming refers and by implication, that they are not in "Canadian territorial waters or in waters over which Canada asserts sovereignty." However, the proposed reply ignores the possibility that Mr. Fleming had in mind that all the waters in the Canadian Sector are claimed by Canada when he used the expression "Canadian territorial waters or waters over which Canada asserts sovereignty." This can be done so long as none of the ice floes is in the Canadian Sector, as is the case. In fact any formula which might be used, such as "None of these ice floes is in Canadian Arctic waters" or "None of these ice floes is in waters in what is sometimes called the Canadian Sector" as an alternative to the one used in the proposed statement, i.e., "All of these ice floes are in the area between the coast of the USSR and the Pole", enables the listener to draw the particular inference which coincides with his conception of the extent of Canadian claims in the Arctic.

However, while none of these drifting research stations is at present in the Canadian Sector, the latest information suggests that the new station may drift into waters within the Canadian Sector in 1957 and that one of the old stations, Drift Station Four, may drift into the Canadian Sector this year. The present position of the new station is 250 miles Northeast of Wrangel Island, which in turn is approximately 100 miles North of the coast of Siberia at a point approximately 300 miles East of the Bering Strait. This is about 1200 miles, as the crow flies, from the boundary of the Canadian Sector. Drifting Station Four, one of the "old" stations, is about 300 miles from the Canadian Sector boundary. In this connection you may be interested in perusing the attached memorandum and map which contains the latest unclassified information available on Soviet drifting stations in the Arctic.

As you know, Canada has never claimed a sector by any express declaration. In 1925 the Honourable Charles Stewart, Minister of the Interior, stated in the House of Commons that Canada claimed as Canadian, all territory "right up to the North Pole." On December 8, 1953, the Prime Minister stated in the House of Commons "We must leave no doubt about our active occupation and exercise of our sovereignty in these Northern lands right up to the North Pole." However, maps published by the Department of Mines and Technical Surveys have for many years shown the Canadian boundary in the Arctic as being coincident with the Sector lines and various Arctic Preserves have been created by Order-in-Council, the boundaries of which are likewise coincident with the boundaries of the Sector.

Undoubtedly the aforementioned public actions and statements along with various periodical articles have been interpreted as indicating a Canadian claim to the Sector and it is considered that the sector theory may still be of value to Canada as a clear indication of Canada's intention to exercise sovereignty over any territories (water, ice or land) susceptible of occupation north of the Canadian mainland between 60°W and 141°W. We are presently making a legal study of the status of the waters of the Arctic Archipelago but we have not yet arrived at the point where we are in a position to make recommendations to the Government on this question or on the broader question of sovereignty over ice and water areas within the Canadian Sector but not immediately contiguous to the Archipelago.

I think to enter on a discussion at this time on what Canada claims or could claim in the Arctic, apart of course from the land areas, might prejudice any future action which the Government might wish to take. I should like to suggest therefore, that in Committee as little as possible be said in reply to this question but that you in an article entitled

"Canada Looks 'Down North'", contributed by you to Foreign Affairs in July 1946, you stated "A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's Northern mainland but the islands and the frozen sea North of the mainland between the meridians of its East and West boundaries, extended to the North Pole" consider whether it would be worthwhile to speak to Mr. Fleming beforehand and suggest to him, on a confidential basis, the problem involved and propose to him that an officer of this Department might show to him at his convenience, and on a confidential basis, the secret working paper of this Department on the sector theory and ice islands and the memorandum giving the latest unclassified information concerning the Soviet drifting stations. This might serve to satisfy Mr. Fleming and indicate to him the intricacy of the problem of sovereignty in the Arctic. I recall that we did this a year or so ago when General Pearkes expressed an interest in this question. I might also call to your attention that the terms "ice floe" and "ice island" are being used synonymously both in Parliament and in this Department.

It seems there is a distinction which, though it has little meaning for the general public, has considerable importance for the nature and scale of the stations. An ice island is much larger than a floe. It is enormously thick and is a virtually permanent formation, whereas ice floes are subject to break-up. It is not known that the Russians have ever mounted stations on ice islands though you will recall that the United States did so from March 1952 to May 1954 and again from April 1955 to September 1955. A paragraph on the distinction has been added to the statement as a matter of interest. The Deputy Minister of Northern Affairs and National Resources concurs in the proposed statement.

Draft Statement

On May 22, in this Committee, the Honourable Member for Eglinton (Mr. Fleming) referred to a Soviet News Bulletin published by the Russian Embassy here in Ottawa concerning the occupation of an ice island by Russian scientists known as North Pole Six, reported to be the third such station now maintained by the Russians. Mr. Fleming asked whether the Department was aware of this and whether I was in a position to make any comments as to whether this base is in Canadian territorial waters or waters over which Canada asserts sovereignty. I mentioned that I would prepare a statement on this question.

I should like to assure the Committee that the Government is aware of the activities in question. It was announced on April 21, 1956, by the

Soviet press that a new Drift Station was being mounted in the area 250 miles Northeast of Wrangel Island. There are also two other ice floes known to be occupied by Soviet personnel and drifting in Arctic waters. All of these ice floes are in the area between the coast of the USSR and the Pole.

As I mentioned in the House on April 9, in reply to a question by the Honourable Member for Oxford (Mr. Nesbitt), these drifting stations appear to be used as weather stations and for other scientific purposes.

As a matter of interest I might just say that these stations are mounted on ice floes rather than ice islands. The distinction, I understand, is that the former originate in the ice pack which is in fact frozen ocean, whereas ice islands originate in the shelf ice which protrudes seaward from land areas. The latter are usually much larger than floes, they are enormously thick and are virtually permanent formations whereas ice floes are subject to break-up.

14. House of Commons, *Debates*, August 3, 1956, 22nd Parliament, 3rd Session, p. 6955

Mr. Hamilton (York West): Has there been any discussion of the principle of ownership of the ice cap north of the land area where according to the indication in this article, we asserted one principle and the United States asserts another?

Mr. Lesage: We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic islands. There is no doubt about it and there are no difficulties concerning it. Our sovereignty has never been endangered by the existence of the D.E.W. line. We have agreements with the United States and the facts are there to prove we have sovereignty over our northern territory. We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty exists over the lands and our territorial waters.

Mr. Hamilton (York West): Do I gather from the minister's answer that if the situation were reversed and it was Russia which intended to make use of this area for a warning line of some kind, we would not be concerned because that does not affect our principle of ownership?

Mr. Lesage: As far as we are aware, Russia has never claimed water or ice as being in the territory over which it has sovereignty. I have not heard that the United States wants to establish a line on the ice cap north of the islands of Canada because this area is the high sea, be it frozen or in liquid form. I suppose and I certainly hope that my hon. friend believes in the freedom of the high seas.

Mr. Hamilton (York West): I do not think there is any question about the freedom of the high seas. What I am requesting from the minister is an answer to a simple question. If we do not assert the sector principle which has been referred to in this article, does that mean that we are quite satisfied to have any power occupy the polar ice cap north of our territory?

Mr. Lesage: The ice cap is in exactly the same situation as the Atlantic Ocean; it is the high seas.

Mr. Hamilton (York West): The minister has not answered the question.

Mr. Lesage: The hon. Member can answer it himself, I have indicated the principles. I do not have to apply them for you.

Mr. Harkness: I think the minister is evading the question. There is no use saying that the Polar ice cap is the high seas because it is not. You cannot sail a ship over it or anything else. As he probably knows, permanent establishments have been erected on the icecap in the way of landing fields, radar stations and so on. As the minister also probably knows, at the present time a big scramble is going on among half a dozen countries to establish sovereignty over various parts of the Antarctic ice cap.

Mr. Lesage: There is land there.

Mr. Harkness: Some of it is land.

Mr. Lesage: It is a continent.

Mr. Harkness: Nobody knows.

Mr. Lesage: That is the difference.

Mr. Harkness: Nobody knows. The minister says there is land, but nobody knows just how much is land. It is an ice cap; nevertheless nations are attempting to establish sovereignty over parts of that ice cap. As far as this Arctic ice cap is concerned nobody knows how much of it is water and how much of it is land. I do not think it is good enough for the minister to evade this question by saying that these are the high seas. They are not. This is an ice cap upon which permanent installations have been established and supplied by air transport.

The Deputy Chairman: Shall the item carry?

Mr. Hamilton (York West): Is that all the answer we get?

Mr. Lesage: I do not know just what the hon. Member wants to know. Do hon. members want to know what the ice cap is under international law? Do they want to know what the ice cap north of the Arctic islands is? My answer is very simple. It is the high sea in frozen form. The ordinary laws of the high sea apply to high seas whether they be in liquid or frozen form. That is the limit of my knowledge of international law on this. If my hon. friend knows more about it than I do I hope he will tell us what he knows.

Mr. Hamilton (York West): What the minister is saying in effect is that we have absolutely no plans for dealing with this area when in fact there is evidence of intention by someone else to make use of it.

The hon. Member for Calgary North has suggested that you cannot consider this as an ocean because planes are flying in that area right now.

Mr. Lesage: My hon. Friend is a lawyer and if he has studied his international law he should know that it is the ocean, that it is the high seas.

Mr. Hamilton (York West): The knowledge of any principle of international law has never prevented a war or a dispute over a territory like this. The asserting of a principle as the minister is doing now is not going to prevent an unfriendly power making use of this area unless we do something about it. If I accept the answer of the minister it is that as long as there is a friendly power going to come along and do something for us we will talk.

Mr. Lesage: Mr. Chairman, on a point of order. I never said what the hon. Member is saying I said. He has said that. It is he who talks about a friendly power occupying the ice cap north of the Arctic islands. I never said that at all.

Mr. Hamilton (York West): What I said and I repeat, is that from the answer the minister has given the only conclusion we can come to, whether or not he likes it, is that that is the case. I repeat that there is no plan. There may be a legal principle which the minister is asserting and in so far as it relates to a friendly country that is wonderful and we can sit back and do nothing, but it certainly is not a principle that is going to do us any good if there is an indication that an unfriendly power is going to make use of this area. I agree with what the hon. Member for Calgary North has said, that anyone who has travelled in the Northwest Territories and the Yukon and the far north realizes that these places are not far out of touch with the rest of the country. As a matter of fact, with the development of the longer range planes we are going to have criss-crossing traffic by intercontinental planes. This is going to become a very important area. What I am suggesting to the minister is that we do not rely on some theory of international law, but that we prepare for the time when someone unfriendly to us may assert a right.

Mr. Lesage: Could I ask the hon. member what he suggests we should do with the ice cap?

Mr. Hamilton (York West): I am suggesting right now that as a first step, if there is an indication from the United States that they are intending to make –

Mr. Lesage: No.

Mr. Hamilton (York West): There is an indication in this article, and had the minister been listening he would probably know more about it.

Mr. Lesage: I was listening, but I do not rely on articles.

Mr. Hamilton (York West): There is an indication that this area may be considered vital by a friendly power to assist in transcontinental defence.

Mr. Lesage: That is an opinion.

Mr. Hamilton (York West): On the basis of that information we should prepare for that day by asserting our own rights over this area and ensuring that any protective stations or even aggressive stations that may be required shall come within the orbit or power of this country, not within that of an unfriendly country. Unless we assert those principles it may soon be too late.

Mr. Harkness: The minister just asked the hon. Member for York West what he would suggest be done. I suggest that we assert the sector principle. As a matter of fact there is a publication put out by the Canadian government where that has already been asserted. I brought up this question of sovereignty over these northern areas and the ice cap about two years ago and at that time I was told that there was no question in anybody's mind in regard to our sovereignty over all that area extending right up to the north pole. I hold in my hand a book entitled "Boundaries of Canada" put out by the Department of Mines and technical Surveys. Right at the front of the book is an outline map which shows the boundary of Canada running up to the north pole straight along the degree of latitude which separates the Yukon from Alaska. That is shown on the map as the boundary.

Mr. Lesage: That is not the boundary.

Mr. Harkness: Then it shows the boundary coming down from there in a somewhat wavy way to what would be the northwest corner of Labrador. There is a more detailed map at page 42.

[Unrelated section omitted]

Mr. Harkness: Mr. Chairman, I was just pointing out that at page 42 there is another more detailed map, and it shows the same thing. It shows the boundary running right up to the north pole along the longitude separating Alaska and the Yukon, and then coming back down again between our northern islands and Greenland and then down to the tip of Labrador. I do not think there is any question that

the Canadian government in the making of its maps and so forth, has tacitly at least given adherence to the sector theory of the possession of this northern area. I think the minister is in error when he says the Canadian government has not adopted that theory and that it has been more or less taken for granted.

Some two years ago I raised this matter in connection with an ice island, I think it was, which some Soviet scientists were occupying and which was floating around up in this northern area. I wanted to know at that time when the situation was, whether Canada exercises any sovereignty over it and so on, and at that time no question was raised as to Canada's sovereignty over this sector extending right up to the north pole. From what the minister has said today, apparently without saying anything to anybody the government is going to abandon that theory altogether and thus perhaps put us in a very awkward position as far as bargaining as far as any foreign power is concerned.

As the hon. Member from York West has pointed out, if the Americans want to put radar stations there we will be delighted and have no objection to it, but if the Russians or somebody else wanted to do the same thing it would be a totally different matter. In order to protect ourselves I think we should certainly return to what I have always understood was our theory of sovereignty, the sector theory and assert our sovereignty over that sector extending up to the north pole as, indeed, it is shown on both maps in this publication on the boundaries of Canada by the Department of Mines and Technical Surveys.

Furthermore, before the minister makes the statement that we do not claim any sovereignty over that area, I think he should consult the Minister of Mines and Technical Surveys under whose authority these maps are issued and also the Prime Minister, the Secretary of State for External Affairs, and the other members of the government.

Mr. Lesage: I do not need to consult with my colleagues, because the government of Canada has never adhered to the general sector theory.

Mr. Harkness: May I ask the minister then, why maps are put out showing this as Canadian territory?

Mr. Lesage: If given time I will tell you. In 1903 these lines were put on the maps of Canada for the first time. It was not to show the boundaries of Canada. It was to show the lines within which the lands and the territorial waters around those lands were claimed by Canada because at that time and for a number of years afterwards many of the islands of the Arctic had not been discovered and it was not known what islands might exist in the interior of that sector.

Our claim since 1903 has been to all the land within these lines, but we have never adhered to a broader sector theory. If you adhere to the general sector theory you claim that you have sovereignty over waters beyond your territorial waters. We have never done that. It is said that because it is ice we might claim sovereignty over it, but the ice is moving all the time. It is never the same ice. Do you believe that any country in the world would recognize our sovereignty over the air space above this water in its liquid form? If you claim sovereignty over a piece of land or your territorial waters, you also have sovereignty over the air space above that land and territorial waters. Other countries would never recognize our sovereignty over these high seas, be they in liquid or frozen form, and which in the frozen form are moving all the time.

This is the law. That is what the position of the Canadian government has been all the time. I do not have to consult with my colleagues, but I believe the member for Calgary North would have done well if he had consulted someone before asserting the things he has asserted without knowing what he was talking about.

**15. House of Commons, *Debates*, April 5, 1957, 22nd
Parliament, 5th Session, p. 3122**

UNITED STATES -- REPORTED MOVEMENT OF VESSELS INTO
ARCTIC WATERS

On the orders of the day:

MR. HOWARD C. GREEN (VANCOUVER-QUADRA): Mr. Speaker, may I ask a question of the Prime Minister. Press dispatches within the last week have indicated that the United States is planning to send a fleet of naval and coast guard vessels, numbering 96, into Arctic waters, some of which at least are Canadian territorial waters.

The dispatch says, I think, that 46 are to go from the Pacific side and 50 from the Atlantic side. Could the Prime Minister tell the house whether or not the Canadian government was consulted about this proposed expedition, and if so whether the government consented?

RIGHT HON. L.S. ST. LAURENT (PRIME MINISTER): Mr. Speaker, my understanding is that the government was consulted about the usual movement of supply ships for United States requirements in that area. I am not sure about the number of ships. However, I will consider the question the hon. gentleman has asked and see whether the exact numbers he has mentioned were specifically referred to in the discussion between the United States government and the Canadian government.

MR. GREEN: The dispatch said the main purpose, apparently, was not to supply United States D.E.W. line stations but to discover a new or a better northwest passage. Does the Prime Minister not think that in view of the fact that this exploration is taking place in Canadian territorial waters, Canada should at least have some ships of her own attached to each of these fleets going in from the Pacific and the Atlantic?

MR. ST. LAURENT (QUEBEC EAST): Well, Mr. Speaker, I will be much more confident about the kind of answer to make to the hon. gentleman when I can rely on the exchanges which have taken place and not on possible dispatches that have been reported in the press.

Mr. GREEN: Perhaps the Prime Minister could give us a further explanation tomorrow?

MR. ST. LAURENT (QUEBEC EAST): As soon as I can get accurate information I shall be glad to communicate it to the house.

**16. House of Commons, *Debates*, April 6, 1957, 22nd
Parliament, 5th Session, p. 3185**

**United States – Statement on Reported Movement of Vessels
into Arctic Waters**

On the orders of the day:

RIGHT HON. L.S. ST. LAURENT (PRIME MINISTER): Mr. Speaker, yesterday the hon. member for Vancouver-Quadra (Mr. Green) asked about recent press reports concerning the activities of United States naval vessels in the Canadian Arctic during the coming summer. I am not sure exactly what report he was referring to, though I understand there was one in the April 3 issue of the Montreal Gazette and another in the edition of the Financial Post dated April 6.

MR. GREEN: No, it was one which appeared in the Christian Science Monitor.

MR. ST. LAURENT (QUEBEC EAST): Well, I have not seen the one but I assume it would be along the same lines.

MR. GREEN: Yes, it was much the same as the one which appeared in the Gazette.

MR. ST. LAURENT (QUEBEC EAST): These stories were apparently based on a recent United States navy press release. When arrangements were being made for the construction of the distant early warning line Canada and the United States agreed that the United States should be responsible for the sea supply of the D.E.W. line while it was being built.

It was realized that because of the amount of material involved and the urgency of the operation, a large number of special vessels would be required which Canada was not in a position to supply. At the time this agreement was reached, however, the United States was informed that once the line was in operation Canada might wish to assume responsibility for the annual resupply. Arrangements have already been completed for the Northern Transportation Company to resupply the western portion of the D.E.W. line beginning in the summer of 1958. Discussions are under way to determine if the Department of Transport can assume the responsibility for supplying the eastern portion of the line in connection with their other responsibilities in the Arctic.

As a result of the agreement I just mentioned the United States navy has been sending two convoys into the Canadian Arctic for the past two summers. One of these has emanated from Seattle and the other from New York or Boston. These convoys have had the task of supplying all the United States installations in the north including those in Alaska and Greenland as well as in Canada. This may be one reason why the number of ships involved seems to be large. Actually only a portion of each convoy enters Canadian waters. The operation this summer will be similar in both size and organization to that of the past two summers.

As in other years Canada will be well represented on both convoys. During the past two summers there have been both official government representatives as well as technical observers working with the commander of each task force. H.M.C.S. LABRADOR has provided icebreaker support for the eastern task force and the Royal Canadian Air Force has carried out a series of ice reconnaissances. Similar arrangements will be in effect again this summer.

Canada has always been consulted when the plans for the convoys were being made each year. This year, for instance, representatives of the Royal Canadian Navy and the Royal Canadian Air Force attended a series of meetings held in Seattle on February 5 to make arrangements for the sea supply of the western Arctic, and a senior Canadian naval officer attended a meeting in Washington on March 25 when the details of the eastern Arctic convoy were being worked out. Incidentally, each year the United States navy has been required to apply for a waiver of the provisions of the Canada Shipping Act, since the cargo ships they charter operate in Canadian coastal waters.

The suggestion that this summer's task force is being organized to discover a northwest passage rather than supply the D.E.W. line and other United States installations is, I am afraid, the fruit of a rather active imagination. During the past two summers a great deal of hydrographic work has been done jointly by Canadian and United States agencies in connection with the sea supply of the D.E.W. line, and except for the area around Boothia peninsula the task is now almost complete. Plans have been made to finish the work during the coming summer by having both Canadian and United States vessels work at the problem from opposite sides. H.M.C.S. LABRADOR will proceed from the Atlantic to the vicinity of Prince Regent inlet and carry out survey work there, while the United States navy icebreaker STORIS and two other United States coastguard survey ships will carry out similar work on the western side of Boothia peninsula. H.M.C.S. LABRADOR will be surveying Bellot strait which provides a channel between the eastern and western Arctic, and if it is found that water

and ice conditions are suitable the three United States navy vessels may attempt to pass through Bellot Strait and accompany the LABRADOR south to the Atlantic.

Useful hydrographic information will undoubtedly be collected during this joint project by the United States and Canadian navies, and it will be interesting to see if larger ships can pass through Bellot strait. We already know that small ships can navigate the strait because the Royal Canadian Mounted Police vessel ST. ROCH completed the passage in 1942.

If larger vessels can navigate this route it will provide a useful alternative for ships carrying supplies to the area, but it will probably always remain a second choice since ice conditions in the vicinity are known to be difficult in most years. Any ship wishing to pass from the Atlantic to the Pacific or vice versa would probably follow the route farther north through Lancaster and Viscount Melville sounds, which H.M.C.S. LABRADOR used in 1955.

MR. GREEN: May I ask the Prime Minister whether the Canadian government considers these waters to be Canadian territorial waters and if so whether the United States government admits that such is the case?

MR. ST. LAURENT (QUEBEC EAST): I do not know whether we can interpret the fact that they did comply with our requirement that they obtain a waiver of the provisions of the Canada Shipping Act as an admission that these are territorial waters, but if they were not territorial waters there would be no point in asking for a waiver under the Canada Shipping Act.

MR. GREEN: There is no doubt, then, that the Canadian government at least considers them as territorial waters?

MR. ST. LAURENT (QUEBEC EAST): Oh yes, the Canadian government considers that these are Canadian territorial waters, and we make it a condition of the consent we have given to these arrangements that they apply for a waiver from the provisions that would otherwise apply in Canadian territorial waters.

17. Memorandum, "Arctic Territorial Waters," April 9, 1957

LAC RG 25, 9057-40

MEMORANDUM FOR FILE Arctic Territorial Waters

I spoke to Mr. R.G. Robertson, Chairman of the Interdepartmental Committee on Territorial Waters today concerning the statement by the Prime Minister in the House on April 6 on Arctic territorial waters.¹⁰³ Mr. Robertson said the main statement had been prepared in Northern Affairs. The Prime Minister had replied to the supplementary questions on his own initiative.

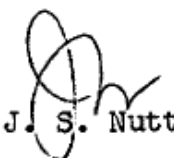
2. It is not clear from the exchange whether the waters to which the questions and answers relate were all of the internal and contiguous waters of the Archipelago, and if this was the intention it is certainly not clear what was intended to be the seaward boundary of the contiguous waters. The questions could be construed as referring only to the waters specifically mentioned in the main reply, i.e. Bellot Strait and also Lancaster and Viscount Melville Sounds. There would seem to be no question about the territoriality of Bellot Strait between the Boothia Peninsula and Somerset Island since I understand it is only about a mile wide. On the other hand Lancaster and Viscount Melville Sounds constitute the main waterway through the Arctic Archipelago and are approximately 70 miles wide at the eastern entrance and 100 at the western entrance. The establishment and recognition of the territoriality of these waters would seem to be tantamount, at least by implication, to the establishment and recognition of a claim to all the internal waters of the Archipelago.

3. It is noteworthy that Canadian insistence that United States obtain a waiver of the provisions of the Canada Shipping Act is not inconsistent with the waters of the Archipelago being high seas outside the normal territorial limit, for instance three miles from the baseline, since I understand that the ships in question would be entering waters within the three-mile limit and so in any event would technically require to apply for a waiver under the Canada Shipping Act.

4. However, it is conceivable that in the light of decisions which may be made by the Government following upon the study now in progress on Arctic territorial waters the Prime Minister's statement may be

¹⁰³ Included as Document 16

held up as indicating that Canada considers the internal and contiguous waters of the Archipelago to be Canadian waters.



J. S. Nutt

18. J.S. Nutt, "Arctic Sovereignty," June 4, 1957

LAC RG 25, vol. 6, file 9057-40,

SECRET

June 4, 1957

Arctic Sovereignty

I am setting out below some first impressions and thoughts relating to sovereignty in the Arctic arising out of my recent 4-day flying trip to the Arctic. The route followed was: Churchill, Coral Harbour (Southampton Island), Resolute, Thule, Alert, the geographic North Pole, T3 (an ice island occupied by the United States, approximately 150 miles off Ellesmere Island), Eureka, Thule and Frobisher - a distance of 4,000 miles. I propose to set out my comments under three headings:

- a. Sovereignty over the interconnecting waters of the Arctic Archipelago;
- b. Sovereignty over the so-called Polar ice cap or Arctic Basin within the "Canadian Sector"; and
- c. Sovereignty over ice islands.

2. As a brief preface it might be mentioned that Canada claims all the islands constituting the Arctic Archipelago but has never made any precise claim to the interconnecting waters. No explicit claim has ever been made to that part of the Arctic outside the Archipelago but within the so-called Sector between 60° west longitude and 141 ° west longitude.

(a) Sovereignty over the interconnecting waters of the Arctic Archipelago

3. My impression was that these waters are inextricably tied up with the islands which they surround. I recognize that to some extent this is an illusion borne of the fact that at this time of the year (and apparently for nine months out of twelve) most of the interconnecting waters over which we flew were frozen over and that all of the territory was snow or ice-covered. This would be significant in making a case of Canadian sovereignty over the interconnecting waters if their physical condition were to render international navigation impracticable. However, ice-breakers may be able to break through

certain of these waters even when they are frozen from shore to shore. Additionally, there is a consideration that over the years ice distribution may be affected by moderating climatic conditions. I think it would be a mistake, therefore, to try to rely too much upon the impression that the Arctic Archipelago appears to be a physical whole.

4. The research into the legal aspects of a possible claim to these waters leads me to believe that a good legal argument could be made in favour of such a claim. I think, however, that the more practical our approach is the more likely we are to find a suitable solution to the problem of sovereignty over the waters of the Archipelago, I do not think that we need rely too much on legal argumentation although it will be useful to have a legal argument in reserve. I think we must look at the problem primarily from the point of view of the interests of the international community, and particularly of the United States, which might be affected by a Canadian claim to these waters. At the moment the chief United States interest in this area is defence. Except insofar as it relates to defence there is not at present any international interest in navigation through the channels of the Archipelago nor is there any international interest in the fisheries of the Archipelago. (There is perhaps one exception and that relates to the agreement between Canada and Norway concerning the recognition by Norway of Canadian sovereignty over the Sverdrup Islands – see copy of Note of November 5, 1930 attached. Whatever rights are recognized in favour of the Norwegian Government should not, however, impose any obstacle to a Canadian claim to the interconnecting waters though certain rights of access, for instance, might enure to the Norwegians as a result of the Exchange of Notes). There is an international interest in overflying this area.

5. I do not think we really know what the official United States view is on the interconnecting waters though I would be inclined to think at the moment that it would be to consider these waters international. (I believe, for instance, that the United States has never actually recognized the Canadian claim to Hudson Strait and Hudson Bay and that the official position at the moment regarding these waters would be that they are international.) However, I think that the United States might be prepared to acquiesce in a Canadian claim to these waters provided it were assured of access by surface vessels to the extent which might be commensurate with its legitimate defence interests in the North. This also, of course, would involve the right to overfly the Archipelago. Presumably existing provisions would be satisfactory in this regard.

6. As far as other countries are concerned I should think passage of aircraft would be the chief concern. However, I should think the very

irregular nature of the Archipelago makes it a matter of no consequence to them whether or not the interconnecting waters are Canadian or international. The only direct route through the Archipelago in what might be considered international air space would be through Lancaster Sound, Viscount Melville Sound, and McClure Strait. Any other route except the most tortuous would involve flying over Canadian land territory. The route through Lancaster Sound does not lead to or from any of the main world centres. Practicable air routes over the Archipelago between the various main centres of the world pass over the islands. Therefore the application of Canadian regulations to aircraft flying over the interconnecting waters does not create any more inconvenience since these rules are, in any event, applicable when the aircraft are flying over the islands.

7. It seems to me that it might be helpful insofar as international sea navigation is concerned, if we could have an assessment of the possible importance of the so-called "Northwest Passage" to international shipping in the foreseeable future. Whether they see a future need for an international waterway from the Atlantic to the Arctic Basin will have a good deal of bearing on the attitude of countries like the United States and the United Kingdom to a Canadian claim. Additionally, we may have to bear in mind that our proclamation of sovereignty over the interconnecting waters of the Archipelago, including the "Northwest Passage", might provide some sort of a precedent to the Soviet Union in arguing that their northern sea route is available only to Soviet ships, if this be not already their position. This may not be too important from a Canadian point of view but may concern the United States and the United Kingdom.

b) Sovereignty over the so-called Polar "ice cap" or Arctic Basin within the "Canadian Sector"

8. From what I could see of the Polar "ice cap" it would not be practicable to occupy it in the sense that land territory or even an ice island may be occupied. This is the impression I gained from viewing the ice cap between 85° north latitude and the geographic North Pole. The area overflow was interlaced with pressure ridges and leads. I should think that in no one particular area of the "ice cap" could bases or settlements be established on a permanent basis. It is true, of course, that aircraft can land on the "ice cap" and temporary bases can be set up on ice floes (as distinct from ice islands) as the Russians have done. Thus a general area might be occupied in the sense that bases could be established and moved from one place to another within that general area. Under existing principles of international law this practice might be developed into a sort of constructive occupation on

the basis of which a claim to sovereignty over a particular area might be made.

9. I would doubt, however, that the international community, and in particular the United States, would be prepared to acquiesce in a claim to sovereignty over the ice cap within the Canadian Sector by Canada whether it might be based on the sector principle or on some sort of constructive occupation. I am inclined to think that the best course open to us would be to drop any pretensions to a claim to outright and exclusive sovereignty over this area and instead to consider some scheme which might smack less of "ice imperialism".

10. On the other hand, I do not think it appropriate to argue against us that the Arctic Basin or Polar "ice cap" is high seas and therefore not susceptible to certain attributes of sovereignty attaching to it. This area is high seas only in the sense that it is frozen ocean though we should bear in mind the effect of the warming trend which I understand is prevalent in the Arctic. I think at the moment we have to look at this area of the world not as high seas but as a Polar area which is neither land nor water, an area which can be sailed over only to a limited extent but which can be flown over, which can be landed on and occupied temporarily and which contains ice islands which drift about within it and which can be occupied for long periods of time. In other words this is a new situation which may require the development of new principles in arriving at a satisfactory solution regarding its status. My guess is that some regime which would recognize the right of states to engage in activities on the Polar "ice cap" as opposed to their exercising exclusive sovereignty might be the answer. This regime might apply only to the littoral states or it might apply to the international community as a whole.

c) Sovereignty over ice islands

11. Unfortunately we were unable to land on ice island T3 nor were we able to see it because of the ice fog. However, the United States has established a base on it for the second time in several years and probably intends staying on it for some time to come. In fact the United States Base Commander at Thule said he intended to recommend that ice islands be considered for use as Strategic Air Command bases.

12. Apparently T3 is about 400" above the level of the ordinary Polar pack ice and extends about 80" below the surface, being approximately 130" in thickness all told, and I seem to recollect that it is reckoned to be over 2000 years old. Apparently, therefore, the island will last for a good many years. Since ice islands appear capable

of more or less permanent occupation and if the Arctic Basin is considered to be res nullius then a case could be made for applying existing principles regarding the accession of territory to ice islands. Whatever the United States view is on the status of ice islands it seems quite clear that the United States attitude does not recognize any Canadian proprietary right in ice islands either by virtue of the fact that the ice island is in the "Canadian Sector" or by virtue of the fact that most ice islands are spawning off the ice shelf no northern Ellesmere Island. (I believe this is the case with T3?) Thus, even if Canada can establish a claim to the shelf ice off Ellesmere Island (which I should think ought not to be opposed, particularly in view of the relatively small area involved), I do not think that we could use this title as a basis for asserting some preeminent interest in any ice islands which may originate in this area. This, of course, would depend on what status might eventually be recognized for the whole Arctic Basin where these ice islands drift. That is, if the sector principle ever gains international recognition we should presumably have some claim to ice islands at least as long as they were within the Canadian Sector.

General Thoughts

13. I should think we should make up our minds as soon as possible concerning our position on sovereignty in the Arctic.

14. Regarding the interconnecting waters of the Arctic Archipelago, I assume that we should want to claim the whole of these waters not only because of the fact that geographically they are inextricable interwoven with the land areas but also because of defence interests. I do not think that we should rely upon possible gradual development of this situation because it may develop against our interests. We should make up our minds and then consult the United States and possibly the United Kingdom and then, subject to our conclusion on the question of sovereignty in the Arctic Basin, make a statement of our claim at an appropriate occasion so as to leave no further doubt concerning it. We shall have to consider whether it will be feasible to proclaim our intentions regarding the waters of the Archipelago and leave in abeyance any public statement concerning the status of the Arctic Basin. I think that before we consult the United States and the United Kingdom on our intentions regarding the waters of the Archipelago we should have made up our own minds concerning the status of the Arctic Basin. However, settling on a status for this area will be a much more involved affair and I am inclined to think, therefore, that we could go ahead on the interconnecting waters while at the same time reserving our position regarding the rest of the Sector.

15. I think that in considering what status we should like to contend for the Polar "ice cap" or Arctic Basin, Canadian interests should be carefully assessed. These will include not only our own defence interests but presumably those of the United States. (Since the United States also has an "Arctic Sector" above Alaska though they do not subscribe to the theory, close consultation with the United States would seem essential). It would also be desirable, I think, to have an assessment of the resources of the seas beneath the "ice cap" and the feasibility of their exploitation in the foreseeable future, an investigation and assessment of the possibilities and importance of navigation by ship in this area in the foreseeable future both from a Canadian and an international point of view, and similarly an assessment of the importance of the area to air transport. I think also that we shall have to bear in mind in deciding what sort of a regime we might wish to see established in this area that it will probably have to take into account ice islands and ice floes in it being occupied at least by the United States and Soviet Union.

16. The Legal Division of this Department has undertaken to examine the legal aspects of sovereignty in the Arctic Basin. Preliminary studies have already been done and a start made on the paper in question. I think, however, that an assessment of Canadian interests and a decision as to the desirable status for the Arctic Basin should be undertaken as soon as possible. In my opinion, this should precede the drafting of a legal argument since the latter should be an attempt to support the desired status for the area.

17. There is one further suggestion which relates indirectly to the question of the status of the Arctic Basin. Any definitive regime for the Basin presupposes Soviet agreement. We are not certain what the official Soviet attitude is towards the Arctic Basin. I think it is fair to infer, however, from Soviet actions in this area that they consider most of the Basin to be international in the sense at any rate that littoral states are free to set up bases on floes moving through the Basin and aircraft are free to overfly and land on the Polar ice cap regardless of the sector involved. It seems to me that as part of our consideration of this problem the Soviet position should be tested as soon as possible at least to the extent of reciprocating in some degree their activities in the "United States" and "Canadian Sectors." In other words, we should land aircraft in the "Soviet Sector" and we should put an expedition on a floe or ice island likely to drift into the Soviet Sector.

19. Letter from J.S. Nutt to Gordon Robertson, June 14, 1957

LAC, RG 25, file 9057-40

SECRET

J.S. Nutt, Esq.,
Legal Division
Department of External Affairs,
Ottawa, Ontario

Dear Jim,

Thank you very much for your letter of June 7th and for the memo dated June 4th¹⁰⁴ concerning Arctic sovereignty. I have read the memorandum with great interest and I think it is a very valuable contribution in thinking out the complicated and difficult questions relating to Canadian policy with regard to territorial waters in the Arctic, the polar ice cap, and the Arctic Basin generally.

I agree with you that there has to be a good deal more thinking done with regard to our interests in all the above matters. It is not going to be easy to find time to do this among the pressure of all the other urgent things that are clamouring for attention here, but we will have to try to see what is possible.

With regard to the interconnecting waters in the Arctic archipelago, I should think that the importance of an international waterway for international shipping in the foreseeable future is likely to be extremely slight. The season, even with effective ice-breakers and ice reconnaissance, is very short and the hazards of ice are so great that I cannot imagine that a waterway up there will ever be of any significance. However, we will see what can be put together on this.

With regard to the polar ice cap, I have, as you know, been strongly of the view for some time that it is only an invitation to trouble for Canada to pretend to assert a claim to water or ice within our sector lines. In short, I agree with your paragraph 9. I know that there have been a very large number of Soviet landings on the ice within this area. If we pretend to any sovereignty, we have to do something about them and I do not see what we could conceivably do.

¹⁰⁴ Included as Document 18.

With regard to your paragraph 10, I am not sure that there would be much point in suggesting a special regime for the polar ice cap and Arctic basin. Any proposal for "special" treatment could get out of hand and I think our interest is likely to be predominantly in having the area outside the archipelago limits regarded and treated as high seas. This too, however, we can do some more thinking about.

With regard to ice islands, I agree that we could not hope to base any proprietary right on the fact of their being temporarily within our "sector" or on the fact that they came from the Ellesmere Island shelf. If, however, they are permanent in entity for all practical purposes, is there any reason why they are not capable of possession even though they move? It seems to me that there is not. If they are capable of possession, presumably any country could set up establishments on them and maintain those establishments as long as the islands did not float within the limit of territorial waters off any coast. Presumably it is not impossible to devise ways to keep the ice islands stationary. What are the implications of these possibilities?

I am asking the Northern Administration Branch and the Northern Research Co-ordination Centre of this department to examine your memorandum and this whole matter and to let me have their views. I shall be in touch with you further after I have them.

Yours sincerely,
Gordon Robertson

20. Memorandum “Arctic Sovereignty,” July 3 1957

LAC, RG 25, file 9057-40

Mr. Rowley “RGR”
These are interesting comments.
I am sending a copy to Nutt.

3 July 57

MEMORANDUM FOR THE DEPUTY MINISTER:

ARCTIC SOVEREIGNTY

I agree that Mr. Nutt’s paper¹⁰⁵ is both interesting and useful. I have one or two minor criticisms.

- a. The term Polar ice cap, though frequently used, is in my opinion incorrect. It should be Polar pack ice. The term ice cap is normally used to refer to stationary, or nearly stationary, ice on land e.g. the Greenland Ice Cap. I suggest though that we should use the term Arctic Ocean Whenever possible since we would like the area to be considered in the same way as any other ocean.
- b. In para. 3 the statement is made that for eight months out of twelve most of the interconnecting waters are frozen over. Many of them are in fact frozen over for a good deal longer and some frequently remain frozen throughout the year. If a general statement is necessary, nine months would be better than eight.
- c. In para 12 Mr. Nutt seems to imply that ice islands are two thousand years old. In fact the ice of which they are formed is believed to be that old, but this does not mean that the islands themselves are so old. They may have broken off the ice shelf of Ellesmere Island comparatively recently and that is in fact the generally held and widely accepted theory. It is also improbable that any ice islands would last very long. In due course they will get caught in a current which will take them either south into the Atlantic where they will melt, or else into the channels of the Canadian Arctic Archipelago, where they will ground and then rapidly break up. This is shown by the

¹⁰⁵ Included as Document 18.

fact that the photography taken five or six years ago show far more ice islands breaking up in the channels of the Canadian Arctic Archipelago than were then floating in the Arctic Ocean.

I would also like to disagree with you about the possibility of devising means of keeping ice islands stationary. Unless an ice island grounds, I can think of no way in which it could be kept stationary. Even if it were possible to anchor in the deep waters of the Arctic Ocean, the effect of current and wind on any anchored ice island would make it sure to drag, and this would be reinforced by the pressure of the polar pack itself.

International Waterways through the Canadian Arctic Archipelago

I agree that at present the main interest in the Northwest Passage and other routes through the Canadian Arctic Archipelago is military and I think that Russia is interested as well as the United States. I can think of three possible events that could lead to a major increase in non-military interest. These are

- a) The discovery of major resources, such as petroleum, in the archipelago itself.
- b) The closing of the Panama Canal, or even the development of a difficult political situation in Panama.
- c) The development of an open polar sea. The average thickness of ice in the Arctic Ocean appears to have decreased considerably since the drift of the "Fram" and the development of an open polar sea within the next century, while improbable, cannot be considered impossible. This would give the polar regions an importance for shipping similar to the importance that is now becoming recognized in connection with international air services.

The Arctic Ocean

I agree with you that we should not attempt to claim the pack ice in our sector of the Arctic Ocean, but should consider those parts outside territorial waters to be high seas. Ice islands present a difficult problem as it seems illogical to make a difference between ice islands and ordinary islands on the one hand and between ice islands and pack ice on the other. Having allowed the United States to occupy an ice island in the Canadian sector without protest, it seems in any case too late to attempt to claim sovereignty of ice islands. I suggest that we should consider the occupied parts of both ice islands and pack ice as if

they were shipping – they are in fact rafts belonging to the country occupying them and coming under our jurisdiction whenever they enter Canadian territorial waters.

**21. House of Commons *Debates*, November 27, 1957,
23rd Parliament, 1st Session, p. 1559**

ARCTIC OCEAN – CANADIAN SOVERIGNTY

Question No. 26 – Mr. Lesage

Are the waters of the Arctic Ocean north of the Arctic archipelago up to the north pole, in the so-called Canadian sector, Canadian waters?

Hon. Alvin Hamilton (Minister of Northern Affairs and National Resources): Mr. Speaker, the answer is that all the islands north of the mainland of Canada which comprise the Canadian Arctic Archipelago are of course part of Canada. North of the limits of the archipelago, however, the position is complicated by unusual features. The Arctic ocean is covered for the most part of the year with polar pack ice having an average thickness of about eight feet. Leads of waters do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen, then, that the Arctic ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application."

Before making any decision regarding the status which Canada might wish to contend for this area, the government will consider every aspect of the question with due regard to the best interests of Canada and to international law.

**22. House of Commons, *Debates*, August 16, 1958, 24th
Parliament, 1st Session, p. 3652**

Right Hon. J. G. Diefenbaker (Prime Minister): Mr. Speaker, possibly I could answer that question. Throughout the years I have felt that in the northern defences of Canada there were in existence situations that could conceivably derogate from Canada's sovereignty. When I became Prime Minister one of my first acts was to have this question looked into in detail, with a view to assuring that while we co-operate in defence willingly and freely, in no way shall our sovereignty be impeded or interfered with; and further than that everything that could possibly be done should be done to assure that our sovereignty to the North pole be asserted, and continually asserted, by Canada.

23. Memorandum for the ACND, "Canadian Sovereignty in the Arctic Basin and the Channels Lying Between the Islands of the Arctic Archipelago," September 16, 1958

LAC, RG 25, File 9057-40, Part 7

DRAFT

CONFIDENTIAL

MEMORANDUM FOR THE ADVISORY COMMITTEE ON NORTHERN DEVELOPMENT

CANADIAN SOVEREIGNTY IN THE ARCTIC BASIN AND THE CHANNELS LYING BETWEEN THE ISLANDS OF THE ARCTIC ARCHIPELAGO

The Canadian position with respect to sovereignty of land lying north of the Canadian mainland is clear. All this land is claimed as Canadian territory and this has not been disputed by any other country in recent years. Canadian title appears secure provided adequate steps are taken to maintain Canadian activities there and, in pace with increasing international interest in the Arctic, to augment these activities to provide evidence of continuing effective occupation.

The Canadian position with respect to sovereignty over the waters of the Arctic Basin and the channels between the islands of the Canadian Arctic Archipelago has not however been clearly formulated. Recent developments, such as the intense scientific activity on the part of the U.S.S.R. and the United States in the Polar Basin including the sector north of the Canadian mainland and the advent of nuclear powered submarine navigation under the polar ice pack, point to the need for clarification of the Canadian position. There is also a possibility that current interest in Antarctica, as evidenced by the inscription of the question of sovereignty in the Antarctic on the agenda of the forthcoming session of the United Nations General Assembly, and the conference of states claiming interest in the Antarctic called for early next year, may result in the elucidation of broad principles for application to polar areas in general, and particularly to those polar areas lying outside the recognized limits of national territory. Delay in asserting any claim the government might wish to put forward might therefore seriously prejudice the Canadian case

For these reasons the Department of External Affairs has suggested that the real Canadian interest in the Polar Basin and the channels between the arctic islands, both from a narrow national point of view and an international point of view, be examined and assessed. It is therefore proposed to request all departments concerned to define such interests as they consider Canada to have in these areas. From their replies a paper on the Canadian interest would be prepared for the consideration of the Advisory Committee on Northern Development. A draft letter to departments is attached as Appendix "A".

G.W. Rowley
Secretary.

Department of Northern Affairs
and National Resources
September 16, 1958

Letter to be sent to -

Under-Secretary of State for External Affairs
Deputy Minister of National Defence
Deputy Minister of Mines and Technical Surveys
Deputy Minister of Transport
Deputy Minister of Fisheries
Deputy Minister of National Revenue
Clerk of the Privy Council
Commissioner, R.C.M.P.
Chairman, Canadian Maritime Commission
Deputy Minister of Northern Affairs
Deputy Minister of Justice

DRAFT

Dear Sir:

The Canadian government has for many years asserted Canadian sovereignty over all land lying north of the Canadian mainland and this position has not been disputed by any other nation in recent years. The Canadian position regarding sovereignty over the waters of that part of the Polar Basin lying north of the Canadian mainland and the channels between the islands of the Canadian Arctic Archipelago has however never been clearly formulated.

The need to clarify the Canadian position with regard to the Polar Basin and the channels between the islands of the Canadian Arctic Archipelago has been greatly increased by recent developments such as the maintenance of scientific stations by both the United States and the U.S.S.R. on the ice in the Polar Basin (including the area lying north of the Canadian mainland) and the advent of nuclear powered submarine navigation. These U.S. and U.S.S.R. activities have been carried out without seeking Canadian permission and without protest by Canada. Since permission is always sought by the United States for the conduct of scientific work in the adjacent Canadian islands, it is apparent that the United States considers the waters of the Polar Basin to lie outside the limits of Canadian territory. In the absence of any representations by Canada the United States might assume Canadian concurrence in this view. Continued acceptance of this situation by Canada will certainly be considered as evidence that Canada does not assert sovereignty in this area.

The current international interest in Antarctica, which has led to the inscription of the question of sovereignty in the Antarctic on the agenda of the forthcoming session of the United Nations General Assembly and the calling of a conference early next year of states claiming interest in the Antarctic, has also a bearing on the matter as it may conceivably result in the elucidation of broad principles for application to the polar areas in general, and particularly to those parts lying outside recognized national boundaries. Delay asserting any claim that Canada might wish to put forward might therefore seriously prejudice any Canadian case.

A necessary step in formulating the Canadian position with respect to the Polar Basin and the channels lying between the islands and the Canadian Arctic Archipelago is an assessment of the real Canadian interest in these areas, both from our particular national point of view and also with regard to international considerations. Under international law any claim of sovereignty over this area would not only cover the waters and ice but also extend to the sea bed below

and the air space above. In addition to any advantages, sovereignty would imply certain obligations including the provision of such services as aids to sea and air navigation, the provision of any necessary local administration, and the enforcement of law. Activities of other countries in the area – whether on the surface, under it, or in the air – would require Canadian permission. It would probably have to be assumed that, if Canada were to assert a claim to sovereignty over water and ice in its sector, the U.S.S.R. would either refuse to recognize the claim or would assert sovereignty to the much larger sector north of its mainland. It is probable that other countries having no such sectors might refuse to recognize a Canadian claim if it were asserted. These are, I think, considerations that have to be weighed in examining the whole problem,

I would be most grateful if you could let me have the views of your department on this subject, Specifically it would be helpful to have answers to the following questions:

1. Would there be any advantages or disadvantages from the point of view of your department in asserting sovereignty over the waters of
 - a) the Polar Basin lying to the north of the Canadian mainland?
 - b) the channels lying between the islands of the Canadian Arctic Archipelago?
2. Would there be any advantages or disadvantages from the point of view of your department in asserting sovereignty over the moving pack ice in
 - a) the Polar basin lying to the north of the Canadian mainland?
 - b) the channels lying between the islands of the Canadian Arctic Archipelago?
3. Would there be any advantages or disadvantages from the point of view of your department in asserting sovereignty over the fixed ice in
 - a) the Polar Basin lying to the north of the Canadian mainland?
 - b) the channels lying between the islands of the Canadian Arctic Archipelago?

4. Would there be any advantages or disadvantages from the point of view of your department in asserting sovereignty over the so-called ice islands (persistent ice floes of considerable thickness which are believed to have broken off the ice shelf off Ellesmere Island and which provide a floating platform which can be occupied on a permanent basis) in
 - a) the Polar Basin lying to the north of the Canadian mainland?
 - b) the channels lying between the islands of the Canadian Arctic Archipelago?
5. Do you see any objection by other countries to Canada claiming sovereignty in each of the above cases? If so, what objections do you expect? And from what countries?
6. Are there any specific areas, either in the Polar Basin or in the channels between the islands, where in your view special considerations exist which should be taken into account? If so, what are these areas and considerations?
7. Would there be any disadvantage from the point of view of your department if other nations bordering on the Polar Basin were to assert sovereignty in the sectors of the Polar Basin lying to the north of their territory? If so, what are these objections?

I would be most grateful if you could let me have your views on these points by December 31, 1958.

Yours sincerely,

R.G. Robertson,
Chairman, Advisory Committee on
Northern Development

24. Memorandum for ACND, "Canadian Sovereignty in the Arctic Basin and the Channels Lying Between the Islands of the Arctic Archipelago," October 14, 1958

LAC, RG 22, Volume 545, File Rowley-ACND – 1958

The Canadian position with respect to sovereignty of land lying north of the Canadian mainland is clear. All this land is claimed as Canadian territory and this has not been disputed by any other country in recent years. Canadian title appears secure provided adequate steps are taken to maintain Canadian activities there and, in pace with increasing international interest in the Arctic, to augment these activities to provide evidence of continuing effective occupation.

The Canadian position with respect to sovereignty over the waters for the Arctic Basin and the channels between the islands of the Canadian Arctic Archipelago has not however been clearly formulated. Recent developments, such as the intense scientific activity on the part for the U.S.S.R. and the United States in the Polar Basin including nuclear powered submarined navigation under the polar ice pack, point to the need for clarification of the Canadian position. There is also a possibility that current interests in Antarctica, as evidenced by the conference of states claiming interest in the Antarctic called for early next year, may result in the elucidation of broad principles for application to polar areas in general, and particularity to those polar areas lying outside of the recognized limits of national territory. Delay in asserting any claim the government might wish to put forward might therefore seriously prejudice the Canadian case.

For these reasons the Department of External Affairs has suggested that the real Canadian interest in the Polar Basin and the channels between the arctic islands, both from a narrow national point of view and an international point of view, be examined and assessed. In it therefore proposed to request all departments concerned to defined such interests as they consider Canada to have in these areas. From their replies a paper on the Canadian interest would be prepared for the consideration of the Advisory Committee on Northern Development. A draft letter to department sis attached as Appendix "A."

G.W. Rowley,
Secretary, Department of Northern Affairs
and National Resources,
October 14, 1958.

25. Letter from J.S. Nutt to J.L. Delisle, November 17, 1958

LAC, file 9057-40, pt. 8.

1746 Massachusetts Ave. N.W.
Washington 6, D.C.,
November 17, 1958

PERSONAL AND SECRET

Dear Jean-Louis:

Under cover of a letter dated September 16 last, the Department of Northern Affairs sent to our Department a draft of a letter which it was proposed to send to Departments on the question of Arctic sovereignty. This draft was sent to me in New York for any comments I might have to make on it. It never got to me in New York and Jack Parry sent it on to me about a month later here in Washington.

I understand from Allan Gotlieb that letters have been sent to the Departments in final form. I have drafted some "off the cuff" comments which might be useful to you in replying to Northern Affairs letter this has not already been done.

I should say that I like Washington very much and am beginning to get a glimpse of understanding of the various subjects with which I deal here. I would imagine that by now you are pretty deeply involved in the many subjects with which Legal Division deals – including the Law of the Sea.

Our regards to yourself and Constance.

Sincerely,

Jean-Louis Delisle, Esq.,
Legal Division,
Department of External Affairs,
Ottawa, Canada.



J. S. Nutt

SECRET

CANADIAN EYES ONLY

MEMORANDUM

ARCTIC SOVEREIGNTY

The following are "off-the-cuff" comments on the questions raised in Northern Affairs draft letter to Department attached to Legal Division memorandum of September 22, 1958.

Question 5 of the letter of the Chairman, Advisory Committee on Northern Development asks: Do you see any objection by other countries to Canada claiming sovereignty in each of the above cases? if so, what objections do you expect? and from what countries?

Question 1 Re asserting sovereignty over the waters of

- (a) the Polar Basin lying to the north of the Canadian mainland.
- (b) the channels lying between the islands of the Canadian Arctic Archipelago.

I assume that question refers to the so-called Canadian "sector" north of the archipelago. A Canadian claim to this area would almost certainly bring objections from the U.S. and U.K. and any countries which might be interested in flying over the Polar Basin. It is apparent from U.S. activities over this area (e.g. military aircraft over flying, submarine exercises, T3) that the U.S. does not consider the Polar Basin susceptible of occupation by any one state. (They have never claimed rights in the "sector" north of Alaska) The U.S. would undoubtedly argue that the area is high seas or akin to it and so incapable of appropriation. They would urge that claims to areas of the Polar Basin would set the pattern for claims to ocean areas. No doubt a claim to the Canadian "sector" of the Polar Basin would bolster the Chilean, Peruvian and Ecuadorian claims to exercise jurisdiction out of 200 miles. Because of the precedent it would set and the inconvenience it would cause them, it is more than unlikely that in their present temper the U.S. could be persuaded to acquiesce in a Canadian claim to the "sector."

What would the Soviet attitude be? One ground for not acquiescing would be that it would complicate their Arctic research based on drafting ice floes. We have no really precise information of the official Soviet view regarding the Soviet "sector." The 1926 proclamation claims only land discovered and to be discovered. Soviet authors have

argued for a status of the polar seas akin to that of the territorial sea. The Russians might see some immediate defence advantage in being able to claim a "sector" so as to keep American aircraft away from the Siberian coast. By the same token of course their own Arctic flights, which have been numerous, over the Greenland, Canadian and U.S. "sectors" would no longer be permissible legally. The attitude of the U.S.S.R. would depend on where lay the balance of advantage for them.

We might also expect opposition on principle from most of the more conservative maritime powers like Japan, France and West Germany. The U.K. would probably not approve on principle but would not wish to a public objection. Even countries like Norway and Denmark (which has a "sector" above Greenland) would likely find it difficult to acquiesce. We should very likely embarrass many friends were we to embark on a course of "ice imperialism."

With regard to the channels of the archipelago it can be argued, I think, that they are historic waters and alternatively that the reasonable application of the straight base-line system would entitle Canada to draw straight base lines about the perimeter of the archipelago, so as to make the waters of the channels internal waters of Canada. I think also that legal counter-arguments could be adduced by any country wishing to oppose a Canadian claim.

On the basis of a U.K. working paper they might be expected to acquiesce in a claim made by us to these waters as historic waters rather than a claim to encircle the archipelago with straight base lines. Their reluctance to acquiesce in a claim based on the straight base-line system would be that such a claim would establish an undesirable precedent since many Arctic base lines would have to be over 100 miles long – approximately twice as long as the longest base line approved in the case of Norway by the International Court of Justice. This is not to say that base lines of such length could not be supported on the basis of the Court's decision, for no maximum limit was set by the Court.

It is almost certain the U.S. does not now recognize Canadian sovereignty over the waters (although they have never queried some of the public statements about the area which could be construed as stating a claim to these waters). It is a question whether the U.S. would be prepared to acquiesce in such a claim. U.S. defence interests might be well disposed to such a claim. The question of timing might be relevant. The U.S. would be very reluctant to acquiesce publicly in any extensions of sovereignty over water areas pending a second conference on the Law of the Sea. It is possible of course that some sub rosa agreement might be reached with the U.S. and U.K. Whether this

could be worked out in the context of opposed American and Canadian views regarding the fishing zone is yet another question.

It is possible that the Soviet Union might object for propaganda reasons. On the other hand Soviet acquiescence might well be forthcoming. A Canadian claim might be alluded to in support of the Soviet claim to Peter the Great Bay which involves a good deal less water than a Canadian claim to the waters of the archipelago would. Similarly a Canadian claim could be invoked to buttress the Indonesian claim to the Java Sea and other waters among the Indonesian islands, notwithstanding that the two archipelagoes can be distinguished on a number of grounds. Since the U.S. and U.K. have opposed both of these claims, a Canadian claim, if acquiesced in by the Soviet Union and Indonesia for instance could be a source of embarrassment to our friends and ourselves. The claim, if made before a second conference on the Law of the Sea, would almost certainly be paraded in support of the 12-mile limit and other such widely removed claims to maritime jurisdiction.

The conclusion would seem to be that though it be decided in principle that Canada should claim the waters of the archipelago, such a claim were better postponed until after a second conference on the Law of the Sea and that in any event consideration should be given to consulting the U.K. and U.S. It may be found to be desirable following such consultations that no specific public claim be made but that Canada begin acting as sovereign in the area and indicate whenever questions are asked that we consider the waters to be Canadian. We should not, however, lose sight of the fact that there may be no real Canadian interests at stake requiring that Canada exercise sovereignty over these waters.

Question 2 Re asserting sovereignty over the moving pack ice

- (a) the Polar Basin lying to the north of the Canadian mainland.
- (b) the channels lying between the islands of the Canadian Arctic Archipelago.

With regard to claiming moving pack ice, in the case of the Polar Basin query whether this would not be virtually the same as claiming the Polar Basin. (I am assuming that the Polar Basin is largely covered with pack ice throughout the year). Similarly, subjection of the moving pack ice within the archipelago would seem to be tantamount to a claim to the waters of the archipelago. Otherwise the claim would expand and contract with the seasons.

Question 3 Re asserting sovereignty over the fixed ice in

- (a) the Polar Basin lying to the north of the Canadian mainland.
- (b) the channels lying between the islands of the Canadian Arctic Archipelago.

It is understood that there is virtually no fixed ice in the archipelago in the sense of "glacial shelf" extending seawards except off the northern shores of Ellesmere and Axel Heiberg Islands and that even in these areas the extent of the ice shelf does not nearly assume the proportions it does in Antarctica. I think there should be little objection based on infringement of even future interests or on precedent to such a claim. However, there is on file in Ottawa a U.K. working paper (File 9057-40 dated about 1954) which suggests that in the Arctic the territorial belt should be measured from the tide-crack in the ice shelf. It is difficult to understand the reason of this when the same paper either advocates or states that in the Antarctic the tide crack be ignored and the edge of the ice be the base line. I doubt the U.K. would insist on the suggestion that the tide crack be taken as the base line.

Question 4 Re asserting sovereignty over the so-called ice islands (persistent ice floes of considerable thickness which are believed to have broken off the ice shelf of Ellesmere Island and which provide a floating platform which can be occupied on a more or less permanent basis) in

- (a) the Polar Basin lying to the north of the Canadian mainland.
- (b) the channels lying between the islands of the Canadian Arctic Archipelago.

Is it intended that all ice islands which can be proved (if this can be done) to have originated off Elsmere Island would be Canadian territory regardless of where situated and by whom occupied or alternatively only that they should be regarded as Canadian only while in the Canadian "sector" and no matter by whom occupied?

The first proposition would very likely be opposed by the U.S.S.R. U.S. practice with regard to ice island T3 indicates they would not acquiesce either.

It is unlikely that a good legal case could be made for basing ownership on source alone. And to suggest that a special status attaches to ice islands while in the Canadian "sector" would be tantamount to claiming that some special regime applied on the "sector" which in turn endowed Canada with rights over ice islands therein. It would seem that the only reasonable claim to an ice island in the Polar Basin would be one based on occupation. Even the rights of states occupying ice islands, vis-a-vis those islands, is unsettled. Thus a claim to a single ice island as sovereign territory might give rise to opposition. The practice of the U.S. and U.S.S.R. has been to occupy ice islands and ice floes at will but not to disturb the occupation of the other except for aerial surveillance. There has been no specific claim to sovereignty over an ice island in the sense of claiming continuous rights after the evacuation of an island. However, the U.S. occupied T3 several years ago left and returned recently. It is interesting to speculate what the U.S. attitude would have been had the U.S.S.R., or for that matter Canada (without consultation), put a party on the island.

The question of a possible claim to sovereignty over ice islands within the connecting waters of the archipelago would seem to be governed by similar considerations, i.e., a claim on the basis of source alone would be unlikely to stand. A claim to sovereignty on the basis of location would presuppose status for the waters of the archipelago being such as to confer special status on the ice island. A claim based on occupation would be subject to the same uncertainty as outlined above.

(With regard to question 6, my recollection is that Northern Affairs factual study of the Arctic tells us that the Eskimos fish through the ice on Coronation Gulf well beyond the 3-mile limit. Query whether this would be occupation. And if so, what would be the effect of the disappearance of the ice in summer.)

CANADIAN EMBASSY,
WASHINGTON, D.C



J. S. Nutt

November 14, 1958

26. Letter from G.R. Clark to Mr. Robertson, "Canadian Sovereignty over Arctic Waters," December 5, 1958

LAC, RG 25, vol. 8, file 9057-40

December 5, 1958

Mr. R.G. Robertson
Chairman
Advisory Committee on Northern Development
Department of Northern Affairs & National Resources
Ottawa

Dear Mr. Robertson,

RE: Canadian Sovereignty over Arctic Waters

With further reference to this subject, the following replies from the point of view of this Department are given to the specific questions listed in your letter of October 30, 1958:

1. Polar Basin

- a) The western part of the polar Basin includes the Beaufort Sea which has an extensive area of open water in the summer, much of which lies over a continental shelf. These shallow waters are potential fishing grounds. Similarly, the bowhead whale which was formerly sought in Bering and Beaufort Seas is increasingly in numbers and might attract whaling interests in other countries. At the present time the international Whaling Convention prohibits the taking of the bowhead whale except for local consumption by the Aborigines. The white whale is presently in the Beaufort Sea in considerable numbers and may also attract foreign exploitation. Our claim to these waters could safeguard these minor stocks for our use in an area generally low in food potential. The disadvantage of claiming sovereignty would probably be that the other countries would claim similar segments. The Alaskan sector may be the most economical region for taking the mammals since the polar ice forces these animals into a much narrower and restricted range as at Pt Barrow. If this were claimed [illegible] would also be restricted.
- b) In the channels lying between the islands of the Canadian Arctic Archipelago we feel that there would be considerable advantage to claiming sovereignty. If this were done we

would have control of the fishery and the sea mammals, e.g. the walrus stocks in Jones and Lancaster Sound. From the standpoint of utilization and management such control is of considerable advantage. In addition to this all foreign ships moving through these channels would be controlled. The only disadvantage would appear to be the extra effort needed to support our claim.

2. Moving Pack Ice

- a) The only advantage to claiming sovereignty on the moving pack ice in the Polar Basin would be to give us more control over the sea mammals, particularly the walrus and the bearded seal. On the other hand, it should be remembered that this ice is not permanent and eventually would have little meaning.
- b) It seems essential to have sovereignty on the moving pack ice in the channels lying between the islands and the Arctic Archipelago in order to control the marine mammal populations.

3. Land Fast Ice

- a) The control of the land fast ice in the Polar Basin and the channels of the Canadian Archipelago mentioned in items 3(a) and 3(b) would seem wise since it is used by certain mammals, particularly the ringed seal for hauling out and breeding. Proper control of the stocks could be maintained better if this sovereignty were established. We recognize, of course, that the edge of the ice is under constant change.

4. Ice Islands

- 1) No advantage from the purely fisheries point of view is indicated in the control of the ice islands. It is assumed that other departments will raise the question of the advantage to be gained from research efforts in this area.
- 2) With regard to the ice islands or persistent ice floes in the channel lying between the islands and the Arctic Archipelago, we feel that there is little to be gained from the point of view of fisheries although claiming sovereignty in the channels themselves we should perhaps claim sovereignty on the ice that is in them. Marine mammals are not prone to using these ice islands.

5. It would seem that if Canada attempts to claim sovereignty, especially in the Polar Basin, that it will be opposed in principle by the USSR and perhaps Japan. Norway, which could find the exploitation of the fish and mammal resources in the area economical, might also object.

6. It would seem that the mainland coastal waters, Jones and Lancaster Sound, Foxe Basin, Hudson Bay and Hudson Strait, contained the presently known and utilizable resources. Control or sovereignty over these regions would seem to be essential if we are to maintain any development in the north.

7. If other countries asserted sovereignty in their sections of the Polar Basin we could hardly object, but as indicated above, it might work to our disadvantage in particular instances as in the Alaska sector where vesting of the marine mammal resources is somewhat [sic].

Yours very truly,

G.R. Clark
Deputy Minister [Dept. of Fisheries]

27. Letter from L.H. Nicholson to Mr. Robertson, December 9, 1958

LAC, RG 25, vol. 8, file 9057-40

Dear Mr. Robertson,

Re: Canadian Sovereignty in the Arctic

I refer to your letter of October 30 seeking the views of Government departments and agencies on this subject.

2. Before answering the specific question asked I think I should say we have directed our attention particularly to matters which relate in some way, however indirectly, to the work of the Force. On this basis there is little if anything that I can offer as to the position we should take in respect to that segment of the Polar Basin lying north of the Canadian mainland and with its apex at the Pole. Any factors remotely, to law enforcement apply to the channels between our Arctic Islands but not to the open waters or ice surfaces beyond those islands.

3. I shall now deal with the specific questions raised in your letter, taking the same numbers for my answers:

1.(a) No significant advantages or disadvantages

1.(b) Possible advantages in the application of conservation measures designed to protect sea mammals, polar bears and possibly sea fowl. On this point it is to be remembered that these islands are bound together by solid sea ice during many months of the year. Conservation measures to protect the polar bear and walrus are now being thought already exist on the west coast of Baffin Island [sic].

2.(a) ditto 1.(a)

2.(b) ditto 1.(b)

3.(a) No significant advantages or disadvantages, bearing in mind that the normal belt of territorial waters would probably take in the land-fast ice.

3.(b) ditto 1.(a)

4.(a) ditto 1.(a)

4.(b) ditto 1.(b)

5. It is thought that other countries would most certainly object if Canada claimed sovereignty over that part of the Polar Basin lying to the north of the Canadian mainland. There would be less likelihood of other countries objecting if Canada claimed sovereignty over the channels lying between the islands. It is thought objections might be expected from the Scandinavian countries and, in respect to channels between the islands, from Russia.
6. If Canada proposes to claim channels between the islands it is thought that special consideration might have to be given to the sea route – McClure Strait, Viscount Melville Sound, Barrow Strait, Lancaster Sound. To the south of this route islands and peninsulas are closely connected to the mainland, whilst to the north the islands are closely interconnected as a block. It might be, therefore, that Canada could more easily establish and maintain a claim to channels between the islands if the main sea route between east and west was categorized as 'international waters', with the usual territorial claim extending from either side.
7. Not applicable from a law-enforcement standpoint, but speaking generally it is suggested that Russia might benefit by asserting sovereignty to the sector lying north of her territory, and it is surely likely that she would do this if Canada made a similar claim.

Yours sincerely,

L.H. Nicholson
Commissioner [RCMP]

28. Note from American Division/ G.E. Hardy to Mr. Cleveland, "Departmental Meeting – Canadian Sovereignty in the Arctic Basin and over the Waters of the Arctic Archipelago," December 10, 1958

LAC, RG 25, File 9057-40, Part 8

Subject: Departmental Meeting – Canadian Sovereignty in the Arctic Basin and over the Waters of the Arctic Archipelago

On December 9, 1958 I attended the above-mentioned meeting in the large Conference Room in the East Block. Representatives from Economic, D.L. (1), D.L. (2), European and Legal Divisions attended. Mr. Cadieux was in the chair.

2. The following points were made on behalf of American Division:

(1) To judge from our knowledge of recent events in Antarctica,

- a) Canada would be wise not to advance a claim in the Arctic Basin which we would be unable to enforce (Australia);
- b) "Effective occupation" was particularly difficult to enforce in Arctic areas;
- c) Canada would be wise to avoid possible criticism in the United Nations and elsewhere by countries such as India on the grounds that we were initiating an "ice grab" and bringing friction into an international area where friction over sovereignty today does not exist or at least is not publicly recognized;
- d) It was logical to assume that scientific experiments and investigations in both Arctic regions, particularly near the poles, would increase. The enforcement of a Canadian claim to sovereignty over a portion of the Arctic Basin would be difficult to maintain and perhaps subject to challenge;
- e) To date, Russia has opposed any "selfish" assertion of sovereignty in the Antarctic, maintaining the position that all the countries of the world have a right to be consulted in the disposition of an international area.

- (2) With the acquisition of statehood by Alaska, the Arctic had become, quite apart from defence considerations, a factor in the political life of the United States. Public awareness of the north was increasing rapidly. The interest of Alaska in the Arctic consequently was a matter for consideration, particularly with regard to the Northwest Passage

29. Letter from External Affairs to R.G. Robertson, December 17, 1958

LAC, RG 25, vol. 7, file 9057-40

DRAFT
SECRET

December 17, 1958

R.G. Robertson
Chairman, Advisory Committee on Northern Development
Langevin Block
Ottawa

Dear Mr. Robertson,

In considering our reply to the seven questions posed in your letter of October 30, 1958, the statements in the House your Minister on November 27, 1957, and by the Prime Minister on August 16, 1958, were borne in my mind as was the Cabinet directive outlined in Mr. Bryce's letter of April 6, 1956, recommending that "all Departments should be cautioned to take no action that might compromise a later claim by Canada that the waters or the archipelago are Canadian inland waters." We were conscious, in examining the questions, of the fact that the legal arguments to support any Canadian assertion of sovereignty over the waters and ice were primarily a matter for the future. Nevertheless this aspect could not be entirely divorced from our thinking.

2. With these observations in mind I list hereunder the replies from the point of view of this Department, to the seven questions which you posed; it is understood that these replies, and those you will have received from other Departments, are only intended at this stage to provide a basis of discussion for the Advisory Committee on Northern Development.

Question 1 What advantages and disadvantages from the point of view of your department would there be in asserting sovereignty over the waters of

- (a) the Polar Basin lying to the north of the Canadian mainland?
- (b) the channels lying between the islands of the Canadian Arctic Archipelago?

From the viewpoint of this Department there would seem to be little advantage and numerous disadvantages to the assertion by Canada of the claim to the waters of the Basin, at least at the present time. It would undoubtedly stir up international controversy. Under present concepts of International Law it would be most difficult to support such a claim and given the nature of the area next to impossible to enforce. From a legal viewpoint we cannot see any strong reason why a status different from that of other high seas should be claimed for the waters of the Polar Basin. From the point of view of defence, I presume it would severely restrict our Arctic reconnaissance activities in the Russian sector of the Polar Basin in the event of a USSR claim. It is difficult to foresee any substantial economic gain which might result from extending sovereignty bearing in mind the fact that the continental shelf, itself, is not at stake. It is the resources which may exist in the shelf that are of chief interest to us from an economic viewpoint. (As you know, the Convention on the Continental Shelf concluded at the Geneva Conference on the Law of the Sea appears to provide reasonable guarantees in this connection.) Nevertheless it is recognized that other countries, especially the USSR, may possibly be building up future claims through present activity in polar areas. Our future legal position might therefore have to be safeguarded through increased activity in the Arctic Basin.

In our opinion the advantages for asserting sovereignty over the waters of the channels far outweigh the disadvantages. It is thought that a legal case could be made for claiming these waters as being inland waters and if this were established our sovereignty over the lands of the archipelago while it has never been challenged would probably be strengthened. By claiming sovereignty we could deny passage to others and generally ensure more effective control and surveillance over the whole archipelago. In addition there might be some advantage from the standpoint of public administration in establishing such a claim.

3. Questions two, three and four relate to the moving pack ice (2), land-fast ice (3) and ice islands (4) in (a) the Polar Basin and (b) the channels between the islands. In our opinion there would appear to be no advantage and some disadvantage to claiming the ice located in the Polar Basin outside the territorial waters and inland waters of the Canadian mainland and the archipelago. We have assumed in considering the term "land-fast ice" that this does not include "shelf ice" of glacial origin but refers to sea ice connected to the shore to which the normal rules of international law would apply. You may wish to clarify this point and explain why no reference was made to shelf ice in your questionnaire. Perhaps the rule to be followed concerning ice – with the exception of shelf ice – could be: So goes the

water, so goes the ice. The ice in whatever form within the territorial waters or the inland waters (it Canada is successful in asserting her claim to the channels lying between the islands of the archipelago), would be within Canadian control and it would lie with Canada to exercise sovereignty over such ice as over the waters below ice outside territorial waters would remain under the same regime as that of high seas. In this connection we think it can be argued that no nation can claim sovereignty to ice on the high seas and that there is therefore nothing to prevent access by anybody to ice islands and ice floes in the Arctic, for instance.

4. As you know, Antarctica is now being discussed in Washington by representatives or interested countries Who have under consideration a draft convention. You are also aware that this convention may include a definition of "Antarctica" and that there is a possibility that it may be so worded as to comprise "all the land and floating ice attached to the land". Any such definition could presumably be used by any nation wishing to do so to support a claim to sovereignty over land-fast ice in the Arctic unless appropriate reservation were made in the convention concerning the Arctic. Consequently, if a convention containing such a definition were to be agreed to for the Antarctic, we would have to re-examine immediately the views given above. It might be worthwhile to study this problem of ice islands and other polar areas at present outside national jurisdictions at a later date, in particular what the effect might be of some country, say the Russians making some claims or appearing to be getting into a position to make a claim to these.

Question 5 Do you see any objection by other countries to Canada claiming sovereignty in each of the above cases? if so, what objections do you expect? and from what countries?

5. Since in our opinion only the waters or the channels should be claimed at the present the objections from many nations which could be foreseen to a possible claim by Canada to the waters and ice of the Polar Basin lying north of the Canadian mainland have not been considered. There can be no assurance, of course, that there would be general acquiescence amongst our friends to Canada's claim to the channels lying between the islands of the archipelago. In fact it is considered possible that the Russians would be amongst our few supporters as they might regard our action as facilitating for them some claim in their own "sector". On the other hand, maritime powers, especially the United States and the United Kingdom, might be reluctant to look upon the waters of the Northwest passage, for instance, as being Canadian inland waters since such a claim, if recognized, would give us control of navigation through those waters.

The United States itself might have particularly strong objections. Through Alaska they are a littoral country of the Beaufort Sea and not so far away relatively speaking from the Northwest Passage which may become in the future, we suppose, with nuclear powered submarines and ships, a practicable route to their Atlantic Coast. Furthermore, the United States is shouldering the main burden of defence in the Northland and they might feel that acquiescence in the Canadian claim might be a source of embarrassment in their defence activity. In addition they, the Australians and the British would want to look at the Canadian assertion of sovereignty over waters of the archipelago very carefully in view of their opposition to the claim advanced by the Indonesians to the waters of their own "archipelago". We are of the opinion that the two claims are quite distinguishable from legal, historical, economic and geographical viewpoints and that on the whole, our own claim has much more validity than the Indonesian one. However, an assertion of sovereignty on our part might nevertheless probably be turned to advantage by the Indonesians. In any case it is our tentative view that a Canadian claim to the waters of the channels would stand better chance of success if it were not advanced on universal rules that may be applicable to archipelagos in general, but rather on the basis of the special features of the Canadian archipelago including the "historic waters" theory and by drawing an analogy, it possible, to the ruling of the International Court of Justice in the Anglo-Norwegian Fisheries' case, and to Article 4 of the Committee on the Territorial Sea adopted at the Geneva Conference on the Law of the Sea, concerning the drawing of the straight baselines to measure the breadth of the territorial sea.

Question 6 Are there any specific areas, either in the Polar Basin or in the channels between the islands, where in your view special considerations exist which should be taken into account? If so, what are these areas and considerations?

6. It is believed that the main stumbling block to Canada's assertion of sovereignty over the waters of the channels lying between the islands of the Canadian Arctic Archipelago will be the United States, which, we presume, will be mainly concerned about free navigation in the "Northwest Passage". In this connection one may recall the United States stand against Canada's claim to Hudson Strait as being historical waters. However, it is not impossible perhaps that quiet negotiations with the United States leading to the granting of special privileges in both these waters might achieve reluctant acquiescence from them.

Question 7 Would there be any disadvantage from the point or view of your department if other nations bordering on the Polar Basin were to

assert sovereignty in the sectors of the Polar Basin lying to the north of their territory? If so, what are these objections?

7. The Department believes that there would be disadvantages from the point of view of freedom of navigation and peaceful uses of waters and ice in the Arctic Basin if other nations were to assert sovereignty to their "sectors" of the Polar Basin. From the standpoint of security it would no doubt severely restrict reconnaissance in the Arctic. It is also thought that it would be in no nation's interest to invite an international wrangle, comparable perhaps to the one now going on concerning the Antarctic, by laying controversial claims to the waters and ice of the Arctic Basin.

Yours sincerely,

Under-Secretary of State
for External Affairs.

30. Joint Planning Committee, "Canadian Sovereignty in the Arctic," December 18, 1958

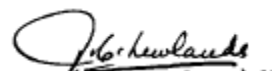
LAC, RG 24, vol. 8101, file 10.

Joint Planning Committee

12 Dec 58

Canadian Sovereignty in the Arctic

1. The attached draft reply to the Chairman, Advisory Committee on Northern Development, on the above-noted subject has been prepared by the JPS subsequent to a meeting attended by JPC Members and a representative from JAG under the chairmanship of the CJS. JIC was also considering this item, which was referred to them through External Affairs' channels and, in order to save them, CJS referred the attached draft reply to JIC for comment. JIC comments are enclosed.
2. The DM has also had the same letter from the Chairman, Advisory Committee on Northern Development, and it is suggested that only one reply from this Department be forwarded - possibly under the DM1s signature rather than CCOS.
3. As a reply is requested by 31 Dec 58, this item is being added to the agenda for the 27/58 JPC meeting on 16 Dec 58.



(J.C. Newlands) Major
Secretary,
Joint Planning Committee

Confidential

CSC 2-2-28

Chairman,
Advisory Committee on
Northern Development

Canadian Sovereignty in the Arctic

The question of Canadian Sovereign in the Arctic as raised in your letter of October 30, 1958 has been reviewed. In order to define the limits of the Arctic under consideration it is presumed that Canada has established sufficient claim to all the islands in the Arctic Archipelago lying north of the Canadian mainland and to the Hudson's Bay. The question then only relates to the channels between the islands themselves and between the islands and the mainland and to that part of the Arctic Ocean which is outside the Canadian Archipelago whether it contains permanent ice or not.

As requested in your referenced letter the following are the views of this Department on the questions posed:

1 (a) No military advantages can be determined for asserting sovereignty over that part of the Arctic Ocean which is outside the Canadian Archipelago. The disadvantage are as follows:

(i) If Canada laid claim to that slice of the Arctic Ocean extending northwards from the Archipelago to the North Pole, other countries, particularly USSR, would have an excuse to lay claim to a much larger slice of the Arctic Ocean. It would, therefore, seem desirable to consider the Arctic Ocean as international waters which precludes setting a precedent for other countries and which would preclude any contiguous borders with the USSR.

(ii) The problem of exercising sovereign over the Arctic Ocean to the North Pole, which should include border patrols to be effective, would be very difficult and costly.

(iii) Any infractions of these borders would be difficult to determine without continuous patrols and any breach of sovereign would be difficult to counteract.

(iv) If the Arctic Ocean outside of the Canadian Archipelago is not considered international waters, Canadian reconnaissance would be very restricted,

(v) The observation posts on the "Ice Islands" in the Arctic Ocean maintained by USSR and USA are not considered military threats to Canada. If the Arctic Ocean is considered international waters observation posts could be established by any country and with the movement of the ice around the 'North Pole observations can be taken fairly close to USSR territory.

(vi) If other countries were to lay claim to slices of the Arctic Ocean which extend Northwards from their territories, Canada would be denied freedom of passage by sea to parts of our Canadian northland.

1 (b) The only disadvantage to asserting Canadian sovereignty over the channels lying between the islands of the Canadian Archipelago and between the islands and the Canadian mainland would be that some countries, particularly UK and USA, might object to this denial of freedom of passage. The advantages, however, are as follows:

(i) It would be of great assistance in preserving Canadian sovereignty of the islands themselves.

(ii) It would facilitate security control of the waters and air throughout the Archipelago.

(iii) It would deny freedom of passage to other countries particularly USSR, for reconnaissance purposes around the northern mainland of Canada.

(iv) It would be feasible to assert Canadian sovereignty over the waters of the channels and would not be too costly to enforce"

2 (a) The moving pack ice in the Arctic Ocean to the north of the Canadian Archipelago has very little military significance except as a barrier and therefore there is no military advantage to asserting Canadian sovereignty over it. This moving pack ice is not sufficiently reliable for missile sights [sic] or forward missile control posts and in addition would be very vulnerable to attack. The disadvantage to asserting Canadian sovereignty over this moving pack ice is the fact that it is moving and would not remain in Canadian territory.

2 (b) The advantages and disadvantages are the same as in 1(b) above, the fact that Pack ice is moving through a channel does not alter the fact that security control of the water and air would be exercised Canada if the channels were considered Canadian territorial waters.

3 (a) The distance that land fast ice extends into the Arctic Ocean north from the Canadian Archipelago and mainland varies

considerably from area to area and from season to season. However there is no real military advantage to asserting Canadian sovereignty over this area of ice beyond our three mile territorial water limit as the ice is not reliable as a military base and is very vulnerable to attack.

3 (b) If the channels are considered Canadian territorial waters this would also apply the land fast ice in the channels.

4 (a) Answered in 1(a) (v) above.

4 (b) Answered in 2(b)above.

5. With the advent of under water navigation in the Arctic Ocean being feasible, many countries may be interested in unrestricted passage through the Arctic Ocean for commercial reasons in the years to come. Immediate objection might come from the UK and USA and possibly Denmark in being denied freedom of passage through the channels of the Canadian Archipelago; however no objection is likely from the USSR as they would wish to deny freedom of passage around the islands off their north coast.

6. The Hudson strait is a particular case as it is taken for granted that this strait is Canadian territorial waters. It is considered most desirable from a military point of view that Canada exercise sovereignty over the Hudson Strait as this channel leads directly into the heartland of Canada.

7. If other countries bordering on the Arctic Ocean were to declare sovereignty over that slice of the Arctic Ocean extending northwards from their territory to the North Pole, Canada would be denied freedom of passage by sea to parts of our northland and Arctic reconnaissance would be very limited.

(Charles Foulkes)
General
Chairman, Chiefs of Staff

31. Memorandum, “Departmental Meeting - Canadian Sovereignty in the Arctic Basin,” December 22, 1958

LAC RG 25, File 9057-40

A meeting to consider the departmental reply to the letter of October 30, 1958 from the Chairman, Advisory Committee on Northern Development, was held in the Main Conference Room on Tuesday afternoon, December 9, 1958, with Mr. Cadieux in the Chair. Those attending were:

J.L. Delisle	(Legal)
F.M. Tovell	(D.L. 1)
E.T. Galpin	(D. L. 2)
C.J. Webster	(European)
G.E. Hardy	(American), and
K.W. MacLellan	(Economic (1))
G.C. Langille	(Legal Division) acted as Secretary

2. In introducing the subject Mr. Cadieux drew the attention of the meeting to the statements in the House by Mr. Hamilton on November 27, 1957 (attached), and by the Prime Minister on August 16, 1958 who said that everything should be done to assure that “our sovereignty to the North Pole be asserted, and continually asserted, by Canada” and to the Cabinet directive, of which the various Departments were informed by a letter of April 6, 1956 from the Privy Council Office that “no formal action should be taken regarding the possible Canadian claims to waters the North at the present time. However, it was recommended that all Departments should be cautioned to take no action that might compromise a later claim by Canada hat the waters of the archipelago are Canadian inland waters”.

3. The seven questions posed by Northern Affairs were dealt with in order.

Question 1:

What advantages and disadvantages from the point of view of your department would there be in asserting sovereignty over the waters of

(a) the Polar Basin lying to the north of the Canadian mainland?

(b) the channels lying between the islands of the Canadian Arctic Archipelago?

1(a) Mr. Delisle pointed out that the waters of the Polar Basin had always been treated as high seas and that a new theory of international law would have to be developed to support an assertion of sovereignty over these waters. He suggested that, as navigational problems were changing because of recent discoveries, this tended to equate the ice areas more closely to navigable waters than previously. He pointed out that, if we were to claim sovereignty, the Russians, if they were to acquiesce, might put forward a similar claim to the Polar Basin lying to the North of the Russian mainland. In his view there was another complicating factor to a Canadian claim in that the United States was turning more attention to this area than heretofore especially because of defence and consequently might be reluctant to recognize any national claim. Mr. Tovell said his Division could see no advantage in disturbing the present status of the Polar Basin as high seas. Mr. Webster thought it likely that the USSR would favour the high seas' concept and that European Division could see no advantage for Canada in attempting to assert a sovereignty over these waters. Mr. Hardy referred to the difficulty Australia was meeting in maintaining its claims to a sector in the Antarctic and said that, in the view of American Division, it would be profitless for Canada to stir up international controversy in advancing a claim to sovereignty over the waters of the Polar Basin which would be most difficult to justify and next to impossible to enforce. Mr. Galpin said that, in the opinion of D.D. (2), no advantage would accrue to Canada in attempting to claim the waters of the Polar Basin and that, on the other hand, our reconnaissance activities would be severely restricted if these waters were segmented amongst the littoral countries. Mr. MacLellan said that Economic Division could see no advantage since in any case the Continental Shelf, which might in due course be exploited, would belong to Canada as the islands of the archipelago were Canadian.

1(b) On the other hand, it was the consensus of the meeting that, from the viewpoint of the Department, there were advantages in Canada asserting sovereignty over the waters of the channels lying between the islands of the archipelago. Mr. Delisle pointed out that a legal case could probably be made for claiming these waters as being inland waters ~~by using the straight baseline system set forth in the yet unratified first Geneva Convention.~~ This claim could also be supported by the doctrine of historic use. He went on to say that our claim to the lands of the archipelago would be further strengthened if Canada were to claim the waters. Most of these waters are frozen throughout the entire year although others are open for only a few weeks in late summer. A legal argument for claiming the waters could be based on the fact that it is difficult to distinguish between land and sea. Mr. Tovell said that it would be to Canada's advantage to claim the waters of the channels since it would increase the security of the lands of the

archipelago and that the United States might support our claim if we were to base it in part on the need for defence because, having sovereignty, we could carry out our responsibilities more efficiently. Mr. Webster agreed with the above points and suggested that there would in addition be an administrative advantage in making such a claim. In his view the USSR would probably not oppose our assertion since this would support similar claims of their own. Mr. Galpin thought it would be in our defence interests. By claiming sovereignty we could deny passage to others although it must be remembered that there might be opposition from the United States and the United Kingdom.

4. It was the consensus of the meeting that the answers to questions 1 (a) and (b) supplied the answers to questions 2, 3 and 4. It was suggested that in the departmental reply clarification of the term “land-fast ice” be sought. A distinction might be made between shelf ice of glacial origin and the normal sea ice which is attached to the land. Claims to the latter would only be asserted for the extent of the territorial sea. Mr. Cadieux suggested that some thought be given to the problem of ice islands which, in the view of those attending the meeting, no nation could claim sovereignty over unless possibly they entered territorial inland waters. While these islands and in fact “moving pack ice” were on the high seas it should be theoretically possible for two or more nations to occupy adjacent areas and this possibility should be examined.

Question 5:

Do you see any objection by other countries to Canada claiming sovereignty in each of the above cases? if so, what objections do you expect? and from what countries?

5. Since the meeting agreed that only the waters of the channels should be claimed the many objections from many nations which could be foreseen to a possible claim by Canada to the waters and ice of the Polar Basin lying north of the Canadian mainland need not be considered. There was, however, no assurance that there would be general acquiescence, especially amongst our friends, to Canada's claim to the channels lying between the islands of the archipelago. Such a claim would of course affect navigation through the so-called Northwest Passage, and maritime powers, especially the United States and the United Kingdom, might be reluctant to consider this as Canadian inland waters. The United States, which is shouldering the main burden of defence in the Northland, might not want to recognize our claim which might possibly endanger their position. They, the Australians and the British, would want to look at it very carefully in

view of the claim, which they dislike very much, advanced by the Indonesians to the waters of the latter's "archipelago". It is considered possible that the Russians would not oppose a Canadian claim to these waters because our action would enable them to make similar claims. Mr. Cadieux pointed out that Canada might get more support if its claim was not advanced as being part of a universal rule but as being based on the "historic waters" theory and by drawing an analogy to the ruling of the International Court of Justice in the Anglo-Norwegian Fisheries case.

Question 6:

Are there any specific areas, either in the Polar Basin or in the channels between the islands, where in your view special considerations exist which should be taken into account? If so, what are these areas and considerations?

6. It was felt that Canada's claim to Hudson Strait (as historical waters) and to the Northwest Passage might get the support of the United States if some sort of deal giving special privileges to that country were worked out.

Question 7:

Would there be any disadvantage from the point of view of your department if other nations bordering on the Polar Basin were to assert sovereignty in the sectors of the Polar Basin lying to the north of their territory? If so, what are these objections?

7. It was believed that there was a disadvantage from the point of view of security if other nations were to assert sovereignty to their "sectors" of the Polar Basin since it would severely restrict reconnaissance in the Arctic. It was also felt that it would be in no nation's interest in having such controversial claims advanced.

8. The Secretary was directed on the basis of the views expressed to draft a reply to the letter of October 30 and to circulate it for comment to the Divisions represented at the meeting.



Legal Division

Extract from House of Commons Debates
Official Report
Wednesday, November 27 1957.

ARCTIC OCEAN -- CANADIAN SOVEREIGNTY

Question No. 26 - Mr. Lesage:

Are the waters of the Arctic ocean north of the Arctic archipelago up to the north pole in the so-called Canadian sector, Canadian waters?

Hon. Alvin Hamilton (Minister of Northern Affairs and National Resources): Mr. Speaker. The answer is that all the islands north of the mainland of Canada which comprise the Canadian Arctic archipelago are of course part of Canada. North of the limits of the archipelago, however the position is complicated by unusual physical features. The Arctic ocean is covered for the most part of the year with polar pack-ice having an average thickness of about eight feet. Leads of water do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen, then, that the Arctic ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application.

Before making any decision regarding the status which Canada might wish to contend for this area the government will consider every aspect of the question. With due regard to the best interests of Canada and to international law.

32. Memorandum, "Status of the Waters of the Canadian Arctic Archipelago," March 9, 1959

LAC, RG 25, file 9057-40

Legal/J.S. Nutt/se

March 9, 1959.

~~(Draft) February 12, 1958.~~

~~August 27, 1958.~~

SECRET

FOR CANADIAN EYES ONLY

Status of the Waters of the Canadian Arctic Archipelago

Introduction

This paper is concerned with the internal waters (1) of the Canadian Arctic Archipelago and the waters contiguous (2) to the Archipelago. Its purpose is to consider what basis there may be in law for contending that these waters have the status of internal waters (3). The paper leaves aside the status of the Beaufort Sea and the Arctic Ocean within the so-called Canadian sector; for the purpose of this paper they are considered as high seas.

2. This paper first examines general international law as it relates to archipelagos and discusses the possible legal affect of special circumstances obtaining in the Arctic Archipelago. It goes on to consider what basis there may be for asserting historical title to some or all of the waters under study. Finally the existence of shelf ice as an extension to some of land areas is considered in its possible effect on the regime for the territorial sea in the region.

General International Law

3. In considering this aspect of the problem we shall examine the proceedings of The Hague Conference for the codification of international law in 1930, State practice, the judgement if the International Court of Justice in the Anglo-Norwegian Fisheries Case, the recommendation of the International Law Commission, and the International Conference on the Law of the Sea, Geneva, 1958.

What is an Archipelago

4. An important preliminary question is, are the Arctic Islands an Archipelago? The dictionaries agree that an archipelago is a body of water studded with islands or the group of islands themselves collectively.⁽⁴⁾ Higgins and Colombo⁽⁵⁾ state:

“Whether a group of islands forms or not an archipelago is determined by geographical conditions but it also depends in some cases on historical or prescriptive grounds”⁽⁶⁾.

Evensen⁽⁷⁾ lays down the following definition:

“An archipelago is a formation of two or more islands, (islets or rocks) which geographically may be considered as a whole”.

Archipelagos, he goes on to say, “vary as to the number and size of the islands and islets as well as with regard to the size, shape and position of archipelagos. In some archipelagos the islands and islets are clustered together in a compact group while others are spread out over great areas of water. Sometimes they consist of a string of islands, islets and rocks forming a fence or rampart for the mainland against the ocean. In other cases they protrude from the mainland out into the sea like a peninsula or a cape, like the Cuban Cayo or the Keys of Florida. Geographically these many variations may be termed archipelagos”. Evensen classifies archipelagos as coastal and outlying or mid-ocean archipelagos. From a geographic point of view there seems no doubt the Canadian Arctic Islands may be considered to be an archipelago and under Evensen’s classification, a coastal archipelago.

The Hague Conference for the Codification of International Law, 1930

5. The sub-committee of the Hague Conference charged with consideration of a code for territorial waters was unable to arrive at a recommendation with regard to the territorial sea of groups of islands. With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the sub-committee was of the opinion that a distance of 20 miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. Owing to the lack of technical details, however, the idea of drafting a definite text on this subject had to be abandoned. The Sub-Committee did not express any opinion with regard to the nature of the waters included within the group.⁽⁸⁾

6. The sub-committee had before it the following recommendation in connection with groups of islands:

“In the case of groups of islands which belong to a single state if at the circumference of the group they are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters...”⁽⁹⁾

A similar recommendation had been included in the draft of the Institute of International Law at its Stockholm meeting in 1928.⁽¹⁰⁾

7. On the other hand, Article 5 of the Draft Convention of the Experts Committee of the League of Nations submitted to the Hague Conference recommended:

“In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from islands most distant from the center of the archipelago.”

This view had previously been followed in the proposal of the American Institute of International Law at the request of the Governing Board of the Pan-American Union in 1925.⁽¹¹⁾ This is also the view adopted by Higgins and Colombo.⁽¹²⁾

8. Here then we have one view which would enable base lines to be drawn around the periphery of an archipelago only where at the circumference of the group the islands are not separated by more than twice the breadth of the territorial sea or at most ten miles, and another which does not include this restriction. This unsettled state of the law is reflected in the Observations contained in the Basis of Discussion prepared for The Hague Conference⁽¹³⁾ on the views of governments on the question of territorial waters of islands:

“On the other hand, the replies show great diversity of view as regards islands in proximity to one another or to the mainland.”

“According to some Governments each island has its own territorial waters and their breadth is in all cases measured in the ordinary way; if the islands are separated by less than twice the breadth of the territorial waters, the overlapping of their territorial waters is a simple fact without further consequences. This is a very simple conception embodying the idea that any point in the sea less than three miles distant from the land is within territorial waters. This conception renders it unnecessary to make any special mention of group of islands or archipelagoes.”

“According to other Governments, wherever two or more islands are sufficiently near to one another or to the mainland, the islands or the islands and the mainland form a unit, and territorial waters must be determined by reference to the unit and not separately for each island; there will thus be a single belt of territorial waters. This conception claims to be based on geographical facts. On the other hand, it raises more complicated questions than the other view. In the first place, it makes it necessary to determine how near the islands must be to one another or to the mainland. Some Governments are in favour of twice the breadth of the territorial waters; others do not advocate any particular distance but desire to take account of geographical facts, which would make it possible to consider as a whole portions of land at a much greater distance from one another, particularly in the neighbourhood of the mainland. This view, moreover, makes it possible to consider as a single whole, possessing its own belt of territorial waters, a group of islands which are sufficiently near one another at the circumference of the group, although within the group the necessary proximity may not exist.”

“To treat a group of islands or an island and the mainland as a single whole possessing its own belt of territorial waters raises a new question. What is to be the status of the waters separating either the mainland from the islands or the islands from one another? According to one opinion, such waters are inland waters and the ordinary belt of territorial waters surrounds the group at its circumference. Another opinion, which appears to be that of the majority of Governments, considers all the waters in question to be territorial waters and to be subject accordingly to the rules governing territorial waters. The first opinion is based on the interests of the coastal State; the second is more favourable to freedom of navigation. In face of these divergences of view, an attempt has been made to discover a possible basis of discussion which would be a compromise, it consists in treating as a unit a group of islands which are sufficiently near to one another at the circumference of the group while giving to the waters included within the group the character of territorial waters.”

10. It is interesting to note that in a memorandum of December 1932⁽¹⁴⁾, Judge Reed has this to say on the question of islands:

“In view of the uncertainty as to the existing position, it might be well to re-examine the whole of the Canadian situation, in order to ascertain whether it is still a satisfactory policy to accept the six mile test. It might be found that conditions in some parts of the country, particularly on the west coast, present problems not

unlike those in Norway and Sweden. In the present confused state of the law, it might not be desirable to proceed on the theory that our rights were limited by a rigid six mile rule”.

The Canadian reply to a questionnaire for The Hague Conference had had this to say in respect of the territorial sea of an island and a group of islands:

“Islands have their own territorial waters... where islands are within six miles of the coast or of each other the territorial waters will mingle and form a single zone. Where an area of water is left completely surrounded by the territorial waters of a single state, and cannot therefore be approached safely through the territorial waters of that state, such area should be deemed a part of the territorial waters of that State.”⁽¹⁵⁾

10. In the 1930s, [illegible] the state of the law was such that it could not have [illegible] that the Arctic Archipelago could be considered as a unit for purposes of ‘territorial waters.’ [illegible]

[Paragraphs 11-13 illegible]

14. [illegible] ...according to which the Norwegian practice of including coastal islands within its outer coastline was held not to be contrary to international law. (See below para 16). These instances similarly would probably be covered by Article 4(1) of the Convention on the Territorial Sea and Contiguous Zone opened for signature at Geneva 1958. This provision reads: “In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight base-lines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.”

15. While the Canadian Arctic Archipelago may be classified as a coastal archipelago the breadth of the internal waters of the Archipelago generally far exceeds that of the waters of other coastal archipelagos²¹). Bearing this in mind, it might be helpful to consider whether the arguments which were involved in objections to the Indonesian claim would apply in the case of the Arctic Archipelago. It is proposed to examine this question from the point of view of the United Kingdom protest which is the most detailed of the protests made available to us (confidentially). The United Kingdom arguments against the Indonesian claim are quoted below and commented on seriatim:

- a) “It is contended that the term “archipelago” is one normally given to a relatively small or compact group of islands or

islets, sufficiently close together to be regarded as constituting a single geographical formation. Indonesia, the main islands of which are separated by the Java Sea which is approximately 240 miles broad and 840 miles long, cannot be regarded as having this character." The United Kingdom qualification that the term "archipelago" is one normally given to a relatively small or compact group of islands can be contested (see definitions of archipelagos above). The qualification in turn is qualified by the word "normally" so that the Arctic Archipelago would not necessarily be excluded by the United Kingdom definition even though the Indonesian were. Geographically it would seem that both are archipelago.

- b) "Even if it could (i.e. Indonesian be considered an archipelago), and whether or not the claim that Indonesia is historically an entity is correct, this would give no ground whatever in international law for claims to waters which are high seas, i.e. are outside the normal limits of territorial waters drawn round each individual in the group". Practice and opinion regarding archipelagos is not settled; it is possible to make a contrary argument to that put above. Even if the United Kingdom contention were correct in its application to Indonesia, it does not necessarily apply to other archipelagos. For instance, in the case of "island fringes" i.e. coastal archipelagos the judgement of the International Court in the Fisheries Case could be invoked. (See discussion below as to applicability of the Fisheries Case).
- c) "Even in the case of recognized archipelagos, the claims to demarcate their territorial waters by the drawing of straight base-lines between the outer islands or points of the group, and the treating as internal or national waters of all waters enclosed by these lines irrespective of distance from land, coupled with the assertion of sovereignty over such waters as if they were land, and as if the whole area formed a continuous block of territory, have never been admitted in international law. Its general application would lead to the enclosure of vast areas of sea, which, apart from all other objections, could certainly not be effectively policed or supervised by the power claiming them." This assertion seems to ignore the Philippines claim [illegible] which appears on the surface identical in terms and principle, if not in magnitude, with the Indonesian claim. The ability of a state to police is subjective and, it is submitted, is not therefore a proper criterion in considering the validity of a claim. A more appropriate criterion would be that raised by the

International Court on the Fisheries Case, i.e. whether the water areas are sufficiently dependent upon the land domain to be subject to a region of internal waters. Fundamentally there seems little distinction between the argument in a) and in b). The same considerations mentioned with respect to argument b) apply to c).

- d) “The drawing of base-lines in this manner is considered to be contrary to the spirit, intention and wording of Article 5 of the draft Articles on the Law of the Sea, which have been drawn up and accepted by the International Law Commission as a basis for discussion and consideration at the Conference of the plenipotentiaries to be held under the auspices of the United Nations at Geneva in February 1958. The straight base-line principle is applicable only along highly broken and indented coastlines, and, as far as islands are concerned, to island fringes along such coast. It has no application to archipelagos as such, even if Indonesia strictly had that character.”

Without attempting to affirm or deny this contention it can be argued that the Arctic Archipelago is an “island fringe” and that Article 5 (now Article 4 of the Convention on the Territorial Sea and Continuous Zone) applies to it (see below).

United Kingdom officials, in an informal memorandum concerning the Arctic Archipelagos [sic] have conceded this. (See discussion below para 71).

- e) “The claim to treat the waters within the base-lines as internal or national waters is particularly objectionable as it implies a denial of the rights of innocent passage, as a right and not merely as a concession ox gratia (which the report and Indonesian statement appear to make). On the high seas or even through territorial waters the right cannot be denied, whereas in waters that are properly internal or national, such passage facilitates as the coastal State voluntarily allows can be withdrawn at any time. The Indonesian claim therefore to treat as internal or national waters seas aggregating over half a million square miles in area quite apart from its geographical unreality and in-acceptability – would involve serious and quite inadmissible infringement of the principle of freedom of the seas.”

This consideration could not be argued in the case of the Arctic Archipelago even if the right of “innocent passage”

were not conceded in favour of other states. The area of water which would be enclosed in the case of the Arctic Archipelago would not be as great as that enclosed by the Indonesian claim. Furthermore, because of the inaccessibility of the Arctic Archipelago enclosure of the waters would not in fact infringe the principle of the freedom of the seas.

The Anglo-Norwegian Fisheries Case

16. This case is most important to our consideration of the status of the waters of the Archipelago, since it held the Norwegian “skjaergaard” (which is an archipelago) to be a whole with the mainland so that it is the outer line of the archipelago which must be taken into consideration in delimiting²²⁾ the belt of Norwegian territorial waters.

17. The court described the geographic realities which led it to this decision as follows:

“...the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the ... mainland... Within the “skjaergaard” almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands and the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea ...”²³⁾

Apart from the fact that the waters of the Canadian Archipelago are much more expansive than those of the Norwegian “skjaergaard” and the population at present scantier, the description might well apply to the Canadian Arctic Archipelago.

18. Having concluded that the “skjaergaard” is one with the mainland, the Court logically could hardly deny that a straight base line system, or some ramification of it, for delimiting the territorial sea, would have to be employed, since continued use of a base line following the sinuositities of the coast in concert with a three or four-mile breadth of the territorial sea would render nugatory the conclusion that it is the outer line of the archipelago from which must be measured the territorial sea.

19. However the Court took up as a separate question whether the delineation of the territorial sea by means of a system of straight base lines is internationally acceptable. The Court said “certain basic

consideration inherent in the nature of the territorial sea, bring to light certain criteria, which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question. Among these considerations some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal state a right to waters off its coasts ... Another fundamental consideration of particular importance in this case is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.”²⁴⁾

20. Concerning the application of the Court’s judgement Dean Curtis has this to say: ²⁵⁾ “... it should be observed that, while the Court used wide-language to lay down the governing principles, it incorporated many references to the geographical facts in its judgment and gave much prominence to these facts ... This emphasis on the geographical features of the coast there in issue, affords substantial ground for confining the decision as a precedent to those coasts resembling the Norwegian in complexity.”

21. In terms of the ordinary meaning of “complexity”, the coastline of the Canadian Archipelago would seem to resemble the Norwegian in complexity, with the distinction that the scales of distance are much larger in the Canadian case. From a technical point of view, in the Canadian Arctic “any given section of coastline, mainland or island, with the exception of the eastern coasts of the eastern Arctic Islands, would not seriously approach Norwegian values on any of the criteria”²⁶⁾ for assessing coastline complexity. However it is arguable that, taken as a whole, i.e., with baselines enveloping the archipelago, and making allowance for the completely different scale (and also the fact that in the case of the Arctic Archipelago information available on the complexity of the coast is incomplete) the complexity of the coastline of the Archipelago compares favourably with that part of the Norwegian coast under consideration by the Court in the Anglo-Norwegian Fisheries case.²⁷⁾

22. If this argument were not tenable,²⁸⁾ it would be necessary to consider whether the decision in the Fisheries case must be restricted to cases of coastlines “resembling the Norwegian in complexity.” It is submitted that it is possible to argue in the Court’s own words that the

decision would apply to a coast “the geographical configuration of which is as unusual as that of Norway.”²⁹⁾ In other words, it applies to coastlines which though not comparable in technical complexity to that of Norway are nevertheless different from those normally encountered. There can be no gainsaying the fact that the geographical configuration of the Canadian Arctic Archipelago is “unusual”.

23. Besides the considerations of physical geography there are other important factors illustrating the “close relationship” between the inland waters of the Archipelago and the land areas which the Court held to be a fundamental consideration. Throughout the long winter, these waters are indistinguishable from the land, since they are continuously covered with ice.³⁰⁾ Even in the warmest of summers the Parry Islands continue to be linked together by almost solid ice and the surfaces of McClure Strait, Viscount Melville Sound and M’Clintock Channel are covered with from 7 to 9/10 ice.³¹⁾

24. Though the population of the Archipelago is not numerous³²⁾ all settlements and all native camps of any permanence are situated on the coast, and the sea provides most of the native food supply,³³⁾ though apparently most hunting, fishing and trapping takes place close to the coast.³⁴⁾ Travel over these waters by boat and dog team is not extensive but they are used for such purpose by the Eskimoes, the R.C.M.P. and others and they are the potential highways of future local surface travel.

25. On the subsidiary question of the length of base lines the Court held:

“...the practice of states does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of territorial waters or ten or twelve sea miles) have not got beyond the state of proposals.

“Furthermore, apart from any question of limiting the lines to ten miles it may be that several lines can be envisaged. In such cases the coastal state would seem to be in the best position to appraise the local conditions dictating the selection.

“Consequently, the Court is unable to share the view of the United Kingdom Government that Norway, in the matter of base lines, now claims recognition of an exceptional system. As will be shown later, all that the Court can see therein is the application of general international law to a specific case.”³⁵⁾

The Court appears to say that in the case of an archipelago the length of base lines is dictated by "local conditions."³⁶⁾ Thus if it is established that an archipelago should be considered as a whole with the mainland, the length of the base lines will be dictated by geographical necessity.

26. It has been shown that, prior to the International Court's decision in the Anglo-Norwegian Fisheries Case, the law on territorial waters of archipelagoes was unsettled. If, then it is granted as argued above that not only on the basis of physical geography but also on other grounds there is a close relationship between the land and water areas in the Canadian Arctic Archipelago, it is submitted that the judgment of the Court in the Anglo-Norwegian Fisheries Case could be used to support a contention that the Canadian Arctic Archipelago should be considered a whole with the mainland and the belt of territorial waters measured from straight base lines drawn about its periphery.

27. Such a contention is less likely to be opposed because of the fact that no important international interests would be impinged upon. Navigation through the Archipelago is impossible except at certain times of the year and then only with the aid of ice-breakers. In any event, there is virtually no foreign shipping in the area. The airspace above the islands is already Canadian and there would seem to be little, if any practical advantage to other states in having pockets or channels of international airspace above the Archipelago. There is no foreign fishing in the connecting waters of the Archipelago.

The Convention on the Territorial Sea – Geneva 1958

28. At its 1954 session, the International Law Commission postponed its consideration of the Article under the heading "Groups of Islands" and requested the views of governments specifically on this question. Such comments as were submitted were not helpful in deciding whether there was a consensus of views. Previously in his Third Report on the Regime of the Territorial Sea³⁷⁾ the special rapporteur had recommended the following article:

1. The term 'group of islands', in the juridical sense, shall mean three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.
2. The straight lines specified in the preceding paragraph shall be the base line for measuring the territorial sea; waters lying within the area bounded by such base lines and the islands themselves shall be considered as inland waters.

3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraph 1 and 2 of this article shall apply pari passu.

At its 1955 and 1956 sessions the Commission again considered the question of groups of islands. It adopted Article 10 which provided: "Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark." The following comment on Article 10 is to be found in the Commission's final report on the Law of the Sea:

3. The Commission had intended to follow up this article with a provision concerning groups of islands. Like the Hague Conference for the Codification of International Law, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagoes. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.
4. The Commission points out, for purposes of information, that Article 5 may be applicable to groups of islands lying off the coast."³⁸⁾

Article 5 provided:

1. Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in the immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea area lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Account may nevertheless be taken, where necessary of [illegible] interests peculiar to a region, the reality and importance of which are closely evidenced by a clearly evidenced by a long usage. Baselines

shall not be drawn to and from drying rocks and drying shoals.

2. The coastal State shall give due publicity to the straight baselines drawn by it.
3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in article 18, through these waters shall be recognized by the coastal state in all these areas where the waters have normally been used for international traffic.

29. The Canadian Delegation to the International Conference on the Law of the Sea, Geneva, 1958 was instructed to take the position "that it would be difficult to devise one formula which could be satisfactorily applied to all archipelagoes and consequently that each should be treated on its own merits".³⁹⁾ It was further recommended that "if ... there should be a proposal before the conference to the effect that the status of 'internal waters' could only be attributed to the waters of an archipelago where the distance between the islands were less than twice the breadth of the territorial sea or some arbitrary distance, the Delegation should endeavour to have included a proviso that the rule shall not detract from the application of Article 5." It was considered that an argument could be made that Article 5 would apply to the Canadian Arctic Archipelago by its very terms notwithstanding the exceptional dimension of the archipelago.

30. In this connection it is of interest to note the United Kingdom comment on Article 10 of the International Law Commission draft: ⁴⁰⁾

"The United Kingdom Government approve this article. They do not consider that there is any need to make special provisions for groups of islands as such, and agree in principle with the last sentence of the Commission's comment upon this article (that Article 5 may be applicable to groups of islands lying off the coast). They consider that the ordinary rules, in conjunction with the judgment of the International Court of Justice in the Anglo-Norwegian case, are adequate to cover this case."⁴¹⁾

31. At the Conference there was surprisingly little discussion on archipelagoes as such. Early in the Conference Indonesia defended its claim against a gratuitous U.S. indictment of it. Indonesia however did not put forward any proposals aimed at underwriting its claim.

32. During the discussion of Article 10 the Philippines introduced an amendment applicable to archipelagoes in the following terms:

(Conference Document A/CONF .13/01/L.96)

“When islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines provided in Article 5 may be applied to determine their territorial sea. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the group. The waters inside such baselines shall be considered internal waters.”

33. This amendment was withdrawn very early in the discussions, presumably because the Philippines assessment was that if the amendment failed their position in having claimed the internal waters of the archipelago would be worse than if nothing were included in the Articles.

34. Yugoslavia had also introduced an amendment (C1/L.59) which would have provided:

“The method referred to in Article 5 of straight baselines joining appropriate points on the coast of islands facing the high seas shall be applied in the same way to groups of islands distant from the coast. The areas of sea within such lines and islands shall be considered as internal waters of the islands.”

35. This was withdrawn, but immediately reintroduced by the delegate of Denmark who thought attention should be given to archipelagoes. He referred to the ILC recommendation to draft an article on groups of islands and its hope that the Conference might study the question of archipelagoes.

36. The U.K. then countered that archipelagoes were so varied, as Professor Evensen had concluded in his paper on archipelagoes (A/CONF .13/18), as to make it difficult to formulate a rule applicable to each case. The representative of the U.K. suggested that a study might be made. Denmark concurred and withdrew the amendment.

37. The drafting sub-committee recommended that paragraph 2 of the Article read:

“Where an island has a territorial sea of its own, that territorial sea is measured in accordance with the provisions of these Articles.”

This was further simplified by the Committee to read as it now does: "The territorial sea of an island is measured in accordance with the provisions of these articles." There was no objection to this substitution for paragraph 2 which had been adopted as proposed by Yugoslavia (CI/L.59): "The provisions of Articles 4 and 5 also apply to islands." That paragraph was presumably intended to permit the application of the principles embodied in Articles 4 and 5⁴¹⁾ to groups of islands wherever situated, i.e., off-shore archipelagoes as well as fringes of islands along the coast. It is questionable whether this interpretation would apply to Article 10 as it stands.

38. It would now seem that whether or not Article 10 (2) would be of any assistance in claiming a right to envelop the Archipelago with straight baselines depends in turn on whether this would be permissible by the terms of Article 4 which deals only with island fringes. It is submitted that Article 4 would apply to the Canadian Archipelago by its very terms notwithstanding the exceptional dimensions of the Archipelago. It is true of course that until it has been ratified by 22 States the Convention on the Territorial Sea will not be legally binding on states and then it will only bind those who are parties to it. However, Article 4 stems from the Judgment of the International Court of Justice and the principles the Article embodies may therefore be invoked independently of the Convention coming into force.

Special Considerations Arising from the Location of the Archipelago in the Arctic

39. It has already been suggested that certain circumstances arising from the fact that the Archipelago is located in the Arctic may in some regard affect the status of the waters of the Archipelago. It has been shown, for instance, that for a goodly portion of each year, and in some cases continuously the waters and the land are linked by ice. There could hardly be a closer physical relationship between land and water. It has also been suggested that the inhibition placed upon navigation in these waters by virtue of year-round ice conditions tend to nullify any argument that a right of innocent passage through the Arctic route would be prejudiced by the waters being considered internal waters. If Article 4 were relied on by Canada for substantiating a claim to treat the Archipelago as one with the mainland, Article 5 para. 2 would safeguard any international shipping rights. It provides:

"2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea

or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.”

Furthermore the geography of the Archipelago is such that any civil aircraft on recognized routes will have already flown over Canadian land territory before flying over the connecting waters. Internal status for these waters would therefore in no way affect international aviation.

40. Another question is whether the sector theory would be of any assistance to a claim to the waters of the Archipelago. The sector theory was originally developed as a method of allocating territories, not as a means of establishing closed sea areas. The most explicit claim under the sector theory is that set out in the Russian decree of April 15, 1926 which claims lands and islands, discovered or to be discovered and had been interpreted by Russian authors as including more or less immovable ice formations as land territory⁴²⁾. The validity of the sector principle as a mode of acquiring sovereignty over territory or waters in the polar regions has never been tested before an international tribunal. It is arguable that the sector theory is valuable as an indication of Canada's intention to exercise sovereignty over territories (including waters) susceptible to the exercise of sovereignty north of the mainland and between 60° W Longitude and 141° W Longitude.⁴³⁾ Although Canada has never claimed a sector by express declaration various claims referring to the sector have been voiced.⁴⁴⁾ In any event, the sector theory cannot be of more assistance in claiming sovereignty over water territory than it is in the case of land territory, i.e., it cannot be more than an indication of intent to exercise sovereignty and may in fact not be helpful at all as an indication of intention to exercise sovereignty over waters which otherwise might be regarded as high seas.

Historic Title

41. Sovereignty over territory usually flows from occupation. However, under international law certain sea territory falls under the sovereignty of the coastal state more or less automatically because of its close relationship to the land. For instance, at least a three-mile strip of territorial sea adjacent to a coast would always be considered by other states to be the territory of the coastal state even though the latter has not occupied it, i.e., has not effectively and exclusively asserted jurisdiction. In the ensuing chapter we propose to examine whether Canada has asserted control over the waters of the Arctic Archipelago in such a manner as would warrant a claim to the waters of the Archipelago being historic waters. “By ‘Historic waters’ are usually meant waters which are treated as internal waters but which

would not have that character were it not for the existence of an historic title.”⁴⁵⁾ A historic title may be said to exist where a state has over a period of years asserted jurisdiction over an area of water as it were a part of its territorial sea or internal waters as where such assertions have the general acquiescence of the international community.⁴⁶⁾

Early Disposition of Territories now Comprising the Archipelagos

42. In 1868 the Rupert’s Land Act⁴⁷⁾ authorized the acquisition by Canada of “Rupert’s Land and the North-western Territory” but there was no indication of the boundary, nor of the status of the contiguous waters. Rupert’s Land was considered to include “the whole of the territories held or claimed by the said Governor and Company.”

43. The original grant to the Hudson’s Bay Company of May 2, 1870, comprehended “trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson’s Strait, together with all the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid ...⁴⁸⁾

44. In 1850 the Hudson’s Bay Company submitted to the United Kingdom House of Commons a statement of the territories claimed under its charter.⁴⁹⁾ The map accompanying the 1850 statement⁵⁰⁾ does not indicate that any special status was attached to any of the adjacent waters including Hudson’s Bay. However, in 1714 reference was made in a memorial to the Lords of Trade regarding the Company’s taking possession of “the whole Bay and Straits of Hudson, together with all other places relating thereto, as mentioned in the mid articles ...⁵¹⁾ Very probably this was intended to include at least Foxe Basin.⁵²⁾ In 1857 in a description of the boundaries claimed by the Company reference is made to “territories⁵³⁾ ... bounded ... on the north by the Arctic Ocean”. This description is hardly precise enough to adjudge the status of the waters intervening between the Arctic Ocean proper and the mainland, i.e., the connecting waters of the Archipelago.

45. Because of doubt whether all British territories north of the mainland had been annexed to Canada an Imperial Order-in-Council of July 31, 1880 incorporated “... all British territories and possessions in North American, not already included within the Dominion of Canada and all islands adjacent to any such territories or possessions ...” Clearly this does not purport to grant the waters outside the then recognized limit of three miles. A Canadian Order-in-Council of 1875⁵⁴⁾

had suggested a description of the boundaries on the north east, north and northwest ... as follows:

‘Bounded on the east by the Atlantic Ocean, and passing toward the north by Davis Straits, Baffin’s Bay, Smith’s Straits, and Kennedy Channel, including such portions of the Northwest coast of Greenland as may belong to Great Britain by right of discovery or otherwise. On the north by the utmost northerly limits of the Continent of America including the islands appertaining thereto.”

46. It is not clear whether the connecting waters of the Archipelago were intended to be included in the description and no background documentation has been located to throw any light on the question. It is probable that only land areas were considered.

47. It would seem, therefore that it was never really considered either in 1868 or 1880 whether Canada fell heir to these waters. In fact, all through the subsequent history of the Archipelagos there does not appear to have been consideration of the specific question: what is the status of the connecting waters of the Archipelago?

The Boundary

48. An Order-in-Council of October 2, 1895 creating the District of Franklin includes many of the connecting waters of the Archipelago and defines the District’s boundaries as follows:

“Beginning at Cape Best, at the entrance to Hudson Strait from the Atlantic thence westerly through said strait, Fox Channel, Gulf of Boothia, Franklin Strait, Ross Strait, Simpson Strait, Victoria Strait, Dease Strait, Coronation Gulf and Dolphin and Union Strait to a point in the Arctic Sea in longitude about 125° 30’ west and in latitude about 71° north; thence northerly including Baring Land, Prince Patrick Island and the Polynea Islands; thence northeasterly to the farthest of Commander Markham’s and Lieutenant Parry’s sledge journey in 1876, in longitude about 63 1/5 ° west and latitude about 83 1/4° north; thence southerly through Robeson Channel, Kennedy Channel, Smith Sound, Baffin Bay and Davis Strait to the place of beginning.”

49. If this were intended as an actual boundary then it clearly includes the connecting waters of the Archipelago and a good deal of the contiguous seas. In the memorandum on the status of Hudson Bay and Strait in the 1937 Report of the Inter-departmental Committee on Territorial Waters 55 it is stated that:

"The districts of Ungava, Franklin and Keewatin were so defined (in the Order-in-Council of December 18, 1897 amending the Order of 2nd October, 1895, dividing the Northwest Territories into provisional districts) as to embrace the whole of Hudson's Bay and Straits."

The Committee presumably considered the Order-in-Council to be some evidence of Canadian title to these waters.

50. However, the description in the 1895 Order-in-Council is not precise and on its face seems rather to have been intended only to indicate what land areas were considered to be within the District of Franklin. This seems to be borne out by the amending description of 1897, except insofar as Hudson's Bay and Strait are concerned.

51. At the time of the definition of the boundaries of the District of Franklin, the Districts of MacKenzie and Yukon in turn were so defined as to include the northern part of the mainland and all islands within three geographical miles. This is an indirect indication that the territorial limit might have been considered to extend only to three miles beyond the coast. In 1897⁵⁶⁾, because of "deficiencies" in the descriptions approved in 1895, the description of the District of MacKenzie was altered to include islands twenty miles from the coast and the District of Franklin to include Melville and Boothia peninsulas and certain named islands and "all those lands and islands comprised between the one hundred and forty first meridian of longitude west of Greenwich on the west and Davis Strait, Baffin Bay, Smith Sound, Kennedy Channel and Robeson Channel on the east which are not included in any other provisional district."

52. In his report on Canadian Sovereignty in the Arctic, Dean Vincent MacDonald⁵⁷⁾ refers to the Order-in-Council as constituting "a formal step by the Canadian Government to declare the extent of Canadian territory, north of the mainland to which it claimed title". It is clear from his paper that Dean MacDonald does not construe this Order-in-Council as an assertion of sovereignty over the whole area within the "boundaries" described. In his Introduction, Dean MacDonald states that the claim he is examining is that in report of "the land areas and marginal waters, included in the zone situated north of the Arctic Circle (i.e. the parallel of 66° 30' North latitude) lying between 60° and 141° West longitude ...". It is not clear, however, whether he construes marginal waters to include for instance the connecting waters of the Archipelago. On its face the Order-in-Council appears not to have been intended to define a boundary but rather to define limits within which the "land and islands" belonged to Canada and the status of the waters just was not considered.

53. We shall now examine subsequent assertions of jurisdiction to see if they afford a stronger basis for supporting a contention that the waters of the Archipelago are historic waters.

Restrictions on Travel

54. Dean MacDonald compares in importance with the Order-in-Council of 1897, that of 1925⁵⁸⁾ requiring all explorers and scientists to secure a permit to travel or conduct investigations in the Northwest Territories and the submission thereto of the nationals of many countries and by the governments thereof (Page 16-21 MacDonald Report). Undoubtedly, this is excellent evidence of an assertion of jurisdiction over the land areas. The Order-in-Council requires among other things that "a log of all voyages ..." be provided the R.C.M.P. by a licensee. This appears to be an assertion of jurisdiction over travel within the Archipelago which is exclusively by sea. Unfortunately no assistance can be had from actual practice since there is no record of requests having been received from expeditions which would not have been entering waters within three miles of the coast. Nor has evidence been found whether the intention of this provision was to require logs of voyages which might not have entered the three-mile limit.

The Game Laws

55. There are a series of Orders-in-Council and Ordinances⁵⁹⁾ which establish a number of game preserves including one which is of particular interest to this study: The Arctic Islands Game Preserve and establish as well a licensing system for persons desirous of hunting, trapping, or trading and trafficking in game in these areas and a regime of prohibitions and restrictions.

56. An Order-in-Council of 1926 states that the prohibitions are to take effect "in any of the following described areas of the Northwest Territories ..." The Arctic Island Preserve is one of those "areas" and is defined as "comprising all that tract of land which may be described as follows ..." The ensuing description is nearly coincident with the description of the District of Franklin in the 1897 Order-in-Council. (See paragraph 48 above) it is not clear whether the intention was that the boundary described outlined the "area: within which the provisions were to apply or whether the bounds were intended only to indicate those "tracts of land" to which the provision applied. The answer to this question is probably the same as the answer to the question what was then considered to be the Northwest Territories for, as mentioned above, reference is made to application of the provisions of the Order-in-Council in "any of the following described areas of the Northwest Territories". This in turn takes us back to the enactments setting up the District of Franklin which we have

suggested were probably intended to include within the District only the land areas. (By way of parentheses the meaning of the word “area” brings to mind the exchange of notes between Norway and Canada on the sovereignty over the Sverdrup Islands⁶⁰⁾ which could be relevant to our study. In a note dated August 8, 1930, Norway recognized Canadian sovereignty over “these islands” i.e. the land and territorial seas. In a subsequent note dated the same day there is a reference to “the areas which the recognition comprises”. It is not clear how much water areas was intended to be comprehended but it was very likely no more than the usual three miles.)

57. In 1929, the description in the 1926 Order-in-Council was amended apparently with a view to including Banks and Victoria Islands in the Arctic Preserve.⁶¹⁾ In the preamble to the new description the phrase “Comprising all that portion of the Northwest Territories” is substituted for “comprising all that tract of land...”. Whilst this alteration is not helpful in indicating what was intended to be included in the Preserve, it is flexible enough to enable the ordinance to be applied as it was intended, to the waters between the Islands and the mainland up to the mid-channel mark.⁶²⁾ This then appears to be the first example of an intention to exercise jurisdiction over waters, though it is not clear from the face of the document that this was intended.

58. With the establishment of defence projects in the Southampton Island, Frobisher Bay and Baffin Island areas, it became necessary to again extend the boundaries of the Arctic Island Preserve. By P.C.6812, dated August 4, 1942, the boundaries of the Arctic Island Preserve were extended to include Southampton Island, Coats Island, Nottingham Island, Salisbury Island, Resolution Island, Loks Land, Bylot Island, that part of Baffin Island not previously included in this preserve and the other islands and waters situated within thirty-five miles of the islands above listed and the Arctic Islands Preserve as previously constituted. This appears to be a further assertion of jurisdiction over water areas within 35 miles of the east coast of Baffin Island.

59. In 1953, the description was again altered. The preamble used the formula “... comprising all that portion of the Northwest Territories the boundaries of which may be described as follows:”. One of the bounds is “... northerly skirting Baffin Island to seaward through a succession of points ten miles to seaward of low-water mark at all the seaward extremities of Baffin Island and its offshore islands ...” Again the intention appears to have been that the ten-mile strip off Baffin Island should be subject to the prohibitions of the Ordinance.

60. On the basis of the 1929, 1942 and 1953 ordinances, it is possible to infer an intention that the limits described were intended as boundaries. The difficulty with this interpretation is that it would also follow that the Arctic Ocean from the 141st meridian west longitude eastwards to the Archipelago would be considered part of the Northwest Territories. This position has never been adopted by the Canadian Government. Since it has never been decided what portion, if any, of the so-called Canadian Sector, beyond the Archipelago, Canada might wish to claim, the preambular formula was again changed in 1955 to "... comprising all that portion of the Northwest Territories lying within the boundaries described ..." in order to remedy the implication that the boundaries of the Northwest Territories extend to the outer limits of the so-called "Canadian Sector" and to the North Pole.⁶³⁾ This new formula was thought to be more general and not to constitute a statement of Canadian claim. It leaves doubt as to what connecting or contiguous waters, if any, of the Archipelago are considered amenable to the Ordinance. For instance, we do not know whether the boundary in the 1953 description which remains in the codified 1955 version "... northerly skirting Baffin Island to seaward through a succession of points ten miles to seaward of low-water mark at all the seaward extremities of Baffin Island and its offshore islands ...", makes the ten mile belt of water amenable to the Ordinance or not. Theoretically, to answer this question we should have to know whether this belt of water is considered to be within the Northwest Territories and as we have seen, the descriptions of the Northwest Territories themselves leave in doubt precisely what areas they comprehend. However, it was apparently the intention that the Ordinance should apply to game wherever it might be found within the boundary of the Northwest Territories, i.e., to the land areas and to coastal waters, straits, channels, gulfs and areas within the boundaries so described. Practically speaking, the answer lies in ascertaining whether the Ordinance is in fact applied to this area. Paragraph 6 of the Annex to the Agreement between Canada and the United States for the establishment of the DEW line for the application of Canadian Law.⁶⁴⁾ It draws particular attention to the ordinance of the Northwest Territories including those relating to the prohibition on the taking or molesting of wildlife or game. [illegible] helpful as evidence of historic title it would be necessary to show that the regime has been enforced in respect of the water areas, against all comers, not merely Canadians, and that there have been no objections from foreign governments. If this is the case then clearly this practice is an attempt to exercise jurisdiction which is consistent only with the waters to which the Ordinance is considered to [illegible] internal waters of Canada. ⁶⁵⁾

Fisheries

61. [illegible] (10) of the Fisheries Act (R.R.C. 1927, Chap. 73) required that whaling vessels, "if not so engaged or hunting in connection with a factory established in Canada" pay a license fee of fifty dollars for whaling in "... the territorial waters of Canada north of the fifty-fifth parallel of north latitude." There is no definition of territorial waters in the [illegible] records of the Department of Fisheries [illegible] any evidence that any attempt has been made to assert jurisdiction beyond three miles in the waters of the Arctic Archipelago. Instructions issued to Fisheries officers clearly indicated that enforcement was confined to the three mile limit.⁶⁶⁾

62. P.C. 1036 of 1928 provided that "no one shall hunt or kill any walruses in Hudson Bay or Straits in Canadian waters south of the 74th parallel of north latitude ..." This was subsequently replaced by P.C. 1543 which described the prohibition area as "... that part of Canada [illegible] Hudson Bay and Strait and the Canadian waters north thereof." According to the Department of Fisheries enforcement measures have been confined to the three-mile limit.⁶⁷⁾

Shipping

63. In 1953, the United States Government requested "approval of the Canadian Government for the carrying out in the summer of 1953 of a joint Canadian-United States Beaufort Sea Expedition along the lines of those carried out 1950, 1951, 1952 ... it is proposed that the ... expedition be undertaken during the summer of 1953 with the major objective of surveying the western Canadian Archipelago, namely McLure Strait, Prince of Wales Strait and Melville Sound."⁶⁸⁾

64. In 1950, oceanographic and hydrographic work in the Beaufort Sea area was conducted by the United States alone. Canadian permission was not sought and was not necessary in the opinion of the Defence Research Board which had some knowledge of the activity.⁶⁹⁾ In 1951 and 1952 the United States continued their hydrographic and oceanographic programme in the area while Defence Research Board carried out complimentary work on inshore waters. In 1952 Canadian-United States co-operation in the work was established on the diplomatic level through an exchange of notes. (See File 11453-40)

65. In 1953 Canada approved the Beaufort Sea Expedition⁷⁰⁾ and requested that attention be directed to the Game and Archeological Sites Ordinance, the Migratory Birds Act and regulations under the Fisheries Act, which forbid, among other things, the hunting or molesting of land and marine animals. Later, following unilateral changes in the expedition, the United States Government was

informed that "The Canadian Government considers that requests to carry out surveys in Canadian waters or on Canadian territory should describe as precisely as possible what work the agency making the request desires to carry out, and state specifically the elements of the force which it is proposed to assign to the task, including the members and types of ships or aircraft, and in the case of ships, their names. If it subsequently proves necessary to modify significantly the size, character or mission of the force, the approval of the Canadian Government should be sought."⁷¹⁾ There is no indication of what waters were comprehended by the expression "Canadian waters."

66. In 1954, the United States requested "the Canadian Government to be good enough to authorize the expedition to enter Canadian territorial waters at such times and places, and to conduct such operations, as may be necessary to enable it to accomplish its mission."⁷²⁾ The area of the survey is described as "The Beaufort Sea area". At a preparatory conference between Canadian and United States officials the proposed area of operations was prescribed as "McClure Strait and Viscount Melville Sound west of the 100th meridian." The United States note much less than signifying that the waters of the Archipelago are considered by the United States to be Canadian waters, could in the context in question imply that the main body of the connecting waters as opposed to waters within the three mile limit, is not considered to be internal waters of Canada or at most that the United States Government does not intend to commit itself.

67. In 1957 an exchange took place in the House concerning the waters of the Archipelago from which it might be inferred that the then Prime Minister (Mr. St. Laurent) was declaring Canadian sovereignty over the interconnecting waters.⁷³⁾ This seems to be the first occasion on which a claim to the interconnecting waters has been implied publicly in Canada. The statement was not a prepared one and it could be interpreted as applying only to the waters specified in the main statement, i.e., Bellot Strait (which is less than three miles wide and therefore territorial in any event) and Viscount, Melville and Lancaster Sounds. However, the reference appears clearly to have been to all the connecting waters of the Archipelago. It is, however, another question whether the United States Navy's application for a waiver under the Canada Shipping Act can be cited against them as evidence of acquiescence in the Canadian claim. The waiver would be required in any event to enter the three mile limit.

68. It is considered, therefore, that United States requests to carry out operations in Canadian waters of the Arctic Archipelago are not useful evidence of acquiescence in Canadian title to the waters of the Archipelago.

Conclusion

69. Generally speaking, it seems that the status of the waters of the Archipelago have not been specifically considered in the administration of the Archipelago. There is no clear evidence concerning the intention of the enactments we have examined either in the discoverable background of their conception, in the wording of the provisions themselves, or in the subsequent practice implementing them, that these waters were inland waters of Canada. It can only be concluded that a claim to the connecting waters as historic waters would be unlikely to stand up to detailed analysis before a juridical tribunal.

70. On the other hand, in view of the various public statements⁷⁴⁾ and enactments which on the face of them seem to voice an extensive claim in the Arctic regions, there is good reason to assume that the view may widely be held abroad that Canada does claim these waters. The very fact that those enactments already passed are fraught with doubt concerning their intention, and the fact that none have ever been questioned is some evidence that this may be the case. At least Canada has probably established an environment whereby the portents for a Canadian claim to jurisdiction over these waters are good.

71. Thus the following statement by the Minister of Northern Affairs in the standing Committee on Mines, Forests and Waters (June 10, 1958) elicited no inquiries:

“The area to north of Canada, including the islands and the waters between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is over natural terrain.”

Furthermore, in March, 1958 we were advised informally by the United Kingdom High Commissioner⁷⁵⁾ that the Foreign Office, while not being prepared at that time to admit as necessarily valid a Canadian claim to all the waters of the Archipelago as natural waters, nevertheless, considered that the Indonesian claim differed from any corresponding claim Canada might wish to make. The following is the Foreign Office Legal Department's opinion:

“A glance at the map shows that the two cases are in fact widely dissimilar. The Arctic Archipelago is really a prolongation of the main mass of Canadian mainland North of the Hudson Bay in the direction of the North Pole, and the whole Archipelago is a clear unity with the continental mass. In short, the Canadian case is very

much more comparable to that of an island fringe off a mainland coast – the kind of case which existed in the Norwegian fishery dispute, in regard to which the International Court of Justice at the Hague decided that where such an island fringe existed, which physically and geographically formed a unity with the mainland, then the waters between the islands and between the islands and the mainland, could properly be treated as internal waters. That is more or less the case of the Arctic Archipelago, but it is not in the least the case of the Indonesian Islands, which indeed, as we said in our Note to the Indonesian Ambassador can only with difficulty be viewed as constituting an Archipelago at all because of the great sea distances between the different main islands.

There is another feature that distinguishes the Canadian case. Where the Indonesian Archipelago, if it is one, could be said to consist mainly of sea interspersed with a certain amount of land, the Arctic Archipelago is the precise reverse. It is practically a solid land mass intersected by a number of relatively narrow channels of water. None of these channels seem to exceed 100 miles in breadth, and many of them are much narrower. The distance that separates the Archipelago from the mainland mass is also quite small.

A further distinction between the two cases, which, though not a strictly juridical one, is nevertheless of considerable practical importance, is that the Arctic Archipelago is very far removed from any main traffic route or lanes normally used by shipping, whereas the Indonesian Islands are situated on or near the main routes between Europe, the Near East and the Far East.”

The Contiguous Waters of the Archipelago

72. On maps of Canada published by the Canadian Hydrographic Service the conventional sign for an international boundary extends along the median line of Davis Strait, Baffin Bay and the narrow waters between Greenland and Ellesmere Island.⁷⁶⁾

73. It may be presumed, though it is not certain, that showing the boundary thereby is an application of the description used in 1875:⁷⁷⁾ “Bounded on the East by the Atlantic Ocean and passing towards the North by Davis Strait, Baffin’s Bay, Smith Straits and Kennedy Channel ...” This was the Order-in-Council concerned with the further transfer of British possessions in North America to Canada when it appeared uncertain whether the transfer of Rupert’s Land and the Northwestern Territories in 1868 had achieved the transfer of all British North America.

74. Breitfuss suggests "For the same reason (i.e. because it is eventually blocked by ice) the so-called "American Way" to the Arctic through Davis Strait, Baffin Bay and Smith Sound ... (may) be regarded as Danish-Canadian ... territorial waters."⁷⁸⁾ Breitfuss, however, is a proponent of the sector principle which probably coloured his conclusion regarding Davis Strait and Baffin Bay.

75. It is submitted that drawing a boundary line down the middle of the channel in the waters between Greenland and the Arctic Archipelago is not supportable in international law. It is even doubtful whether it would be valid as an application of the sector theory using the north coast of the mainland as the base of the sector rather than the north coast of the Archipelago. Such a boundary would presumably commence at Cape Chidley and follow northward the seaward boundary of the territorial sea off the eastern shore of the Archipelago. Whether there was a legal justification for showing the line in question as a boundary appears never to have been considered.⁷⁹⁾ There are grounds for assuming that it stemmed from an earlier description⁸⁰⁾ the intention of which seems clearly to have been to indicate what land areas Canada claimed. Furthermore, the 141st meridian from the North Pole to the Canada-Alaska boundary is also shown as a boundary line and it has never been explicitly contended by Canada (apart from purposes of map publication) that it is more than a line indicating that the land areas to the east belong to Canada (See footnote 44)

Ice Formations and the Territorial Sea

76. One question remains and that is from where should the territorial sea be measured where there is permanent ice extending out to sea from the shore? Should base lines be drawn from headland to headland disregarding ice formations, should the tide crack⁸¹⁾ be the baseline, or should it be the outer edge of more or less immovable shelf ice?

77. It appears that this problem only arises along the northern coast of Ellesmere Island and perhaps Axel Heiberg Island. In these regions shelf ice extends up to ten miles from the shore.⁸²⁾ It is presumed that this ice is afloat for most of this distance but no information is presently available on the location of the tide crack.

78. Some Russian writers have interpreted the Decree of 1926 as including "ice formations that are more or less immovable" as land territory. According to a United Kingdom working paper on Soviet claims in the Arctic,⁸³⁾ along all her land (including immovable ice) frontiers the Soviet Union claims a belt of territorial waters twelve

miles wide. The source of this statement is not given. However, it probably does represent the official Soviet attitude.

79. The United Kingdom working paper has suggested for the Arctic that the tide crack would be a reasonable point from which territorial waters might be measured presumably because it is assumed it coincides with the coastline. At the same time this is not considered suitable in the Antarctic since the floating shelf ice is treated as land. It is difficult to see why shelf ice in the Arctic might not also be treated as land and the territorial seas therefore measured from the outer edge of the shelf ice. To measure it from the tide crack would probably mean that for most of the length of the ice shelf Canadian territorial waters would consist of more or less immovable shelf ice. However, from a practical point of view the situation would be little changed in taking the outer edge of the shelf ice as the base line. The three mile belt beyond the outer edge of the shelf ice in this region is covered with from nine to ten tenths ice even in optimum summer conditions.⁸⁴⁾ Pending an assessment of the need or desirability or assimilating the ice shelf in this region to land the whole question of where the base line should be is an academic one for Canada. This is not so, of course, in the Antarctic, where the shelf ice extends great distances beyond the tide crack and is actually occupied in places and where there are so many competing claims.

80. If in considering the status of the ice shelf from the point of view of international law we are to do so in the context of present concepts, we must consider whether ice can be assimilated to land, i.e., it is a more or less permanent phenomena and can it be occupied? Certainly on the basis of experience in the Antarctic the answer seems to be in the affirmative in respect of shelf ice inside of and beyond the tide crack. Thus for Canada it may be purely a question whether we desire to consider the shelf ice as an extension of the land.

81. Where the shelf ice beyond the tide crack appears as permanent as, and as capable of occupation as shelf ice within the tide crack, the latter would seem to be excluded as a logical base line. If the ice shelf is to be considered as an extension of the land, then its outer edge is the logical base line for measuring territorial waters. Otherwise a base line based on the coast is the logical one.

Summary of Conclusions

- (1) That under general international law and particularly the decision of the International Court of Justice in the Anglo-Norwegian Fisheries Judgement, a case could be made for treating the Arctic Archipelago as a whole with the mainland and measuring the territorial sea from straight base lines

drawn about the coastline of the outer circumference of the Archipelago.

- (2) That (apart from Foxe Basin and Cumberland Sound) the insufficiency of evidence of a long standing and unequivocal intention to assert sovereignty over these waters and as far as it may have been the intention to assert jurisdiction for various purposes, the virtual non-existence of evidence of application of measures particularly vis-à-vis foreign states, would render a claim to the waters of the Archipelago as historic waters vulnerable to close scrutiny. However, that the measures which have been examined, equivocal as they are, have probably created a general impression that Canada considers these waters to be Canadian.
- (3) That a claim to territoriality of waters east of the Archipelago out to the median line in Davis Strait and Baffin Bay cannot be supported in international law.
- (4) That in regions where permanent ice adjoins the shoreline, particularly northern Ellesmere Island, the base line would seem logically to be either a line based on the coast or the outer edge of the shelf ice depending upon whether or not it is considered the shelf ice is an extension of the land.

PRELIMINARY APPLICATION OF STRAIGHT BASE LINE SYSTEM
TO
CANADIAN ARCTIC TERRITORIAL WATERS
BASE LINE TURNING POINTS AND DISTANCES BETWEEN THEM

TURNING POINT NO.	LOCATION	DISTANCE BETWEEN POINTS (MILES)
1	Button Islands (south side Hudson Strait)	37
2	Resolution Island – (Hatton Headland)	102
3	Lady Franklin Island	41
4	Islet Lat. 63-37 Long. 63-55 (off Brevoort Island)	76
5	Saxe Cobourg	53
6	Angijak I.	46
7	Northern Entrance Pt. Exeter Sound, Lat. 66-20 Long. 61-27	16
8	Cape Dyer	4
9	Point at Lat. 66-40 Long. 61-14	19
10	Point at Lat. 66-56 Long. 61-43	15
11	Durban Island	80
12	Kangeek Pt..	86
13	Henry Kater Peninsula	47
14	Cape Aston	38
15	Agnes Monument	5
16	Cape Christian	82
17	Cape Adair	90
18	Cape Macculloch	57
19	Cape Walter Pathurst	106
20	Islets off Cape Cookburn	56
21	Princess Charlotte Monument	49
22	S.E. Point of Ellesmere I. Lat. 76-37, Long. 77-56	89
23	Point in Lat. 77-02 Long. 75-44	44
24	Brevoort I. of Pim I.	72
25	Cape John Barrow	43
26	Point in Lat. 80-24 Long. 69-25 (North of C. Lawrence)	48
27	Point in Lat. 81-03 Long. 66-35	26
28	Cape Cracroft	49
29	Cape Frederick VII	11
30	Cape Union	15

31	Cape Sheridan	28
32	Cape Henry Joseph	11
33	Cape Hecla	42
34	Cape Aldrich	34
35	Ward Hunt Island	38
36	Cape Richards	6
37	Cape Fanshawe Martin	12
38	Cape Egerton	39
39	Alert Point	46
40	Small Islet off Cape Bourne, Lat. 81-57 Long. 90-45	49
41	N. W. Point Axel Heiberg Island	92
42	Small Islet off Meighen I. Lat. 80-02 Long. 99-30	78
43	Small Islet off C. Isachsen	93
44	Small Islet off Borden I.	24
45	Small Islet off Jenness Islands	88
46	Point 5 miles S.W. Cape. Andreasen	74
47	Small Islets off Lands End.	11
48	Islets about 10 miles S. of Lands End	130
49	Gore Is. Off C. Prince Alfred	140
50	Cape Kellett	
51	C. Dalhousie	128
52	Pullen Island	99
53	Herschel Island	96
54	Demarcation Point	40

Total 2902

F.C.G. Smith,
Dominion Hydrographer,
Canadian Hydrographic Service.

Nov. 15, 1956.



FOOTNOTES

Footnotes No.

(1) By internal waters is meant all those water areas encompassed within baselines drawn around the perimeter of the archipelago including those waters between the archipelago and the mainland except Hudson Bay and Strait in respect of which title is assumed.

(2) By contiguous waters is meant Davis Strait, Baffin Bay, Smith Sound, Kane Basin, Kennedy Channel and Robeson Channel west of the "boundary line" represented on maps published by the Hydrographic Survey Branch, and elsewhere the belt of territorial sea outside the baselines mentioned in footnote (1).

(3) For an examination of the legal basis for the Canadian claim to the land areas of the Archipelago (See Vincent Macdonald's Report, File Pocket – File 9057-40).

(4) - Shorter Oxford English Dictionary.
- Columbia and Lippincott Gazetteer
- Funk and Wagnall's
- Now Standard Dictionary of the English Language
- Glossary of terms used on Admiralty Charts and in Associated Publications 1953 Part II.

See also the United States Hydrographic Office Publication No. 77, "Sailing Directions for Northern Canada", 1946 which contains a paragraph entitled, "Navigation in the Western Approach to the Arctic Archipelago" which, though not relevant in context, does imply by its title that this area is best described by the term, "Archipelago".

(5) International Law of the Sea – Higgins and Colombo.

(6) An example given of the latter is "the British claim to New Guinea and Papua ... covering more than one hundred miles from the shore, embraces all the numerous scattered islands which are considered as forming an archipelago and has been generally admitted by other nations."

(7) U.N. Document A/CONF.13/18 – "Certain legal aspects concerning the delimitation of the territorial waters of archipelagos".

(8) AJIL 8. 24, p. 251.

(9) Basis of Discussion (Conference for the Codification of International Law) 13, page 51. Also AJIL 5. 24, p. 33.

(10) S'il s'agit d'un groupe d'îles appartenant à un même État, dont la distance de proche en proche à la périphérie du groupe ne dépasse pas la double mesure de la Mer Territoriale, ce groupe sera considéré comme un ensemble et l'étendue de la Mer Territoriale sera comptée à partir de la ligne qui joint les extrémités extérieures des îles.

Dans le cas d'un archipel, l'étendue de la Mer Territoriale sera comptée à partir des îles ou îlots les plus éloignés de la côte, à condition que cet archipel soit composé d'îles ou d'îlots dont la distance entre eux n'excède pas la double mesure de la Mer Territoriale et que les îles ou îlots les plus proches de la côte ne soient pas éloignés d'elle d'une distance supérieure à cette double mesure."

(11) "... In the case of an archipelago, the islands and keys comprising it shall be considered as forming a unit and the extent of the territorial sea ... shall be measured from the islands furthest from the center of the archipelago." Jessup. "The Law of Territorial Waters and Maritime Jurisdiction", p. 447.

(12) According to Higgins and Colombo (International Law of the Sea, 2nd Edition 1950, p. 79) the generally recognized rule "appears to be" that a group of islands forming part of an archipelago should be considered as a unit and the extent of territorial waters measured from the islands farthest from the center of the archipelago. It is considered that not too much weight can be given to this statement of the law since it cites both the recommendation of the Committee of Experts of the League (see footnote 11) and those of the Institute of International Law (see footnote 10). The latter places a restriction on the distance between the outer islands of the Archipelago whilst the former does not.

(13) See footnote (9).

(14) Report of Interdepartmental Committee on Territorial Waters, Ottawa, July 2, 1937 – Appendix A, p. 28.

(15) Extract from Canadian Reply to Questionnaire for First Codification Conference, The Hague, 1930, See I File 10600-40.

(16) U.N. Document A/Conf. 13/18, p. 19 for a detailed outline of the practice referred to.

(17) *ibid* p. 25.

(18) *ibid* p. 27; also UN Document A/CN.4/99 p. 28.

(19) Translation of a communique redefining Indonesian territorial waters, issued in Djakarta on December 13, 1957:

The Council of Ministers on Friday 13th December, 1957, discussed the matter of the territorial waters of the Indonesia Republic. As an Archipelago composed of thousands of islands Indonesia has its specific geographic features and characteristics. Historically the Indonesian Archipelago has been an entity since time immemorial. For the sake of territorial entirety and of protecting the wealth of the Indonesian State it is deemed necessary to consider all the islands and water situated in between them as one inseparable entity. The delimitation of territorial waters as laid down in Section 1, Sub-section (1), of the Territorial Sea on Maritime [illegible], 1939 (Territorial Sea and Maritimes Districts Ordinance, State Gazette 39-442) is no longer in harmony with the above considerations as it divides the Indonesian land territorial into separate parts having their own territorial waters. On the ground of the above considerations the Government states that all waters around between and connecting the islands or parts of the islands belonging to the Indonesian State, irrespective of their width or dimension, are natural appurtenances of its land territorial and, therefore, an integral part of the island or national waters subject to the absolute sovereignty of Indonesia. The peaceful passage of foreign vessels through these waters is guaranteed as long and insofar as it is not contrary to the sovereignty of the Indonesian state or harmful to its security. The delimitation of the territorial sea with a width of twelve nautical miles shall be measured from straight baselines connecting the outermost points of the islands of the Republic of Indonesia.

Statutory provisions thereto will be made at the earliest possible moment. The Government will vindicate its position in the international Conference on Maritimes Rights to be held in Geneva in February 1958.

(20) U.N. Document A/Conf.13/18 p. 29.

(21) See Appendix A.

(22) I.C.J. Reports, 1951, p. 128.

(23) I.C.J. Reports, 1951, p. 127.

(24) I.C.J. Reports, 1951, p. 133.

(25) Curtis Report, p. 21.

(26) Curtis Report Annex, Chap.12, p. 119-120.

(27) Curtis Report Annex, Chap.12, Table 7, p. 121.

(28) See letter of November 9, 1955, from the Acting Deputy Minister of Fines and Technical Surveys vis.:

In regard to your second paragraph referring to the statement made on page 119 of the Curtis Report, we agree that if the area is taken as a whole and allowance is made for the completely different scale, the complexity of the coastline compares favourably with that part of the Norwegian coast under consideration by the Court in the Anglo-Norwegian Fisheries case. Table 7, page 121 of the Curtis Report shows the numerical comparison under the foregoing assumptions to be 1300 miles per hundred miles for Arctic Canada and 1110 miles for Norway.

However, we would like to raise the question as to whether it is possible to make a true comparison on a numerical basis (which "coastline complexity" by definition involves) if basic factors are changed. Would making allowances for a completely different scale in fact destroy true comparison?

If we treat the Arctic as a whole the choice of the coastal trend line crucially determines the numerical amount of coastline complexity. For example, the trend line used in calculating values for Table 7, Section of Arctic Canada, ran from Demarcation Point, Yukon, to Cape Chidley, Labrador, via Ellesmere Island. This trend line literally enveloped all of the Arctic Archipelago and when used with the actual length of coastline including islands, gave a coastline complexity comparable to that of Norway. If, instead, a trend line were to be constructed across Northern Canada roughly following the mainland, and treating the Arctic Archipelago as offshore islands, a much larger value of coastline complexity could be computed. Such very broad treatment needed to calculate coastline complexity from either of the above trend lines finds no counterpart in the restricted treatment of the Norwegian Coast.

The actual length of the trend line used in Table 7, being some 29,000 nautical miles long, is of continental magnitude. In contrast, the Norwegian trend length for that part of the coast under consideration by the Court in the Anglo-Norwegian Fisheries case is only 650 nautical miles.

(29) I.C.J. Reports 1951, p. 133.

(30) The exception is the entrance to Lancaster Sound which nevertheless is covered with unconsolidated pack.

(31) The Pattern of Ice Distribution in Canadian Arctic Seas – Dunbar. Volume XVIII, Series III, June 1954. Transactions of the Royal Society of Canada, p. 9.

(32) 1953 –3,000 Eskimos, 300 Whites.

(33) Kimble and Good, "Geography of the Northlands", p. 360.

(34) An exception is the Coppermine and Bathurst Eskimos who usually spend the spring hunting seals through the ice in Coronation Gulf, often twenty or thirty miles from the mainland.

(35) I.C.J. Reports 1951, p. 131.

(36) I.C.J. Reports 1951, p. 131.

(37) U.N. Document A/ CN4/77.

(38) Report of the International Law Commission. Doc. A-3159.

(39) See Commentary for Canadian Delegation to the Conference on the Law of the Sea, p. 32 and 38.

(40) U.N. Document A/Conf. 13/18, p. 23.

(41) Article 4 of the International Conference on the Law of the Sea:

"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

“5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

“6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.”

Article 5 of the International Conference on the Law of the Sea:

“1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

“2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.”

(42) See Foreign Office Working Paper, “Soviet Claims in the Arctic”. (File 10600-AF-40).

(43) See Legal Division working paper, “Sector Theory and Floating Ice Islands in the Arctic”, dated August 30, 1954. File 9057-40.

(44) There is a good deal of evidence from which foreign states probably conclude that Canada is an adherent of the sector theory, *inter alia*.

(a) Statement of Hon. Charles Stewart in House of Commons 1925 that Canada claimed as Canadian all territory “right up to the North Pole”. (Hansard June 11, 1925: p. 3773).

(b) Cf. maps published by the Department of Mines and Technical Surveys which always extend the recognized international boundary symbol to the North Pole. (In this connection, see letter dated December 20, 1946, File 9057-40, wherein External Affairs agreed to this demarcation).

(c) Order-in-Council P.C.1146 of July 19, 1926, creating Arctic Preserves coincident with the “Canadian Sector”.

(45) I.C.J. Reports 1951, p. 130.

(46) (a) “...the legality of the (prescriptive claim is to be measured, not by the size of the area affected, but on the definiteness and duration of the assertion and the acquiescence of foreign powers.” Jessup’s - The Law of Territorial Waters and Maritime Jurisdiction 1927, p. 382.

(b) "... prescription in International Law may therefore be defined as the acquisition of sovereignty over territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order." Lexterpacht – Oppenheim's International Law, Vol. I Sixth Edition, p. 527.

(47) 31-32 Sic. C.105, Imp.

(48) Annex [illegible], p. 26, Report of Interdepartmental Committee on Territorial Waters, 1937.

(49) House of Commons paper 542, July 12, 1850.

(50) See Letter 1349 of August 5, 1955 from High Commissioner in London. File 10600-AF-40.

(51) See footnote 48, p. 30.

(52) Hudson Bay and Straits are considered to be inland waters of Canada. This being so, it is submitted that Foxe Basin must partake of the same status since the only entrance to it outside of Hudson Bay and Straits is a narrow Strait, the waters of which are entirely territorial.

(53) See footnote 48, p. 32.

(54) P.C. 460, April 30, 1875.

(55) Report of the Interdepartmental Committee on Territorial Waters 1937, Annex H, p. 34.

(56) P.C. 3388, December 18, 1897.

(57) Canadian Sovereignty in the Arctic C. MacDonald p. 16 (File pocket 9057-40)

(58) Ordinance respecting Scientists and Explores assented to June 23, 1926.

(59) P.C. 1146 of July 19, 1926; P.C. 113 of January 25, 1929; P.C. 807 of May 15, 1929. Ordinance respecting the Preservation of Game in the Northwest Territories assented to June 30, 1953, and amendments of June 16, 1954; January 27, 1955.

(60) C.T.S. 1930, No.17.

(61) P.C. 113, January 25, 1929.

(62) See letter of September 16, 1955, from the Acting Deputy Minister of Northern Affairs and National Resources (File 10600-AF-40) via.:

In 1926, when the original Arctic Islands Preserve was created, there were two other preserves immediately adjacent thereto - the Banks Island and the Victoria Island Preserves. The multiplicity of boundary lines involved created confusion and made the map difficult to read. In addition, white trappers were not permitted to hunt or trap in these preserves, but it was found that there were cases where they were setting their traps on the ice, a short distance off the shore and claiming they were not on the preserves. Technically, they were right, but this was not in accordance with the aim behind the creation of the preserves. It was decided, therefore, to add the Banks Island and the Victoria Island Preserves to the Arctic Islands Preserve and to move the boundary to mid-channel between the Islands and the mainland. This, in effect, added to the preserve the waters as well as a few small islands immediately south of and adjacent to Banks and Victoria Islands. These changes in the boundaries of the Arctic Islands Preserve were affected by P.C. 113, dated January 25th, 1929.

(63) See letter from Deputy Minister of Northern Affairs and National Resources dated August 29, 1955.

(64) [illegible] 1955, No.8.

(65) Higgins and Colombos –The International Law of the Sea S 3151, p. 280.

(66) Letter from the Deputy Minister of Fisheries dated September 27, 1955, (File 10600-AF-40) quoting excerpt from letter of July 18, 1906, from Assistant Commissioner of Fisheries to the Captain of the steamer “Arctic” as follows:

“You will observe that the amending Act (an act to amend the Fisheries Act) interprets the waters of Hudson Bay as being territorial waters of Canada; but outside Hudson Bay, and in the waters north of the 55th parallel of north latitude, you will be guided by the generally accepted principle of international law and usage which interprets such territorial waters as being those within the three mile limit, whether such limit is measured from the mainland or around any island belonging to Canada, and in generally accepted bays and mouths of rivers.”

(67) See letter from Deputy Minister of Fisheries dated September 27, 1955 (File 10600-AF-40)

(68) Note of February 24, 1953. (File 11453-40)

(69) Memorandum April 13, 1953. (File 11453-40)

(70) Note of April 21, 1953. (File 11453-40)

(71) Memorandum 18 June 1953 handed to United States Section P.J.B.D. (File 11453-40)

(72) United States Embassy Note February 24, 1954. (File 11453-40)

(73) Annex "L" of the Commentary for the Canadian Delegation to the Conference on the Law of the Sea (February 24, 1958) vis.:

"United States—Statement on Reported Movement of Vessels into Arctic Waters.

On the Orders of the day: Feb. 24, 1958.

Right Hon. L.S. St. Laurent (Prime Minister):

Mr. Speaker, yesterday the hon. Member for Vancouver-Quadra (Mr. Green) asked about recent press reports concerning the activities of United States naval vessels in the Canadian Arctic during the coming summer. I am not sure exactly what report he was referring to, though I understand there was one in the April 3 issue of the Montreal Gazette and another in the edition of the Financial Post dated April 6.

Mr. Green: No, it was one which appeared in the Christian Science Monitor.

Mr. St. Laurent (Quebec East): Well, I have not seen the one in the Christian Science Monitor, but I assume it would be along the same lines.

Mr. Green: Yes, it was much the same as the one which appeared in the Gazette.

Mr. St. Laurent (Quebec East): These stories were apparently based on a recent United States navy press release. When arrangements were being made for the construction of the distant early warning line Canada and the United States agreed that the United States should be responsible for the sea supply of the D.E.W. line while it was being built.

It was realised that because of the amount of material involved and the urgency of the operation, a large number of special vessels would be required which Canada was not in a position to supply. At the time this agreement was reached, however, the United States was informed that once the line was in operation Canada might wish to assume responsibility for the annual resupply. Arrangements have already been completed for the Northern Transportation Company to resupply the western portion of the D.E.W. line beginning in the summer of 1958. Discussions are under way to determine if the Department of Transport can assume the responsibility for supplying the eastern portion of the line in connection with their other responsibilities in the Arctic.

As a result of the agreement I just mentioned the United States navy has been sending two convoys into the Canadian Arctic for the past two summers. One of these has emanated from Seattle and the other from New York or Boston. These convoys have had the task of supplying all the United States installations in the North including those in Alaska and Greenland as well as in Canada. This may be one reason why the number of ships involved seems to be large. Actually only a portion of each convoy enters Canadian waters. The operation this summer will be similar in both size and organization to that of the past two summers.

As in other years Canada will be well represented on both convoys. During the past two summers there have been both official government representatives as well as technical observers working with the commander of each task force. H.M.C.S. LABRADOR has provided icebreaker support for the eastern task force and the Royal Canadian Air Force has carried out a series of ice reconnaissances. Similar arrangements will be in effect again this summer.

Canada has always been consulted when the plans for the convoys were being made each year. This year, for instance, representatives of the Royal Canadian Navy and the Royal Canadian Air Force attended a series of meetings held in Seattle on February 5 to make arrangements for the sea supply of the western Arctic, and a senior Canadian naval officer attended a meeting in Washington on March 25 when the details of the eastern Arctic convoy were being worked out. Incidentally, each year the United States navy has been required to apply for a waiver of the provisions of the Canada Shipping Act, since the cargo ships they charter operate in Canadian coastal waters.

The suggestion that this summer's task force is being organized to discover a northwest passage rather than supply the D.E.W. line and other United States installations is, I am afraid, the fruit of a rather

active imagination. During the past two summers a great deal of hydrographic work has been more jointly by Canadian and United States agencies in connection with the sea supply of the D.E.W. line, and except for the area around Boothia peninsula the task is now almost complete. Plans have been made to finish the work during the coming summer by having both Canadian and United States vessels work at the problem from opposite sides. H.M.C.S. LABRADOR will proceed from the Atlantic to the vicinity of Prince Regent inlet and carry out survey work there, while the United States navy icebreaker STORIS and two other United States coastguard survey ships will carry out similar work on the western side of Boothia peninsula. H.M.C.S. LABRADOR will be surveying Bellot strait which provides a channel between the eastern and western Arctic, and if it is found that water and ice conditions are suitable the three United States navy vessels may attempt to pass through Bellot strait and accompany the LABRADOR south to the Atlantic.

Useful hydrographic work will undoubtedly be collected during this joint project by the United States and Canadian navies, and it will be interesting to see if larger ships can pass through Bellot strait. We already know that small ships can navigate the strait because the Royal Canadian Mounted Police Vessel St. ROCH completed the passage in 1942.

If larger vessels can navigate this route it will provide a useful alternative for ships carrying supplies to these areas, but it will probably always remain a second choice since ice conditions in the vicinity are known to be difficult in most years. Any ship wishing to pass from the Atlantic to the Pacific or visa versa would probably follow the route farther north through Lancaster and Viscount Melville sounds, which H.M.C.S. LABRADOR used in 1955.

Mr. Green: May I ask the Prime Minister whether the Canadian Government considers these waters to be Canadian territorial waters, and if so whether the United States government admits that such is the case?

Mr. Sr. Laurent (Quebec East): I do not know whether we can interpret the fact that they did comply with our requirement that they obtain a waiver of the provision of the Canada Shipping Act as an admission that these are territorial waters, but if they were not territorial waters there would be no point in asking for a waiver under the Canada Shipping Act.

Mr. Green: There is no doubt, then that the Canadian Government at least considers these as territorial waters?

Mr. St. Laurent (Quebec East): Oh yes, the Canadian government considers that these are Canadian Territorial waters, and we make it a condition of the consent we have given to these arrangements that they apply for a waiver from the provisions that would otherwise apply in Canadian territorial water.

(74) See footnote 44.

(75) See letter dated March 5, 1958. (File 10600-AF-40)

(76) Letter of December 20, 1946, containing concurrence of U.S.S.E.A. (the legal aspects of this policy decision were apparently not investigated). File 9057-40, Vol. IV.

(77) Order-in-Council P.C. 460 of April 30, 1875.

(78) Article by L. Breitfuss, 1928, attached to letter of July 3, 1948. (File 9057-40, Vol. IV.)

(79) F.N. 76. Also External Affairs memorandum of December 20, 1946, Vol. IV (File 9057-40).

(80) Order-in-Council P.C. 460, April 30, 1875.

(81) The tide-crack is the line of juncture between more or less immovable ice formations which rise and fall with the tide and the fringe ice which skirts the coast and is unmoved by the tide.

(82) Arctic Ice Islands P.95 reprinted from "Arctic" Vol. 5, No. 2, July 1952.

(83) File 9057-40; Memorandum dated February 25, 1955.

(84) The Pattern of Ice Distribution in the Canadian Arctic Seas – DUNBAR. Geography of the Northlands –Kimble and Good.

33. Minutes of the 52nd Meeting of the ACND, April 20, 1959, "Section III"¹⁰⁶

LAC, RG 24, vol. 8101, file 10

Transcribed to include only sections relevant to maritime sovereignty

Present:

Mr. R.G. Robertson, Deputy Minister of Northern Affairs and National Resources (Chairman)
Commissioner C.E. Rivett-Carnac, Royal Canadian Mounted Police.
Mr. D.A. Golden, Deputy Minister of Defence Production.

Mr. M. Cadieux, representing the Under-Secretary of State for External Affairs.
Mr. J.S. Hodgson, representing the Secretary to the Cabinet.
Dr. W.E. van Steenburgh, representing the Deputy Minister of Mines and Technical Surveys.
A/V/M A. de Niverville, representing the Deputy Minister of Transport.
Commodore J.C. Littler, representing the Chairman, Chiefs of Staff.
Mr. F.T. Davies, representing the Chairman, Defence Research Board.
Mr. R.F. Legget, representing the President, National Research Council.
Dr. P.E. Moore, representing the Deputy Minister of National Health.
Dr. A.L. Pritchard, representing the Deputy Minister of Fisheries.
Mr. G.G.E. Steele, representing the Deputy Minister of Finance.

Mr. G.W. Rowley, Department of Northern Affairs and National Resources (Secretary).

Also Present:

Inspector W.J. Fitzsimmons, R.C.M.P.

¹⁰⁶ For more on the ACND see a dedicated volume in this series: P. Whitney Lackenbauer and Dan Heidt, "The Advisory Committee on Northern Development: Context and Meeting Minutes, 1948-66," *Documents on Canadian Arctic Sovereignty and Security* no. 4 (Calgary: CMSS/AINA, 2015).

Mr. G.Y. Loughead, Department of National Defence.
F/L W. Morgan, Department of National Defence.
S/L W.B. Asbury, Department of National Defence.
Mr. B.G. Sivertz, Department of Northern Affairs and National Resources.
Mr. A. Laframboise, Privy Council Office.
Mr. H.A. Langlois, Department of Northern Affairs and National Resources.

...

III. Canadian Sovereignty Over Arctic Waters (Secret)

22. Mr. Robertson said the study of Canadian sovereignty over arctic waters had led to the conclusion that little would be gained by asserting a Canadian claim over the waters of the Polar Basin to the north of Canada, and that other countries with the possible exception of the U.S.S.R. would certainly oppose such a claim. Asserting Canadian sovereignty over the waters within the Archipelago on the other hand would have real advantages, but the Canadian claim would be unlikely to succeed without the support of other countries.

(Secretary's memorandum Document ND-271 dated April 14, 1959).

23. Mr. Cadieux suggested that in the list of advantages of claiming the waters within the Canadian Archipelago the word "good" should be deleted in describing the legal case. The chances of successfully asserting a claim to the waters within the Archipelago would depend largely on when and how it was made. Other countries, particularly the United States and the United Kingdom, would have to be consulted beforehand as their support would be essential and a claim would have to be carefully timed. A claim made prematurely could weaken the Canadian case. With regard to the waters of the Polar Basin it seemed clear that Canadian sovereignty should not be asserted under existing conditions. Circumstances might change however and nothing would be gained by specifically denying any claim. The special case of shelf ice and land fast ice extending into the Polar Basin would probably be affected by any agreements relating to this type of ice in Antarctica. Land fast ice was not extensive in that part of the Polar Basin so little would be gained by pressing a claim.

24. Mr. Rowley suggested that, while awaiting an opportune time to assert a claim, every effort should be made to increase Canadian scientific and other activities in the area since this would strengthen the Canadian case.

25. A/V/M de Niverville referred to the polar flights of Air France and K.L.M. It had been necessary to draw the companies' attention to the fact that these flights passed over Canadian territory.

26. Dr. van Steenburgh enquired whether the sector lines shown on many Canadian maps should be retained.

27. Mr. Robertson considered the sector lines should be retained on the maps since removing them might be construed as an indication of Canadian policy. On the instructions of the Cabinet all departments had been cautioned on April 6, 1959, to take no action that might compromise a later claim by Canada that the waters of the Canadian Arctic Archipelago were Canadian inland waters. This might be drawn again to the attention of departments.

28. The paper with the minor amendments suggested in the discussion and with a paragraph drafted by the Department of External Affairs on the timing of an assertion of sovereignty over the waters of the Canadian Arctic Archipelago, might be referred again to the Committee and, if approved, would then be brought to the attention of those ministers on the Cabinet Committee on Territorial Waters.

29. The Committee agreed that the paper on Canadian sovereignty over arctic waters, with minor amendments and with an additional paragraph on the timing of an assertion of sovereignty over the waters within the Canadian Archipelago, should be referred again to the Committee prior to being drawn to the attention of the ministers represented on the Cabinet Committee on Territorial Waters;

(a) the attention of ministers should also be drawn to the importance of increasing Canadian activities in the area in order to strengthen the claim that Canada will be able to make.

(b) the sector lines on Canadian maps should be retained;

(c) the substance of the letter of 6 April, 1956, to all ministers from the Secretary to the Cabinet be again drawn to the attention of all departments.

34. The Fifty-Fourth Meeting of the ACND, July 6, 1959

LAC, RG 2-B-2, vol. 6182.

Transcribed to include only sections relevant to maritime sovereignty

Present:

Mr. R.G. Robertson, Deputy Minister of Northern Affairs and National Resources (Chairman).

Mr. Dana Wilgress, Chairman, Canadian Section, P.J.B.D.

Mr. F. M. Tovell, representing the Under-Secretary of State for External Affairs.

Mr. G.G.E. Steele, representing the Deputy Minister of Finance.

Dr. W.E. Van Steenburgh, representing the Deputy Minister of Mines and Technical Surveys.

A/V/M A. de Niverville, representing the Deputy Minister of Transport.

Mr. W.H. Huck, representing the Deputy Minister of Defence Production.

Commodore J. C. Littler, representing the Chairman, Chiefs of Staff.

Supt. H.A. Larsen, representing the Commissioner, Police.

Mr. T.A. Harwood, representing the Chairman, Defence Research Board.

Mr. R. F. Legget, representing the President, National Research Council.

Dr. P.E. Moore, representing the Deputy Minister of National Health.

Dr. A.L. Pritchard, representing the Deputy Minister of Fisheries.

Col. H.M. Jones, representing the Deputy Minister of Citizenship and Immigration.

Mr. G. W. Rowley, Department of Northern Affairs and National Resources (Secretary).

Also Present

Mr. G.Y. Loughhead, Department of National Defence.

Dr. G. Hattersley-Smith, Defence Research Board.

F/L W. Morgan, Department of National Defence.

Mr. A. Laframboise, Privy Council Office.

Mr. B.G. Sivertz, Department of Northern Affairs and National Resources.

Mr. H.A. Langlois, Department of Northern Affairs and National Resources.

...

II. Business Arising Out of the Minutes of the 53rd Meeting:

(a) Canadian Sovereignty Over Arctic Waters (Secret)

14. Mr. Robertson reported that the paper on Canadian sovereignty over arctic waters had now been circulated to the ministers on the Cabinet Committee on Territorial Waters. The Prime Minister had also read the paper. He would ask the Minister of Northern Affairs and National Resources whether the course recommended in the paper would be adopted as government policy.

(Secretary's memorandum Document ND-283 dated June 30, 1959).

15. The Committee noted the report on the paper on Canadian Sovereignty over Arctic Waters.

...

IV. U.S. Navy Submarine Operations in the Arctic (Secret)

25. Commodore Littler reported that the U.S. Navy was planning to send the U.S. submarine "Skate" in the fall through the Northwest Passage to the Polar Basin. The Royal Canadian Navy was arranging to invite the U.S. Navy to co-operate in a programme of scientific research to include the work of the "Skate". In this way it was hoped to avoid a situation which could prejudice a Canadian claim to sovereignty of these waters. It was understood that the U.S. Navy would probably accept this invitation. The Chairman, Chiefs of Staff, had therefore asked that any discussion of this matter at the A.C.N.D. be postponed for the time being, and the proposed paper referred to in the agenda had therefore not been prepared.

26. The Committee noted the report on the U.S. Navy's intentions with regard to submarine operations in the area of the Northwest Passage.

[ATTACHED]

CANADIAN SOVEREIGNTY OVER ARCTIC WATERS

The Canadian government has for many years asserted Canadian sovereignty over all land lying north of the Canadian mainland and this position has not been disputed by any other nation in recent years. The Canadian position regarding sovereignty over the Arctic waters has however never been clearly formulated. A factor which could have an important bearing in this context is the adoption at the International Conference on the Law of the Sea, held in Geneva early in 1958, of article 4 of the Convention on Territorial Waters which provides that a country may delimit its territorial sea by applying the straight base line system between appropriate points where the coast line is deeply indented or cut into, or where there is a fringe of islands along the coast in the immediate vicinity. This emphasizes the difference between the waters of that part of the Polar Basin lying north of the land territory of Canada and the waters of the channels of the Canadian Arctic Archipelago.

The need to clarify the Canadian position with regard to the Polar Basin and the channels of the Canadian Arctic Archipelago has been greatly increased by recent developments such as the maintenance of scientific stations by both the United States and the U.S.S.R. on the ice in the Polar Basin (including the area lying north of the Canadian mainland) and the advent of nuclear powered submarine navigation. These U.S. and U.S.S.R. activities have been carried out without seeking Canadian permission and without protest by Canada. Since permission is always sought by the United States for the conduct of scientific work in the adjacent Canadian islands, it is apparent that the United States considers the waters of the Polar Basin to lie outside the limits of Canadian territory. In the absence of any representations by Canada the United States might assume Canadian concurrence in this view. Continued acceptance of this situation by Canada will certainly be considered as evidence that Canada does not assert sovereignty in this area.

The U.S.S.R. has never made any formal claim to the waters of the Arctic Ocean in the sector north of the mainland of the U.S.S.R. and Soviet declarations of sovereignty in this sector have referred specifically to lands and islands. The view expressed by some Soviet writers that Russian sovereignty extended over the water and ice in their sector may be an indication of official Soviet thinking. On the other hand the establishment by the U.S.S.R. of scientific stations on the ice in other sectors of the Arctic Ocean, and the fact that the Soviet

based their protest at a recent R.C.A.F. flight over one of their stations in the sector north of Russia on the grounds of annoyance to scientists without any reference to infringement of sovereignty, could imply that the U.S.S.R. was not at present intending to press a claim to sovereignty over the water and ice in the sector north of Russia.

The current international interest in Antarctica, which has led to the calling of a conference of states claiming interest in the Antarctic, has a bearing on the matter as it may conceivably result in the elucidation of broad principles for application to the polar areas in general, and particularly to those parts lying outside recognized national boundaries. Delay in asserting any claim that Canada might wish to put forward might therefore seriously prejudice any Canadian case, if there should, now or in future, be a desire to try to assert one.

The Advisory Committee on Northern Development has been asked to consider the position which Canada should adopt towards claiming sovereignty over Arctic waters. A necessary step in formulating the Canadian position is an assessment of the real Canadian interest in these areas both from our particular national point of view and also in regard to international considerations. Under international law any claim of sovereignty over this area would not only cover the waters and ice but also extend to the seabed below and the air space above. (The right to exploit the resources which may exist in the continental shelf would not, however, depend on any claim of sovereignty over Arctic waters. Canada might claim jurisdiction over the resources of the seabed and sub-soil of our polar shelf either under the general principles of international law or under the Convention on the Continental Shelf adopted by the Geneva Conference on the Law of the Sea provided, as appears reasonably certain, it is ratified by Canada and at least twenty-one additional nations and so comes into force. The exercise of this jurisdiction in such ways as the issue of licences for exploration for petroleum over areas covered by the sea in the same way as for areas of land might however be considered an act of sovereignty, and would tend to strengthen rather than weaken any Canadian claim.) Sovereignty over the waters of the Arctic would imply certain obligations including the provision of such services as aids to sea and air navigation, the provision of any necessary local administration and the enforcement of law. An adequate programme of scientific investigation would also become even more desirable than at present. Activities of other countries in the area – whether on the surface, under it, or in the air – would require Canadian permission. To determine the real Canadian interest, all departments concerned were requested to state their views on the advantages and disadvantages of asserting sovereignty over

- (a) the Polar Basin lying to the north of the Canadian mainland and
- (b) the channels of the Canadian Arctic Archipelago.

The Polar Basin lying to the North of the Canadian Mainland

In general departments saw little advantage and several possible disadvantages in asserting a claim to Canadian sovereignty over the waters and ice of the Polar Basin lying north of the Canadian mainland.

Advantages were –

1. The western part of the Polar Basin contains potential fishing grounds. The bowhead whale is increasing in numbers and might attract whaling interests in other countries. (At the present time the International Whaling Convention prohibits the taking of the bowhead whale except for local consumption by aboriginal people). The white whale is numerous and might also attract foreign exploitation. Claiming these waters could safeguard these minor stocks for Canadian use in an area generally low in food potential.
2. Control of the stocks of seals would be made easier if sovereignty were claimed over the landfast ice (ice attached to the land and not free to drift) and, to a lesser extent over the moving pack ice.
3. It would be possible to restrict the sport hunting of polar bears. This hunting carried out by means of aircraft just beyond territorial limits in Alaska is posing a serious threat to the existence of the species and to the welfare of the Eskimos. A similar situation could arise in northern Canada.
4. Canadian responsibility in the designation of air ways and air routes in the Polar Basin would be clarified.

Disadvantages were –

1. Under present concepts of international law it would be difficult to support a claim and almost impossible to enforce one. From the point of view of international law there appears to be no strong reason why a status different from that of other high seas should be claimed for the Polar Basin. From a legal point of view, the validity of the sector theory as a mode of acquiring sovereignty over land, ice or water has never been tested and is considered to be of very dubious value.

2. No substantial economic gain would result other than, possibly, that noted in the preceding paragraph since the Convention on the Continental Shelf concluded at the Geneva Conference on the Law of the Sea appears to provide satisfactory guarantees that the resources of the continental shelf are reserved for exploitation by the maritime state.
3. A Canadian claim to the sector of the Arctic Ocean north of the Canadian mainland would open the way for the U.S.S.R. on precisely the same basis, to claim the much larger sector north of the Russian mainland. These two sectors would bring about 240° out of the 360° under national sovereignty with resulting rights to control sea and air navigation through or over them. Countries with a present or potential interest in such navigation would certainly object.
4. Unless all the Arctic Ocean beyond the Canadian Arctic Archipelago were considered international waters, (including, in particular, that portion lying north of the Soviet Union) Canadian reconnaissance activities would be very restricted.
5. Exercising sovereignty over the Arctic Ocean to the North Pole, which should include air and naval patrols to be effective, would be very difficult and costly.
6. Provision of effective customs control would also be difficult and costly.
7. Any infractions of the border would be difficult to determine without continuous patrols, and any breach of sovereignty would be difficult to counteract.
8. If other countries were to assert sovereignty over the sectors lying north of their territories, Canada could be denied freedom of passage by sea to parts of the Canadian north.
9. Observation posts maintained on the ice by the U.S.S.R and U.S.A. are not considered direct military threats to Canada. If the Arctic Ocean were considered international waters, observation posts could be established by any country and could be carried by the movement of the ice fairly close to the U.S.S.R.
10. The exchange of scientific information on the Polar Basin might be impeded if the area were split into national sectors.

Notwithstanding these disadvantages in putting forward a claim to the waters and ice of the Canadian sector, concepts of international law frequently change and developments in the Antarctic may lead to the recognition of certain types of ice being recognized as being capable of appropriation. Consequently, the sector might, it is suggested, be held in abeyance by Canada because, while it is not needed to buttress Canadian claims to polar land areas, it might possibly some day be of use should it become advisable to lay a claim to sovereignty over the permanently fixed or floating ice in the high seas of the Canadian "sector".

The Waters within the Canadian Arctic Archipelago

Advantages -

1. A legal case could be made for claiming these waters as being inland waters, and if this were established Canadian sovereignty over the lands of the archipelago, while it has never been challenged, would be strengthened. A discussion of the legal position regarding a claim to these waters is attached as an annex.
2. Although it might both be possible to deny the right of innocent passage through those waters, Canada would nevertheless obtain, under internal law, an increased right of control over the passage of naval and commercial vessels of other countries. (For example, under the convention on Territorial Waters, submarines would be required to navigate on the surface and show their flag.)
3. Sovereignty over the waters for the Arctic Archipelago would not be as costly to enforce as sovereignty over the Arctic Basin.
4. Security control of the waters and air throughout the archipelago would be materially facilitated.
5. Freedom of passage to other countries for military reconnaissance purposes around the northern mainland of Canada could be denied.
6. The advantages in claiming sovereignty over the sector of the Canadian Polar Basin apply also to the channels lying between the islands, but with greater force, particularly with regard to the control of known fishery and sea mammal resources.
7. The effective discharge of marine responsibilities pertaining to

inspection and regulation and the establishment and operation of aids to navigation within the archipelago or on routes through it would be facilitated by the control which would be possible.

8. The movement of personnel and vehicles on the sea ice could be controlled.

In general departments considered that many western nations would object strongly to any Canadian claim to sovereignty over the sector of the Polar Basin to the north of the Canadian mainland, particularly on view of the fact that it would facilitate a comparable claim on the part of the Soviet Union to the vast sector north of its mainland – a claim which might have grave implications for western defence interests. These objections would probably be less strong in the case of the channels within the Arctic Archipelago. The following objections to a Canadian claim to the waters of the Archipelago were foreseen –

1. By the U.K., the U.S.A., and the Scandinavian countries since it could be argued that the channels were becoming practicable and potentially valuable routes, particularly with the advent of nuclear-powered ships and submarines.
2. By the U.K., the U.S.A. and Australia because a claim to Canadian sovereignty of the waters of the archipelago might establish a precedent to support the Indonesian claim to the waters of the Indonesian archipelago. (Any claim to the Canadian sovereignty would therefore stand more chance of success if it were not based chiefly on universal rules that might be applicable to archipelagos in general, but instead on special factors applicable to the Canadian Arctic Archipelago.
3. By the United States since a Canadian claim might affect their defence activities in the north.
4. By Russia, and probably Japan and Norway, since they might at some time wish to exploit the fish and mammal resources.

A suggestion was made that the main route through the Northwest Passage – Lancaster Sound, Barrow Strait, Melville Sound, Prince of Wales Strait – might be considered international waters, with Canada claiming the remaining waters in the Arctic Archipelago. This route is however one of the parts most important for fish and mammal resources and if it were excluded Canada would also forfeit any control of shipping and aircraft operating along it. Furthermore, if the

straight base-line system is applied to the waters of the archipelago, this area would be enclosed within the base-lines.

Departments considered that if other countries asserted sovereignty over their "sectors" there would be the following disadvantages to Canada:

1. Canadian reconnaissance would be restricted to the Canadian sector only;
2. Canada would be unable to exploit fish and mammal resources outside the Canadian sector;
3. An international wrangle, similar to the present Antarctic situation, might develop;
4. Freedom of movement by sea and air could be restricted;
5. Canada would not be free to extend research beyond the Canadian sector if we so wished.

Conclusions

On the whole, the consensus of opinion among departments, so far as the Arctic basin outside the Archipelago is concerned, is that it is difficult to see any advantages or consequence in the assertion of a claim to sovereignty by Canada. On the other hand, there is likelihood of strong objection by other countries and real disadvantages in the possibility of a corresponding claim by the U.S.S.R. The shelf ice (permanent ice of considerable age and thickness attached to parts of the coast of Ellesmere Island and up to about 5 miles wide) and the small areas of landfast ice extending into the Polar Basin might on the other hand be claimed as Canadian territory. A stronger claim could probably be established in the case of shelf ice than in the case of landfast ice which normally breaks up each summer. Objections might however be raised by other countries since acceptance of a Canadian claim to shelf ice would provide a precedent for the Antarctic where shelf ice covers large areas of the ocean, and acceptance of a Canadian claim to landfast ice would imply acceptance of any Russian claim to the much more extensive landfast ice off the coast of the U.S.S.R.

So far as the waters within the Archipelago are concerned, the general view appears to be that there would be real advantages if sovereignty could be asserted, and little offsetting disadvantage. The problem seems to be whether such sovereignty could be claimed, with acceptance by other countries and, if so, on what basis and in what

way it could best be done.

Tactics

If it is decided that, in principle, Canada should claim the waters of the Arctic Archipelago, consideration would have to be given to what would be the most advantageous time, from a tactical point of view, for putting forward such a claim. In order to facilitate its acceptance by major maritime states, in particular the United Kingdom and United States, there would appear to be four reasons why it would not be desirable either to announce formally a claim to these waters (for example, by applying the straight-base-line system to the Archipelago) or to indicate publicly an intention to claim them at a date prior to the Second Conference on the Law of the Sea, which will be held March-April 1960. These are as follows:

- (a) as our policy with regard to the question of fishery limits is at present opposed by the United States and United Kingdom, they might not be sympathetic to a claim by Canada to the waters of the Arctic Archipelago, nor disposed for tactical reasons to grant recognition to such a claim;
- (b) having regard to the extensive bodies of waters over which, by means of such a claim, we would be exercising national sovereignty, it might be considered that encouragement was given by Canada to other states to put forward more extensive claims to national waters, particularly the territorial sea. Canada might accordingly lay itself open to the charge of "prejudicing" the outcome of the Conference;
- (c) a claim by Canada, at this time, might encourage Indonesia, the Philippines and perhaps some other states to re-introduce the question of archipelagos at the next Conference, in the belief that they will be assured of Canadian support. If a Canadian claim to the Arctic Archipelago were to be linked with claims of Indonesia and the Philippines, it might well be weakened;
- (d) on ratification by Canada of the Convention on Territorial Waters (Article 4 of which authorizes the application of the straight-base-line system to coast lines which are highly indented or which has a fringe of islands in the immediate vicinity) Canada might be in a stronger position to uphold the validity of a claim to the waters of the Arctic Archipelago. It is hoped that Canada would be able to ratify the Convention soon after the Second Conference takes place. On the other hand, because the Convention will not come into force until it is

ratified by at least twenty-two countries (which might take some time), it might not be desirable to postpone a formal claim to the waters of the Arctic Archipelago until the Convention actually takes effect.

On the other hand, in light of developments prior to the next conference and if circumstances warrant, there might possibly be some tactical advantage from a Canadian viewpoint in confidentially intimating to the United States, and perhaps the United Kingdom, that Canada intends to make such a claim. For example, if bilateral discussions are held with the United States in order to attempt to bring them around to supporting the Canadian proposal at the Second Conference and our outstanding territorial waters and related fisheries questions are reviewed with a view to the ultimate working out of some broad bilateral understanding, there possibly might be some tactical advantage in making known Canada's intention to claim the waters of the Arctic Archipelago.

It is therefore recommended that if a decision is made, in principle, to claim the waters of the Arctic Archipelago, it would be desirable to postpone formal announcement of this claim, or public indication of Canada's intention to make it until after the Second Conference on the Law of the Sea, but that, in the meantime, and in the light of developments prior to the next Conference, the Government might consider the desirability of confidentially disclosing to the United States, or perhaps the United Kingdom, Canada's intention to claim the waters of the Arctic Archipelago if it is thought that, for tactical reasons, it would be advantageous to do so. Since the support of these two countries would seem to be essential, they should be consulted before the claim is eventually formally announced. It is recommended that whenever reference to our claim is made outside Government or official circles, care should be taken to indicate that it is not a new one, that it is of long standing.

Legal Position regarding a possible claim to
Waters of the Arctic Archipelago

Canadian sovereignty over the islands of the Arctic Archipelago is firmly established and unchallenged. However, the question of sovereignty over the waters of the Arctic Archipelago raises special international law problems, which have, in the past, tended to be somewhat obscured by references to the sector theory. Although some writers take the view that there are no special rules for claiming sovereignty over such waters, and other maintain that regardless of the distances involved they have the status of 'internal waters' in international law, it is widely recognized today (for example, in a study of the United Nations Secretariats) that the archipelagos of the world differ widely and no single formula exists for delimiting their territorial waters. In determining whether international law would permit a claim to sovereignty, it would be necessary to take into consideration various geographical, economic, historical and political factors, and to have regard to (a) the Anglo-Norwegian Fisheries Case, and (b) the Convention on Territorial Waters adopted at the Geneva Conference on the Law of the Sea.

- a) The International Court of Justice, in the Anglo-Norwegian Fisheries Case, laid down that the complexity of the Norwegian coastline and its close connection with the mainland entitled Norway to use the straight base-line system for delimiting its territorial sea, instead of applying the general rule of following the sinuosities of the coast. Whether the Norwegian system could be applied to our Archipelago would largely depend on the similarity of the two coastlines. Dean Curtis, in his study of Canadian territorial waters (1955) concluded that, while the Norwegian and Canadian Arctic coastlines were not comparable in several respects, nevertheless, the complexity of the coastlines of our Archipelago, taken as a whole, and making allowances for the completely different scale, compared favourably with that part of the Norwegian coast considered by the International Court in the Anglo-Norwegian Fisheries Case.
- b) Article 4 of the Convention on Territorial Waters specifies that straight baselines may be applied "where the coastline is deeply indented or cut into, or if there is a fringe of islands along the coasts in its immediate vicinity". The base-lines should follow "the general direction of the coast" and the new-areas and land must be "closely linked". (The right of innocent passage must also be allowed.)

If Canada ratifies this Convention and it comes into force internationally, its straight base-line provisions, together with the Anglo-Norwegian Fisheries case, may be of assistance to a possible claim to the waters of the Arctic Archipelago. Whether the required criteria are fulfilled in the case of our Archipelago is a question which, of course, has important international aspects. It will be recalled that the Indonesian claim in 1957 to the waters of its archipelago was rejected by the United States and United Kingdom. In determining whether international acquiescence might be expected in any claim by Canada, several unique features of our Archipelago would be relevant:

- a) the fact that the waters of the Archipelago are largely frozen over most of the year and thus form an integral part of the land areas (this fact will be of additional significance if the proposed Antarctic Convention contains a provision assimilating land-fast ice to land);
- b) the fact that the Arctic Archipelago is far removed from main traffic routes and, as is usually ice-bound, could not normally be navigated without Canadian assistance (by means of ice breakers or aerial reconnaissance);
- c) the fact that there is some evidence of continued administrative usage over the waters or part of them, which might be of use in demonstrating historic root of title.

It would have to be borne in mind that a formal claim to the waters of the Archipelago would probably have the effect of prejudicing any claim by Canada to the high seas lying within the Arctic basin, since these would fall outside the base-lines drawn to enclose the Archipelago.

35. Extract from: Telegram from Ambassador in United States to Secretary of State for External Affairs, April 28, 1960

Documents on Canadian External Relations, vol. 27, no. 663

TELEGRAM 1117
1960

Washington, April 28,

CONFIDENTIAL. CANADIAN EYES ONLY. PRIORITY.

PASSAGE OF USA SUBMARINE SEADRAGON THROUGH ARCTIC ARCHIPELAGO

The naval attaché, Commodore Robertson, has informed us that the Secretary, USA Section, Military Cooperation Committee, has advised the Secretary of the Canadian Section under MCM-833 of 25 April 1960 as follows: "(1) In order that Canadian military authorities may have advice of USA intentions, the following date is provided as a matter of info on a USA navy project. (2) During August-September, 1960 USA navy intends to transfer the USS Seadragon (SS(N)584) from the Atlantic fleet to the Pacific fleet. (3) The planned route is via Baffin Bay, Lancaster Sound, Viscount Melville Sound, McClure Strait, thence via the Arctic Basin and Bering Strait to the Pacific Ocean. Seadragon will conduct under-ice exploration and scientific studies while in the Arctic Basin. The duration of the voyage will be about thirty-five days."

2. It is our understanding that Commodore Robertson has been invited to make the trip with Seadragon and has accepted, subject to naval headquarters approval. Meantime Commodore Robertson is sitting in on USN meetings at which plans are being laid for this voyage and has undertaken to keep us informed of developments.

3. We understand that the above-quoted text is intended as early advance info of the USN's plans. Commodore Robertson understands that later a request for permission will come forward in accordance with procedures governing entrance of USA vessels into Canadian waters.

36. Letter to Mr. Cadieux, June 8, 1960

Documents on Canadian External Relations vol. 27 no. 664.

National Defence Member, Interdepartmental Committee on
Territorial Waters, to Chairman, Interdepartmental Committee on
Territorial Waters

Ottawa, June 8, 1960

Dear Mr. Cadieux:

Further to my letter dated 9 May, 1960 concerning the transfer of the nuclear submarine USS *Seadragon* from the Atlantic to the Pacific Fleet via the Northwest Passage, attached for information is a copy of the message received from the USN through the Naval Member Canadian Joint Staff Washington.

It is noted that the USN have requested Canadian concurrence for the proposed transfer of *Seadragon* via Lancaster Sound, Viscount Melville Sound and McClure Strait during period 1 to 20 August 1960. This request is in accordance with Canada-US agreed clearance procedure for visits by public vessels between Canada and the United States (Local Notification Procedure). Copy of this procedure is attached for information.

The passage of the *Seadragon* is classed as an operational visit and in such cases normally notification only is required on a service to service basis.

Subject to the concurrence of the Interdepartmental Committee, it is proposed to forward concurrence to this passage. No reply will be made to MCCM 833 dated 25 April 1960 as this was purely an informative memorandum.

It is requested that this may be given earliest consideration to ensure that the reply to the USN request is not delayed.

Lieutenant-Commander E.M. Jones
[PIÈCE JOINTE/ENCLOSURE]

37. Memorandum from Under-Secretary of State for External Affairs to Secretary of State for External Affairs, June 10, 1960

***Documents on Canadian External Relations* vol. 27 no. 665.**

SECRET. CANADIAN EYES ONLY.

Ottawa, June 10, 1960

CANADIAN POSITION IN RELATION TO ARCTIC WATERS: PASSAGE OF THE U.S.S. SEADRAGON

You will recall that Canadian Naval Headquarters received notification of the intended transfer of the Nuclear Submarine Seadragon in August or September of this year from the Atlantic to the Pacific through the Northwest Passage. You have been considering the implications of this notification and the reply which might be made to it.

The earlier notification from the United States was apparently only preliminary advice that the passage was being considered. The transfer of the vessel to the Pacific has now been decided upon and "Canadian concurrence" for the voyage has been requested. This request will greatly strengthen our claim to the waters of the Canadian Archipelago as Internal Waters. It is recommended, therefore, that advantage be taken of this development and that the request be granted in accordance with the Canada-United States agreed clearance procedure for visits by public vessels between Canada and the United States by a reply being sent on a service to service basis.

N.A. R[obertson]

Marginal note:

SSEA would like channel of reply carefully considered from point of view of protection of sovereign claim to waters. R.C.I.] 10/6

La réponse a été envoyée par la voie militaire.
The reply was sent through service channels.

38. Memorandum to Cabinet, "Canadian Sovereignty over the Arctic Archipelago," June 27, 1960

LAC, RG 22, vol. 545, file ROWLEY – ACND 1960.

CONFIDENTIAL

June 27, 1960

MEMORANDUM TO CABINET

CANADIAN SOVEREIGNTY OVER THE ARCTIC ARCHIPELAGO

At a meeting held on March 8, 1960, the Cabinet had for consideration a memorandum concerning possible Canadian claims to waters of the Arctic Ocean and channels of the Arctic Archipelago. Additional information was asked for on, first, the legal basis of Canada's claim to sovereignty over the islands of the Arctic Archipelago themselves and, second, whether Canada had ever made a formal claim to these islands.

1. The Legal Basis of Canada's Claim to Sovereignty over the Islands of the Arctic Archipelago

The best basis for Canada's claim to sovereignty over the islands of the Arctic Archipelago is founded upon the doctrine of effective occupation which is the most generally recognized ground for sovereignty. There are other doctrines or principles which supplant this one but they carry less weight in International Law. They are founded upon discovery – aided by symbolic acts of possession; the sector principle; prescription; and recognition by other nations and acquiescence to Canada's claim. The relative merits of each are summarized below.

a) Effective Occupation

According to Oppenheim, "occupation is effected through taking possession of and establishing an administration over, the territory in the name of, and for the acquiring state". The key terms are possession and administration. The customary form of administration in polar regions consists of maintenance of police posts, customs houses, post offices, schools, hospitals, scientific, wireless, and weather stations. In the Canadian Arctic Islands, where the climate is severe, it is sufficient that administrative control be exercised only when weather conditions permit travel. It is unnecessary for state authority to be asserted without interruption in all parts of the land all year 'round. In the Eastern Greenland Case of 1931 importance was attributed to such

discontinuous acts in the area under dispute as scientific expeditions, inspections by government in the area under dispute as scientific expeditions, inspections by government vessels, the issuance of permits, hunting expeditions, and so forth.

It is generally admitted that it is not necessary to occupy every one of a group of islands provided that from the occupied islands or places order can be maintained in all of the islands. Military or police forces may be used for this purpose. Furthermore, a state may exercise control exceptionally over a polar area from the temperate zone.

Canada's claim to sovereignty, though long asserted, has been called into question only on one instance in the last thirty years and that was Norway in 1930 over the Sverdrup Islands. That contest was satisfactorily settled with Norway. No notice since then of any other contest or claim has been received. On the contrary, there have been acts of recognition of Canada's title including acquiescence in the requirements for Scientific and Explorers Licences for scientific expeditions to the Canadian Arctic Islands.

Canada fell heir to the rights of Great Britain in the 1860's. By statutes, orders-in-council, and ordinances it has continuously and progressively asserted its administrative authority over the whole of the Arctic territory; and it has likewise since 1904, by the publication of many official maps, depicted the limits of its claims. Apart from this, as indicated in Appendix I, it has supplied the whole area with a complete network of laws, and of law making and law enforcing organs and has engaged in detailed acts of administration which have grown tremendously in number and variety since the 1860's.

One leading authority, Gustave Smedal, cites the handling by Canada of its Arctic territories as a good precedent of how to take effective possession of polar regions, and adds that there is no reason to deny Canadian sovereignty over the territories which it has in this way really brought under effective control and jurisdiction.

Altogether, it is clear that Canada's sovereignty over the islands of the Arctic Archipelago has been effectively established and accepted.

b) Discovery

The views of the authorities on International Law with regard to whether the fact of discovery by itself is a sufficient ground for propriety right is not made clear. Both the Island of Palma Arbitration and the East Greenland Case make it clear on what slight ground title by discovery may be superseded by relatively few acts of settlement and occupation by another state.

The doctrine of discovery, however, is not without merit as a supplementary ground for Canadian sovereignty. A formidable claim to the Canadian Arctic Islands could be made on the basis of past discoveries and derivative transfers from Great Britain.

c) The Sector Principle

Most jurists express the view that the so-called sector principle was a weak foundation under International law. One writer argues that it is “the last survivor of the old hinterland principle as applied to continents and appears to have no stronger basis in International law than that now discarded theory”.

As applied to the Arctic, this principle argues that countries bordering on the Arctic have a valid claim to the territory which is bounded by the northern coasts and lines projected from the extreme eastern and western limits of the coasts to the North Pole. In terms of Canada, Canadian sovereignty would extend to land in the area north of the mainland in the form of a triangle – whose base is the mainland apex the North Pole and sides respectively the 141°W and the 60 °W meridians of longitude (excluding Greenland).

Reliance on this principle by Canada would be necessary only in two cases: (1) as regards land within the claimed territorial limits nor yet discovered (it is extremely doubtful if there is any), and (2) lands therein so remote from settled areas as might be argued are outside the limit of effective occupation (there is none at present that could be so regarded). However, it seems reasonably certain that Canada’s title to both types can more effectively be based on the occupation of the arctic region as a whole.

The attitude of nations with special interests in the Arctic area with regard the acceptance of this principle is summarized in Appendix II.

Since it has a weak foundation in International Law it is questionable whether the sector principle, although propounded at various times to some extent by members of Canadian governments and incorporated in the domestic laws of the U.S.S.R., is an argument which it would be wise for Canada to stress in its claim to sovereignty over the Arctic Islands. Effective occupation is a much surer ground.

d) Prescription

Prescription as a basis for a claim to territory in International Law is so vague that some writers deny its usefulness altogether. Oppenheim defines it as “the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty

over it during such a period as is necessary to create, under the influence of historical developments, the general conviction that the present condition of things is in conformity with international order”.

Canada has for many years exercise sovereignty over the Arctic Archipelago in a continuous and undisturbed manner. As mentioned previously, no foreign states have opposed the Canadian claim since the Sverdrup case by Norway thirty years ago. Apart from this case, the last dispute or disagreement occurred in 1920. In that year, Canada protested to Denmark against the killing of musk-ox on Ellesmere Island by Greenland natives. The Danish Government replied that it considered this islands as a No-man's Land but did not repeat this claim after Great Britain recognized Danish sovereignty over Greenland in September, 1920. In 1921, the Canadian Government informed the Government of Denmark that, should the Rasmussen expedition discover islands and lands in the sector between Canada and the North Pole, these would be regarded as belonging to Canada.

Dean Vincent MacDonald (who did a study of our sovereignty ten years ago) states that it is unnecessary for Canada to base its claim to the Arctic Islands upon this principle since title can be based with greater certainty on the doctrine of effective occupation.

(e) Recognition of Canada's Title

Nations with special interest in the Arctic, such as Denmark, Norway, the U.S.S.R. and the U.S.A. have recognized Canada's position on a number of occasions of which the following are some examples:

- 1) Denmark and Norway in the cases referred to beforehand.
- 2) The U.S.S.R. in 1945, when permission was requested for Soviet flyers en route to California via the North Pole to cross Canadian arctic territory.
- 3) The U.S.A. at various times as outlined in the files of the Permanent Joint Board on Defence and the Department of External Affairs, e.g. recent request to the Canadian Government for permission for two U.S. submarines to enter Canadian territorial waters in the Arctic Archipelago.

School text-books and maps published in foreign countries all over the world show the islands of the Canadian Arctic Archipelago as belonging to Canada. Furthermore, there have been numerous

occasions when foreign newspapers, international conferences and so forth have referred to these islands as being part of Canada.

2. Claims made by Canada to Sovereignty over the Islands of the Arctic Archipelago

As the following examples show by statutes, orders-in-council, ordinances, and statements made by Cabinet ministers, Canada has for years asserted its claim to sovereignty over all of the Arctic Islands:

- 1) The Ruperts Land Act of 1869 as amended by the Imperial Order-in-Council of 1880 to incorporate "...all British territories and possessions of North America not already included within the Dominion of Canada and all islands adjacent to any such territories or possessions."
- 2) The orders-in-council establishing the District of Franklin of 1896 and 1897 in which the district is defined as comprising "Melville and Boothia peninsulas, Baffin, North Devon, Ellesmere, Grant, North Somerset, Prince of Wales, Victoria, Wollaston, Prince Albert, and Banksland, Parry Island, and all those lands and islands comprised between the 141st meridian of longitude west of Greenwich on the west, and Davis Strait, Devon Bay, Smith Sound, Kennedy Channel, and Robeson Channel on the east, which are not included in any other provincial district."
- 3) The establishment of the Arctic Islands Game Preserve in 1926 and the publication of its boundaries as set forth in Schedule "A" of the Northwest Territories Game Ordinance (see Appendix III).
- 4) Statements made by Cabinet ministers on various occasions such as:

New York Times, June 12, 1925

"...Canada's claim to the northern archipelago was again asserted in the House of Commons today by Hon. Charles Stewart, Minister of the Interior. Tabling a large map, Mr. Stewart said that the Canadian claim was to islands lying north of the Canadian mainland up to the North Pole. The limits of Canada's claim, as indicated on the map, formed a great triangle with the mainland as the base and the North Pole at the apex. The western boundary was a continuation of the boundary between Canada and Alaska; the eastern, took a line up Davis straits between

Canada and Greenland and then followed long. 60 west to the Pole. Mr. Stewart roughly defined the territory claimed by Canada as that lying north of Canada, west of Greenland, between 60 and 142."

Special Committee on Estimates, March 23, 1955

"...Hon. Mr. Lesage: Our claim to the northernmost islands has never been challenged. If you will look at the annual report of the department and the map which is attached to the back cover it shows the effective occupation of the northern islands. There is a weather station at Alert bay which is at the northernmost island; then you have a weather station at Eureka, at Isachsen and at Mould Bay. At Resolute you have an R.C.A.F post, a weather station and an air field. At Craig Harbour you have R.C.M.P., at Alexandre Fiord you have an R.C.M.P post. These are all in the Queen Elizabeth Islands which are the northernmost islands..."

House of Commons Debates, November 27, 1957

Hon. Alvin Hamilton (Minister of Northern Affairs and National Resources): Mr. Speaker, the answer is that all the islands north of the mainland of Canada which comprise the Canadian Arctic Archipelago are of course part of Canada. North of the limits of the archipelago, however, the position is complicated by unusual features. The Arctic ocean is covered for the most part of the year with polar pack ice having an average thickness of about eight feet. Leads of waters do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen, then, that the Arctic ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application..."

Conclusion

Canada has asserted its claim to sovereignty over the Arctic Islands since the 1860's and published the limits of its claim as early as 1895. No protest by other nations has been received apart from that of Norway in 1930 and that was settled. Apart from such formal assertions of sovereignty, Canada has made so many displays of effective sovereignty in so many respects, and for so long a period, as

to establish its title to all of the islands in the Arctic Archipelago upon the doctrine of effective occupation in conformity with International Law.

Alvin Hamilton

39. Memorandum, "Canadian Sovereignty," November 17, 1960

LAC, RG 22, vol. 545, file ROWLEY - ACND 1960

Ottawa, November 17, 1960.

CANADIAN SOVEREIGNTY

The legal case for Canadian sovereignty over the Canadian Arctic Archipelago was summarized in the attached memorandum to the Cabinet dated 27 June, 1960. The extent to which Canadian sovereignty extends over the waters between the islands of the archipelago and into the Arctic Ocean has never been defined. The position which Canada should adopt in this regard is at present being considered by the Cabinet. The subject is summarized in a memorandum to the Cabinet dated 1 February, 1960, a copy of which is attached.

Sovereign rights for the purpose of exploring and exploiting the natural resources of the soil and subsoil of the continental shelf would not be affected by claims of sovereignty over the water because the Conference on the Law of the Sea in Geneva in 1958 adopted a convention that the coastal state should exercise these rights out to the point at which the depths of the waters reached 200 metres, or beyond that depth if exploitation of the natural resources was a practicable possibility. This convention will come into force as soon as it has been ratified by twenty-two states.

The Minister of Northern Affairs and Natural Resources is a member of the Cabinet Committee on Territorial Waters which is not concerned mainly with fisheries jurisdiction and the limits of territorial waters. The Committee is chaired by the Secretary of State for External Affairs. An Interdepartmental Sub-Committee on Territorial Waters, on which this department is represented, reports to the Chairman of the Cabinet Committee.

G.W. Rowley

38. Letter from Under Secretary of State for External Affairs to the Deputy Minister of Transport, "SEACOM Cable," May 23, 1962

LAC, RG 25, vol. 11, file 9057-40

SECRET

Ottawa, May 23, 1962

The Deputy Minister,
Department of Transport,
Ottawa

Subject: SEACOM Cable

I refer our letter to your Department dated April 17, 1962, in which we brought to your attention documentation received by this Department from the Deputy High Commissioner for New Zealand concerning the long-term political problems which are likely to be encountered in the landing of the SEACOM Cable at Singapore and in the laying of the cable through waters claimed by Indonesia or the Philippines as territorial or internal waters. Attached to our letter was a copy of a memorandum on the subject dated March 9, from the Secretary of External Affairs in Wellington to the director General of the New Zealand General Post Office.

This question has been given study by our Legal Division, and we are of the opinion that we should concur in the line of action proposed in paragraph 4 (d) of the letter of March 9 referred to above, i.e. that the Philippines and Indonesia Governments be approached informally and, without asking for approval to the laying of the cable, that it be represented that its laying is a matter of practical importance in relation to which it is in the interests of neither side to raise a political dispute concerning territorial claims. Our reasons for concurring in this procedure would be largely similar to those of New Zealand, but there is an additional factor in our case which would also seem to argue in favour of this procedure.

As you may know, Cabinet has for some time had under consideration a recommendation that Canada's claim to the waters of the Arctic Archipelago be implemented in accordance with Article 4 of the Geneva Convention on the Territorial Sea and Contiguous Zone which permits the delineation of the line from which a country's territorial waters may be measured by means of the straight baseline or "headland to headland" system. No decision has been reached by Cabinet on this question, but Cabinet has directed that in the meantime nothing be said or done which might prejudice such a

Canadian claim. There are a number of factors both political and legal involved in this matter, some of which are directly relevant to the question now raised by New Zealand.

Both the Indonesian and Philippine claims are much in dispute. The United Kingdom, France, the United States, the Netherlands, and Australia have, for instance, all delivered notes of protest against the Indonesia extension of territorial waters. In effect, they assert that the Indonesian claim constitutes a violation of the rules of international law concerning the freedom of the seas in that it would convert into national waters vast areas of the high seas freely used for centuries by the ships of all nations.

We were requested by the Australians in December 1957 to make a similar protest. In our reply, we expressed sympathy with the Australian position but stated that, for reasons connected with our national interest in the Arctic Archipelago, we preferred not to make any pronouncement on the Indonesian claim until the general subject of territorial waters was discussed at the Conference on the Law of the Sea at Geneva. Shortly after this the Japanese authorities in Tokyo were also informed that Canada does "not propose to take any position on this question of territorial waters or archipelagos until this is discussed next month at the Conference on the Law of the Sea in Geneva." That is where the matter has remained.

One of the main reasons behind our reluctance to become involved in any dispute over the claims of Indonesia and the Philippines is the apparent similarity of our claim in certain respects. Like Canada's claim to the Arctic Archipelago, the Philippine and Indonesian claims are based in part upon the straight baseline system, as well as on other grounds. There are however a number of dissimilarities between their claims and Canada's.

There might be merit in giving consideration to the possibility of drawing to the attention of the British, New Zealand, and Australian authorities these dissimilarities, explaining that we share their views as to the invalidity of the claims of these countries, and enquire as to whether they concur in our view that the Canadian claim rests on a different and stronger footing. In the circumstances the other old Commonwealth countries might be prepared to give some form of recognition to the Canadian claim, in order to get Canadian support in any dispute with Philippines and Indonesia. On the other hand, it is possible that the Commonwealth countries in question might feel obliged to call the Canadian claim into question in order to preserve their position vis a vis the Philippines and Indonesian claims.

The question is obviously an extremely delicate one, requiring careful consideration as to the best means of handling it without, on the one hand, raising the merits of Canada's claim prematurely, nor on the other hand suggesting any reluctance on Canada's part to call into question the claims of the Philippines and Indonesians because of possible doubts as to the validity of Canada's claim. On balance, it would seem advisable, in our view, not to become involved in any discussions as to the merits of the Indonesian and Philippine claims, if at all possible, either with the other Commonwealth countries or the two countries in question. It may be that at a later stage this will prove unavoidable, in which case consideration could be then given to the position to be taken.

On balance, we believe that we should at this time merely reply to the Deputy High Commissioner for New Zealand along the lines indicated in para. 1 above. Before doing so, however, we would appreciate receiving your views. Since this matter is urgent, we would appreciate learning your views at the earliest possible date.

In view of the importance of this question to Canada and its delicacy at the present time, we should be grateful if this letter could receive very limited circulation, and the information given in paras. 2 to 7 treated as though it were for Canadian Eyes Only.

Under-Secretary of
State
for External Affairs

40. The Under-Secretary of State for External Affairs, “United States Naval Arctic Operations – 1962,” July 18, 1962

LAC, RG 25, vol. 5281, file 9057-40

DEPARTMENT OF NATIONAL DEFENCE

Ottawa 4, Ontario.
18 July, 1962

The Under-Secretary of State for External Affairs, East Block,
OTTAWA, Ontario.

UNITED STATES NAVAL ARCTIC OPERATIONS – 1962

The Maritime Commander Atlantic has been formally notified by the United States Navy of the intended submerged transit of the nuclear submarine USS SKATE through Baffin Bay, Kane Basin and Robeson Channel about 18-23 July, 1962, or, in the event that this route proves not to be feasible, then USS SKATE would attempt to pass through Lancaster Sound, Viscount Melville Sound and McClure Strait about 22-26 July, 1962, on its way to the Arctic Ocean. The notification of the proposed operations was made in accordance with the established procedures for operational visits by warships between Canada and the United States.

The method used by the United States Navy to inform Canadian authorities of the proposed operations is in accord with the recent thinking of the Interdepartmental Committee on Territorial Waters who were consulted on this matter and also with the procedure used in 1960 during similar operations by the USS SEA DRAGON. The recognition of Canadian interests in the Arctic by the United States Navy would appear, if, anything to have enhanced Canada's claims of sovereignty in that area. It, thus, is the intention of the RCN to approve the submarine operation on a Service-to-Service basis.

The Naval Member of the Canadian Joint Staff (Washington), Commodore J.C. O'Brian, RCN, has been invited to take passage in USS Skate as an observer.

(sgd.) James A. Sharpe
(E.B. Armstrong),
DEPUTY MINISTER

41. Memorandum, “Agenda for Tomorrow’s Meeting of the Interdepartmental Committee on Territorial Waters,” September 10, 1962

LAC, RG 25, vol. 5281, file 9057-40

To: MR. CADIEUX

FROM MR. J.A. BEESLEY

SUBJECT: *Agenda for tomorrow’s meeting of the interdepartmental committee on territorial waters*

Arctic Sovereignty: U.S.S. Skate

As you know the general question of the passage of U.S. nuclear submarines through the waters of the Arctic Archipelago was discussed at a meeting of the Interdepartmental Committee on Territorial Waters on June 4, when it was decided that the proposed passage should be handled in the same way as in the case of the U.S.S. Sea Dragon in the past: (i.e. on a “service to service” basis) subject to the approval of the Secretary of State for External Affairs. It was decided also that when the request was received from the U.S. Navy the reply should make it clear that the Nuclear Safety Committee would have to be consulted before approval could be given, so as to indicate some Canadian control over passage through the waters in question. In the event, however, this procedure was not followed.

[section redacted]

... paragraph (c) of the Preamble, paragraph 2 (c), paragraph 5(b) and 5(b) III of the attached statement of clearance procedures) and that the notice given accorded with agreed procedures. Moreover, it is relevant that no notice was given relating to a second ship which carried our joint operations with the Skate at the North Pole, but which did not pass through the waters of the Arctic Archipelago. Our position does not, therefore, seem to have eroded materially.

[section redacted]

5. Apart from the question of notification of the voyage, a separate problem has arisen as a result of the press release issued by the U.S. Navy (see attached copy of telegram 2429 of August 21 from

Washington) without our concurrence. As you will recall, a similar difficulty arose over the U.S.S. Sea Dragon (see attached copy of telegram 2217 of September 1, 1960 from Washington) and at that time we made clear our desire to be consulted at all stages concerning public announcements of such voyages. It would seem necessary, therefore, to consider appropriate action with respect to this aspect of the problem as well.

6. Lieut./Cdr. Bridgman (who has now been replaced by another Naval Officer on the Interdepartmental Committee) and I have had discussions as to the best course of action on the question of notice and approval, and have agreed, subject to the Committee's approval, that one reply be sent to the U.S. Navy acknowledging both messages and pointing out that under the normal operating procedures provided for in the relevant agreement at least 24 hours notice is required for such passages,

[section redacted]

Gas Exploration Permits off Strait of Juan de Fuca

7. As you will recall, this problem was discussed at a recent meeting of the Interdepartmental Committee, and it was agreed that Northern Affairs and National Defence would consult to determine the exact areas covered by some gas permit applications off the Strait of Juan de Fuca with a view to attempting to determine whether they extended beyond the probable boundary line of the Canadian continental shelf, and that a memorandum to Cabinet would be prepared when this information was received. We have heard nothing, however, from either Northern Affairs or National Defence on this question, and it would presumably be of interest to the Committee to learn of recent developments.

Passage of Nuclear Vessel "N.S. Savannah" through Strait of Juan de Fuca

8. A case has arisen of the proposed passage of a nuclear vessel through the Strait of Juan de Fuca (see attached telegram 2507 dated August 29 from Washington) in addition to the proposed passage of a vessel carrying spent radioactive material considered recently. As far as is known the questions posed by the proposed passage of this vessel have not been considered by the Interdepartmental Committee, nor by the Nuclear Safety Committee. It would seem appropriate for the Committee to give consideration to the courses of action on this problem.

Other Matters

9. Other subjects which you might consider worth raising are the nature of a reply to questions in the House on the Law of the Sea (see attached draft) and the proposed letter to Defence Research Board, Department of National Defence, raising the question of unauthorized statements on Antarctic Sovereignty.

J.A. Beesley

42. Draft Memorandum to Minister on Arctic Sovereignty, September 18, 1962

LAC, RG 25, vol. 11, file 9057-40

Re: Draft Memorandum to Minister
on Arctic Sovereignty

[section redacted]

2. With regard to paragraph 6(b), I think we should be prepared for complications. The State Department is fully alive to the sovereignty question and they may balk at any procedure which may not be capable of being construed as without prejudice to the sovereignty issue. My own inclination, which I believe Mr. Menzies shares, would have been to play the press release aspect in a security key, that is, to be prepared, if necessary, frankly to say to the State Department that we had no intention of raising the sovereignty issue but believe that press releases which name specific bodies of water in the archipelago and which did not specify or at least infer Canadian complicity could conceivably encourage others, particularly the Russians, to suggest they should be allowed passage. This could be equally embarrassing to the U.S. Government whose public opinion at least would no doubt be aroused by the thought of Soviet submarines passing through the Archipelago.

43. Extract of Telegram from Secretary of State for External Affairs to Ambassador in United States, October 10, 1962

Documents on Canadian External Relations vol. 29, no. 752

Telegram L-136

Ottawa, October 10, 1962

Secret. Canadian Eyes Only. Priority.

Reference: Your Tel 2429 Aug 29.

USA Nuclear-powered Submarines in Arctic Waters

Consideration was given at the interdepartmental level to this recent exercise with regard to its possible implications for Canadian claims to sovereignty in the Arctic. It was noted that one of the two vessels concerned, the USS *Skate*, had effected passage in both directions through the waters of the Arctic Archipelago, informal notification of such passage having been received through service channels. Compared with the June 1960 voyage of the USS *Sea Dragon*, when Canadian concurrence was requested, notification in this case was merely "for your information." While notification is all that can be required under the agreed clearance procedures between Canada and the US for passage of warships through territorial waters, it was given for the return voyage on August 17 i.e. one day after the trip had actually begun. No reply was sent at the time by the RCN to either message.

2. It was noted further that the subsequent press release reported in your telegram made no mention of prior consultation with Canadian authorities and was thus likely to give the impression that the waters of the Arctic Archipelago are international waters not subject to Canadian jurisdiction or control. You will recall (your telegram 2217 of September 1, 1960) that a similar difficulty arose over the *Sea Dragon* and that we made clear our desire at the time to be consulted at all stages concerning public announcement of such voyages.
3. As a result of this study the Minister has directed that the following reply to the messages from the US Navy should go forward:

“It is noted that in contrast to the passage of USS *Sea Dragon* in August 60, when concurrence was requested six weeks ahead of time, notice of the proposed passage of USS *Skate* was much shorter, and in the case of the return voyage was not received until the day after the voyage had begun, contrary to the agreed clearance procedures, paragraph 5(d) of which provides for a minimum 24 hours’ notice.”

“Request you point this out to COMSUBLANT and ask that minimum possible notification of future nuclear submarine transits be given in order that the required clearances for such passages may be obtained.”

It is understood that this message will be sent today from Naval Headquarters to CANCOMARLANT information CANAIRHED.

4. Moreover, the Minister has agreed that you should take up separately with the State Department the matter of the press release. It is preferred that you follow strictly the line which you took in 1960, namely state, as in the case of the USS *Sea Dragon*, that we expect to be consulted concerning such releases ...
5. We suggest that you wait about one week before making this démarche in case the RCN message filters up to the State Department. Any initiative taken by latter in raising the subject in the meantime might provide a suitable opening for introducing the matter of the press release.

44. ACND Paper, “Canadian Sovereignty in the Arctic,” revised October 19, 1962

LAC, RG 22, vol. 546, file ROWLEY – ACND 1962

CANADIAN SOVEREIGNTY IN THE ARCTIC

1. The Islands of the Arctic Archipelago

All the islands north of the mainland of Canada which comprise the Arctic Archipelago are part of Canada. This is not questioned by any other country. It is considered that Canada's claim can be based upon the doctrine of effective occupation. No land is known between the present known limits of the Archipelago – as shown on the latest maps – and the North Pole and it is most unlikely that any will be found. Should other islands be discovered, extending the limits of the Archipelago, they would, of course, be considered to be Canadian.

2. Waters of the Arctic Archipelago

With regard the interconnecting waters, it is the opinion of the government that a good case can be made for considering them in their entirety to be part and parcel of the Archipelago and hence Canadian internal water. This matter is currently being studied as part of the broad question of defining the territorial waters of Canada.

3. Arctic Ocean North of the Archipelago to the Pole

North of the presently known limits of the Archipelago, the position is complicated by unusual physical features. The Arctic Ocean, which is covered for the most part of the year with polar pack ice, is not open water nor has it the stable qualities of land. Consequently, the ordinary rules of international law may or may not have application.

Before making any decision as to the status which Canada might wish to contend with due regard to the best interests of Canada and to international law.

4. Sovereignty and the DEW Line

Canadian sovereignty in connection with the DEW Line presents no problem since the line runs through an area in which Canada's sovereignty has never been questioned.

5. The Sector Theory

The sector theory is described by a leading authority in international law –Oppenheim – as holding that “territory” lying within the sector formed by meridians of longitude drawn from the extreme points of a coastline fronting on the pole belongs to a coastal state. The word “territory” is of course ambiguous; it could mean waters as well as land. The sector theory has never been adjudicated upon by an international court and many international law authorities do not accept its validity.

Canada has never claimed the sector as such. So-called claims to the Canadian sector, such as those by Senator Poirier in 1907 and by the then Minister of the Interior, Mr. Stewart, in 1925, are not free from ambiguity and would seem to have been intended to apply to a claim to land territory only. (This is not to say that the sector theory might not be useful in furthering any other Arctic claims Canada might in the future see fit to put forward though it will be appreciated that the extent of the theory’s usefulness in this regard is problematical.)

The most comprehensive sector claim yet put forward is that of the USSR in 1926, whereby the USSR claims all the land discovered and to be discovered in the “Soviet Sector”.

In 1904 sector lines were drawn for the first time on Canadian maps to indicate that Canada considered all the territory within these lines right up to the Pole to be Canadian. So far as is known, all the land within these limits has been discovered and Canada claims it by effective occupation. There has been no suggestion that any country entertains any doubts as to Canadian sovereignty over land in this territory.

6. Ice in the Arctic Ocean

Most of the Arctic Ocean is covered by pack ice which is made up of large areas of relatively thin floating ice, never more than a few years old, together with a few so called “ice islands,” composed of much older and thicker ice, which has broken off the fixed ice shelf on the north coast of Ellesmere Island. These may be several miles across and over 100 feet in thickness and they may drift in the pack for many years. Aircraft have landed on both types of ice. The position of any base established on the pack ice is constantly changing as the ice moves with the currents and winds.

Before making any decision as to jurisdiction over the normal pack ice and the ice islands, the government will consider every aspect of

the question with due regard to the best interests of Canada and international law.

7. Soviet and U.S. Activities in the Arctic Basin

In 1937 the Russians established a camp on an ice floe at the North Pole. It was occupied by four men for a period of nine months during which time it drifted to a point off the east coast of Greenland. This station was subsequently called North Pole 1. In 1941 the Russians landed at three places on the sea ice north of Siberia in the vicinity of latitude 80, spending a few days at each place for scientific measurements. A series of expeditions between 1947 and 1949 made over 200 landings on the ice which resulted in the discovery of the Lomonosov Ridge, a great submarine mountain range extending across the central Arctic Basin. From April 1950 to April 1951 a semi-permanent camp, North Pole 2, was again established on the ice of the Polar Basin and it was followed by two more stations in 1954. There have now been eleven of these stations of which two, North Pole 10, and North Pole 11 are still occupied. All were on ordinary ice floes except North Pole 6 which was on an ice island. One abandoned station, North Pole 7, drifted apparently through Robeson Channel and was discovered in 1961 in the pack ice off Clyde Inlet, Baffin Island. The Russians have continued to make a very large number of temporary landings to obtain supplementary information. As a result of all this work the Russians have obtained a great quantity of scientific information, particularly in geophysical subjects.

The United States has also carried out a certain amount of work in the Arctic Basin. Most of their activities have been centred around the occupation of Ice Island T-3. Four other stations on the polar pack ice have been occupied for considerable periods, and many temporary landings have been made. At present two stations are occupied, one on T-3 now near latitude 80°N, north of Alaska and the other, ARLIS II, on a smaller ice island at about the same latitude but further west.

8. Continental Shelf

At the eighty-six nation Conference of the Law of the Sea held in Geneva in the spring of 1958, an international convention was adopted relating to the continental shelf. Canada has signed this convention which will enter into force when it has been ratified by a minimum of twenty-two nations. The Convention on the continental shelf provides that the coastal state shall exercise sovereign rights over the continental shelf adjacent to its coast for purposes of exploring and exploiting the natural resources of the seabed and subsoil. These rights may be exercised out to the point at which the depth of the

superadjacent waters reaches 200 metres, OR, beyond that depth if exploitation of the natural resources is a practical possibility. It should be emphasised that the rights of the coastal state apply only to the seabed and subsoil and no sovereignty over the waters lying above the shelf is conferred on the coastal state by this Convention. The limits of the nation's territorial waters have not yet been finally defined in international law.

Revised 19 October, 1962.
G.W. Rowley & G.M. Carty.

45. Letter to Alexis Johnson, September 16, 1963

NARA, RG 59, Central Foreign Policy Files, POL 33-4, box 3856

September 16, 1963

Dear Alex:

I appreciate the opportunity afforded by your letter of September 5, 1963, to express our tentative views regarding the impact on national defence resulting from the Canadian proposal to extend fisheries limits to twelve miles. The extension of fisheries limits alone would not have a direct adverse effect on U.S. security interests if measured from the sinuosities of the coast. The methods by which Canada proposes to accomplish this, however, might have a serious effect.

I understand that Canada proposes to accomplish extension of her fishing limits by extending the limits of her internal waters under a combination of straight baseline and "historic" claims. Such unilateral procedures removing large areas previously recognized by the U.S. as free high seas would adversely affect U.S. security because of the dangerous precedent that would be established for possible similar action by other countries.

The Department of Defence would not object to the use of straight base lines in those areas where the criteria of Article IV of the Convention of Territorial Sea and the Contiguous Zone are met. A valid case would appear to be the East Coast of Labrador which rather closely resembles the coast of Norway. The Department, however, would see valid objection to the extension of this principle elsewhere, such as the Queen Charlotte Sound, the Gulf of St. Lawrence, the Bay of Fundy, or to the waters north of Canada reaching to the Pole. Recognition of the application of this principle in support of these Canadian claims would create a precedent detrimental to U.S. security interests. As an example, two of the most significant claims adopting the straight base line principle to "Archipelago" island groups are those of Indonesia and of the Philippines. Since their Assertion, both these claims have been protested by the U.S. Should the U.S. recognize the Canadian straight base line claim or her "archipelago" claim to all the waters to her north extending to the Pole, it may be expected that these other nations will press for recognition of their claims with renewed vigour. In view of the importance of the application of this

principle to the security interests of the United States, we have undertaken a further study of its possible world-wide implications. This study will be forwarded to you upon its completion within the next few weeks.

We further understand that Canada may lay claim to Hudson Bay, Hudson Straits, the Gulf of St. Lawrence, the Bay of Fundy, Dixon Entrance and Hecate Straits, and Queen Charlotte Sound on "historic" grounds. The U.S. has in past years consistently refused to recognize the validity of the Canadian historic claim to these waters. Canada, has, moreover, indicated claim to all the islands and all of the waters to her north extending to the Pole. We are aware of the some forty nations which have already extended their fishery limits out to twelve miles, eleven of these taking such action after the 1960 Law of the Sea Conference. Recognition now of the U.S. to the "historic" claim of Canada to these waters undoubtedly would be seized upon by other nations to extend their own internal and territorial seas.

On the other hand, it is recognized that "historic" claims must be evaluated on a case by case basis. However, even if the Canadian claims can be supported, it may not be possible for the U.S. to now change its position regarding their recognition without providing the Soviets or other nations of the world with a precedent upon which they could seize to bolster their own "historic" claims. We understand that the validity of the Canadian historic claim to each body of water involved is now under study by the legal division of your Department.

The concern of the Department of Defence stems from the recognition of the fact that the Free World is an oceanic confederation whose lifelines are the sea lanes of the world. The greatest threat to free world naval power lies in the restriction of the mobility of its naval forces. Should the U.S. recognize the "historic" claim of Canada, we might well anticipate that the Soviet Union would press her "historic" claim to such extensive areas as the Kara, Laptev, East Siberian and Sea of Okhotsk. It is apparent that if these northern seas should become subject to the regime of internal waters the polar routes utilized by our submarines could be effectively closed and the right of our military aircraft to overfly these waters denied. The removal of such vast areas from the regime of "high seas" would severely limit our ability to maintain effective control of the Seas and restrict our ability to meet U.S. commitments to the security of the Free World.

An alternative approach to the Canadian problem may be suggested which might have the advantage of avoiding the need for Canada to extend her "internal" waters in order to attain her

announced objectives of conserving their fisheries or protecting her national security. It would appear that these objectives could best be realized by the Canadian exercise of appropriate specific fishery and security controls over her contiguous seas rather than by attempting to extend her sovereignty over these waters. This important distinction between a nation's sovereignty over her internal waters and the other special controls she may exercise over her contiguous seas is followed in practice in such areas as customs, immigration, health, and in exploiting the resources of the continental shelf. All of these special controls extend our beyond a nation's territorial seas.

With regard to fishery controls, the Canadian position might be strengthened by her negotiating bilateral or multilateral agreements recognizing such exclusive fishery zones which can be justified for reasons of conservation or economic dependence. This approach can be patterned somewhat along the lines of the current negotiations with Ecuador which we understand also seeks to avoid recognition of the application of the straight base line method.

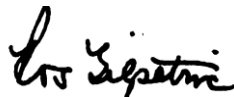
With regard to the security threat which Canada finds posed by the presence of the Soviet trawler fleet close to her shores, it is suggested that the Canadian Government consider taking direct appropriate action against any offending vessels rather than attempt to extend her territorial or internal waters. Under international law a nation is justified to take all the defensive measures required to guarantee its existence against any dangers that may menace it. If necessary, Canada might even establish Defensive Sea Areas for this purpose. The United States, of course, has dealt with the threat of the Soviet fishing fleet by taking such specific action as adequate surveillance, trailing suspected vessels, and by boarding and search where required by the circumstances (e.g., suspected cable cutting incidents). Since the threat of the Soviet trawlers may be viewed as affecting the mutual defence of Canada and the United States, we would be prepared to discuss with Canada such joint navy efforts as may be deemed advisable to reduce or nullify this threat.

It may be significant that the Congress of the United States is also currently concerned with the same aspects of the presence of the Soviet fishing fleet off our shores, both from the viewpoint of the conservation of our fishery resources and national defence. Our handling of this problem and implementing legislation enacted may well influence the U.S. position with respect to the Canadian proposals.

Inasmuch as the Department of Defence considers that the Navy has primary concern in this area, Admiral R.S. Craighill, U.S. Navy, and

Captain H.E. Ost, U.S. Navy, have been designated as its representatives to attend the suggested inter-departmental meeting.

Sincerely yours,

A handwritten signature in black ink, appearing to read "U. Alexis Johnson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

DEPUTY

Honorable U. Alexis Johnson
Deputy Under Secretary of State
Department of State

46. Report Prepared by the Deputy Under Secretary of State for Political Affairs (Johnson)

Foreign Relations of the United States 1964–1968, Vol. XII, No. 317

Washington, undated [likely February 5, 1964].

MEETING WITH CANADIANS ON TERRITORIAL WATERS

As expected, at the meeting in Ottawa February 5 with Canadian Minister of External Affairs Paul Martin, Canada dropped its claims to the waters of the Arctic archipelago but insisted on claiming all other straits and bays on both the East and West Coasts, as well as the Gulf of St. Lawrence, as internal waters. They seemed to admit that the position we have taken offering to acquiesce in a 12-mile fishing zone, measured in a valid manner from the coast and straight base lines, meets the larger part of their fishing problems, and that their claims to most of these other waters are of doubtful international legality. However, in effect the Minister took the position that, as domestic political commitments had been made by Canadian leaders on these more exaggerated claims, it would be politically impossible to give them up and hoped that the United States would bail them out of their problem by not protesting their action. Deputy Under Secretary Johnson pointed out the impossibility of our doing this because of the precedents it would set elsewhere for freedom of the seas, particularly off Soviet coasts, and made the suggestion of a non-contentious (i.e. friendly) suit in the International Court of Justice. Martin was obviously very much taken aback by his failure to obtain all he was seeking from us. After a private meeting with Mr. Johnson and subsequently caucusing with his advisers, he indicated that the Cabinet would consider the matter on Tuesday, February 11, and Mr. Johnson agreed to return to Ottawa on February 12 for further discussions.

47. Memorandum of Conversation, "Discussion of Proposed Extension of Fisheries Zone," February 5, 1964

NARA, RG 59, Central Foreign Policy Files, POL 33-4 – proof with paper document

PART I of II

Subject: Discussion of Proposed Extension of Fisheries Zone

15 February 1964

February 5, 1964

Time 10:15 am

Place: Ministry of External
Affairs, Ottawa

Participants:

United States

U. Alexis Johnson, Deputy Under-Secretary of State for Political Affairs

W. Walton Butterworth, U.S. Ambassador to Canada

Raymond T. Yingling, Assistant Legal Advisor, Dept. of State

William C. Herrington, Special Assistant for Fisheries and Wildlife

Fred E. Taylor, Deputy Special Assistant for Fisheries and Wildlife

H. Bernard Glazer, Special Coordinator, office of Deputy Under
Secretary

William R. Terry, Office of the Commissioner, Dept. of the Interior

Rear Adm. Richard S. Craighill, USN, Director Political/Military Div.,

Office of the Chief of Naval Operations

Captain Herman Ost, USN, Office of the Chief of Naval Operations

Canada

Paul Martin, Secretary of State for External Affairs

H.J. Robichaud, Minister for Fisheries

Marcel Cadieux, Deputy Under Secretary for External Affairs

S.V. Ozere, Assistant Deputy Minister for Fisheries

J.A. Beesley, Legal Division, Dept. of External Affairs

Commodore R.W. Murdoch, RCN, Director of Intelligence

Lt. Comdr. Westwood, RCN, Department of National Defence

The Secretary of State for External Affairs Paul Martin opened the meeting with a formal statement which set forth the major alteration in the Canadian proposals: that of deferring for the present their claim to the waters of the Arctic Archipelago. Minister of Fisheries Robichaud then made a statement on the subject of the retention of fishing rights so as to cover areas and species now being fished.

A brief discussion ensued on the subject of "reciprocal" rights which was resolved to the satisfaction of all by the reading of Deputy Under Secretary Johnson's formal statement of December 4, 1963. Mr. Johnson then went on to summarize his understanding of the formal statements which had just been rendered. It was brought out that Canada was maintaining its claim to all contiguous bodies of water, while deferring the question of the Arctic Archipelago. Furthermore, there would be in effect a freeze of the status quo regarding U.S. fishing rights within these contiguous bodies of water. Such a freeze would not cover the volumes of catches. The U.S. position, Mr. Johnson explained, was based upon full customary rights up to the 3-mile limit, except where our treaty rights permit fishing up to the shore. In answer to Mr. Robichaud's query, Mr. Harrington explained that the king crab fishing was based upon the continental shelf concept. Mr. Johnson added that the U.S. does not accept the claim and position advanced by several of the Latin American countries. There is no de facto acceptance of a 12 mile zone. Rather, there exists an "impasse" between the U.S. and Ecuador, for example. For its part, U.S. vessels can fish up to the shore line upon the purchase of licenses.

Mr. Robichaud brought out that it was the intention to apply to US trawlers the restrictions applied to large Canadian trawlers in such waters as the Gulf of St. Lawrence. Mr. Johnson then raised the problem of the "now being fished" formula which would mean that the U.S. could not change the type or area of its fishing, but could only do more of what was now being done. He pointed out that he had deliberately used the expression "customary" rather than "historic" fishing rights. In the ensuing discussion Mr. Ozere pointed out that this feature of the Canadian position is important with regard to other foreign countries which might wish to establish new fisheries in waters contiguous to Canada. The deputy Under-Secretary observed that the proposal for agreement on mutually nondiscriminatory regulations was very useful. At this point Mr. Terry elicited the fact that the ruling concerning large trawlers would be in addition to such nondiscriminatory regulations. With regard to treaty rights, Mr. Johnson explained, their modification would require more than mere executive action. Turning then to the question of internal waters, he declared that the U.S. cannot acquiesce for agree with the Canadian claim. Our arguments have been presented and we feel that protest

per se would be inadequate. The proposed Canadian action would create an undesirable precedent in spite of any such protest. The U.S. position therefore, is necessarily affected unless we take vigorous action to oppose Canada. He then that preceded to question the usefulness of the 12 mile zone, fisheries-wise, in the gulf of St. Lawrence. It was clear from the discussion which then developed that there was some difference of opinion between Canadian and U.S. fishing experts as to the value of U.S. catches and the location of customary U.S. fishing grounds within the Gulf.

Mr. Martin characterized this entire matter as an essentially serious political problem which he felt was perhaps greater than any problem which it might create for the U.S. He described the two countries as sharing in the fish wealth of these waters, as cooperating in keeping other national fisheries out, and as demonstrating the good relations between the two countries. He describe any extreme U.S. action as pushing legalism beyond any reasonable need. The deputy Under-Secretary replied that it was not a question of legalism but of our fishing interests (particularly off the coast of Latin America) and our defense interests world-wide. Recognizing Canada's political commitment to extend the fishing zone to 12 miles, Mr. Johnson pointed out U.S. willingness to acquiesce therein. He suggested that Canada can recently explained that it is accomplished its commitment within the allowable limits set by international law. The U.S., he said, has been most forthcoming with regard to the question of the 12-mile zone and the use of baselines. Mr. Martin, seconded by Mr. Robichaud, explained that the political commitment went beyond the question of zones and included internal waters. The Ambassador asked at this point if whether it was a commitment or merely an expression of desire. Mr. Martin concluded his remarks about factors which created international law by stating that if the U.S. values its relations with Canada, it would make no protest of the Canadian action, but only possibly a "strong grunt." A protest, he added, would not change any law that might be created by the action, but would certainly aid other countries in opposing Canada's move. Mr. Johnson turn this around by explaining that the proposed Canadian action will aid other countries against the U.S. Rejecting this view, Mr. Cadieux opined that the U.S. was in a unique position, that it had a special relationship with Canada. Therefore, the U.S. attitude toward Canadian action could be of a special nature and need not be that of one country towards another in the world community. Mr. Johnson asked whether Canada viewed its position as not being contrary to international law. A legal situation would be created by the U.S. responses to the Canadian action, replied Mr. Martin. Other countries, Mr. Yingling interjected could protest despite any inaction by the U.S. He emphasized the difference between agreeing to the extension of fishing rights and

agreeing to the extension of territorial sovereignty. With regard to the latter, the U.S. is challenging any such action by other countries.

In view of the Canadian position with regard to the application of international law, Mr. Johnson suggested that the two sides agree to a non-contentious, friendly, suit to the International Court of Justice. Such a suit would preserve the position of both sides. The loss by either side would affect only the given bodies of water. A victory, on the other hand, would preserve the claimed position. Mr. Martin described this proposal as dangerous, despite Mr. Johnson's assertion that such a demonstration of support for the rule of law should aid U.S.-Canadian relations. Mr. Martin held that it would be a very unwise course. It would be the first time in history that a dispute between the two countries had been made a matter of court action. This matter, he declared, was more than a legal dispute. If the U.S. were to win, Canada would be placed in an invidious position, which could not but develop animosity between our two peoples. Our serious reaction is engendered, Mr. Johnson observed, by the fact that this is not merely a bilateral matter. Mr. Martin responded with the thought that the U.S. should accept the Canadian position despite its unhappiness with same. There is too much involved for the U.S. to take such a relaxed attitude, Mr. Johnson replied. Mr. Ozere felt that if it could be argued that the loss of a suit in the ICJ would not create a precedent, it could as well be argued that the acceptance of the Canadian plan would also not be precedent-creating. Mr. Johnson, seconded by Mr. Yingling pointed out that the Canadian proposals very much weakened the U.S. position. The latter described the extension of sovereignty to solve a fishing problem as tantamount to using a cannon to shoot down a sparrow. Mr. Johnson then reiterated his thought that a 12-mile fishing zone should go far towards solving the fishing problem, especially in the Bay of Fundy. Alluding to the Tory opposition, Mr. Martin said that this disagreement was viewed by them as a most serious dispute in U.S.-Canadian relations. The Ambassador then summed up his understanding of the Canadian position as being, that in the event of a disagreement between our two countries which could not be resolved by arbitration, the U.S. must necessarily accede to the position of Canada. This he described as being completely untenable.

Receiving Mr. Johnson's confirmation that this was the **firm** position of the U.S., Mr. Martin observed that it was a very serious thing and suggested adjournment of the meeting until after lunch. While the wording of the press release was being considered, Mr. Robichaud observed that his Government has thus far been able to contain the Canadian fishermen. The situation has now reached the point where action must be taken. Answering the Ambassador's query, he acknowledged the intent to exclude certain foreign fisheries, such

as those of Portugal. The Gulf of St. Lawrence he described as being the point of most serious interest.

48. Memorandum of Conversation, "Discussion of Proposed Extension of Fisheries Zone," February 5, 1964

NARA, RG 59, Central Foreign Policy Files, POL 33-4

PART II of II
Approved in G,
15 February 1964

February 5, 1964
Time 2:45 pm
Place: Ministry of External
Affairs, Ottawa

Participants:

United States

U. Alexis Johnson, Deputy Under-Secretary of State for Political Affairs
W. Walton Butterworth, U.S. Ambassador to Canada
Raymond T. Yingling, Assistant Legal Advisor, Dept. of State
William C. Herrington, Special Assistant for Fisheries and Wildlife
Fred E. Taylor, Deputy Special Assistant for Fisheries and Wildlife
H. Bernard Glazer, Special Coordinator, office of Deputy Under Secretary
William R. Terry, office of the Commissioner, Dept. of the Interior
Rear Adm. Richard S. Craighill, USN, Director Political/Military Div.,
Office of the Chief of Naval Operations
Captain Herman Ost, USN, Office of the Chief of Naval Operations

Canada

Paul Martin, Secretary of State for External Affairs
H.J. Robichaud, Minister for Fisheries
marcel Cadieux, Deputy Under Secretary for External Affairs
S.V. Ozere, Assistant Deputy Minister for Fisheries
J.A. Beesley, Legal Division, Dept. of External Affairs
Commodore R.W. Murdoch, RCN, Director of Intelligence
Lt. Comdr. Westwood, RCN, Department of National Defence

The afternoon session was opened with the review by Mr. Martin of what he described as the still unresolved and very disturbing problem. Referring to the declarations made in the past by Canadian leaders, he urged the application to the Bay of Fundy of the U.S.

approach to the question of Hudson Bay. He expressed understanding for the U.S. over-all position, but hoped that we would take into consideration the possibility of impairment of U.S.-Canadian relations. While the U.S. has been helpful with regard to the 12-mile zone, the other residual problems require, in his view, passive treatment by the U.S. to undercut any moves by other countries. He reiterated the seriousness with which Canada regards a settlement by means of ICJ adjudication. Mr. Martin concluded by referring to the reaction of the U.S. to previous statements by Canada regarding the Bay of Fundy.

A general discussion ensued regarding the strength of the legal factors involved, the U.S. position on the high seas question, and the value to Canada of no public protest by the U.S. Deputy Under Secretary Johnson pointed out that our acquiescence in the Canadian proposal for a 12-mile fishing zone was unprecedented. We are most sympathetic with the Canadian fishing problems and believe such to be manageable if separated from the question of territorial claims. To the degree to which we acquiesce in Canada's territorial claims, the same are advanced and the U.S. position is correspondingly weakened elsewhere. Our adherence to the criteria of the 1958 Geneva Convention regarding baselines was coupled with the belief that the application of same should meet the major portion of the fishing problem for Canada.

There was some inconclusive discussion of the U.S. reaction to Canadian steps to force Russian ships out of the Bay of Fundy during which Mr. Johnson emphasized the difference from our standpoint in enclosing a bay as internal waters and the twelve-mile zone which, in practice, closes all of a bay to fishing. At this point, after a brief exchange, Mr. Martin asked permission to caucus privately with his delegation.

The Canadian delegation returned to the conference table and Mr. Martin led off with a review of the situation in which he expressed disappointment that the Canadian concession on the Arctic Archipelago had not been more impressive to the U.S. He described Canada as having made fundamental concessions without having received any in return. U.S. Acceptance of the 12-mile zone, he said, was no concession, as such a zone was as valid in international law as a 3-mile zone. Furthermore, this does not meet Canadian needs. Reading from the Prime Minister's 1962 reply in Parliament to a question on the status of the Bay of Fundy, he asserted that Canada cannot give up its claim. He said that it was not too much to ask that the U.S. accept Canada's claims to the small areas involved. A Canadian government could not survive if such claims were abandoned.

Mr. Johnson replied that a statement by a country does not change rights or the legality of the situation. He differed with the Foreign Secretary regarding the fact of U.S. concessions and repeated his feeling that the degree to which fishing problems were involved was still unclear. It was brought out that the only point on which Prime Minister Pearson and the late President Kennedy had disagreed was that regarding the extension of Canada's fishing zone. The U.S. has, however, receded on the 12-mile zone. Mr. Yingling pointed out that the Prime Minister has said nothing regarding "historic" waters. During the discussion which followed Mr. Yingling, referring to the status of the Bay of Fundy, cited the 1854 arbitration award in the case of the SS WASHINGTON, which held that Fundy was not a British bay or indeed a bay at all and required Great Britain to pay the sum of \$3,000 as damages. Minister Martin observed that the Canadian Supreme Court had stated that this ruling does not affect the validity of Canada's claims. Referring once more to the political factors involved, he urged the U.S. not to make it difficult for Canada by making it easy for other countries to contest Canada's claims. Mr. Yingling alluded to the fact that part of the Bay of Fundy is in the U.S.

There was a brief discussion between Messrs. Johnson, Cadieux, and Yingling concerning Hudson Bay and the Bay of Fundy, which ended by Mr. Johnson repeating the fact that silence on our part regarding Canada's claim would prevent our being able to press our opposition to similar claims elsewhere in the world. Mr. Martin asked if the U.S. could not plead the special circumstances of its relations with Canada when confronting other countries. Canada's action, Mr. Johnson replied, would greatly strengthen the case of other countries against the U.S. He added that the Sea of Okhotsk was very much in our mind in this regard. Mr. Martin said that it was a question of how a protest was launched and added that it should be done so as not to be embarrassing to Canada. The Ambassador interposed the remark that it was unwise to obfuscate the nature of our misunderstanding and pointed out that the U.S. would not seek permission to overfly or sail through such waters as Canada would claim. Our disagreement could have far-reaching effects and must be clarified. Mr. Beesley suggested that Canada would ignore its claim to these "internal" waters with regard to the U.S. The U.S. would not need or be expected to ask permission to make entry nor would any protest of any such entry be made by Canada. Hence, in his view, there would exist no acceptance by the U.S. of Canadian claims. Mr. Yingling, replied that Canada's silence in the face of such action by the U.S. would constitute *de facto* permission (as Canada's sovereignty would have been acknowledged through voluntary inaction). IN any event, Mr. Johnson said, such a solution would not solve U.S. problems with third countries. The USSR, for example, could agree with North Korea to maintain the Sea of

Okhotsk against U.S. entry (in a manner similar to that which Canada proposes regarding the Gulf of St. Lawrence). Mr. Beesley asked whether the U.S. was motivated by legal objectives or Naval interests. To this Mr. Yingling replied that we opposed Canada's position because it was legally unsound. We don't have different laws for different people. Mr. Beesley then pointed out the undesirability of rigidity. He said there was room for change, that the whole question was highly subjective, and that Canada would be made an object lesson by any ICJ action.

Mr. Robichaud then asked to what degree the U.S. would protest. The Ambassador in turn asked whether Canada intended to adhere to its entire package of proposals. Receiving an affirmative answer, Mr. Johnson said the protest would include all waters claimed as "historic" (except Hudson Bay). However, rather than it being a protest, we would suggest a friendly suit. Mr. Martin then asked whether the US would be willing to delay such a protest for as much as one year. Mr. Johnson responded negatively and indicated that it would be most difficult for us to stop short of judicial action. Mr. Beesley suggested that Canada would refuse to accept the jurisdiction of the court, but Mr. Martin said the damage would be done in any event, and added that there seemed to be no way at present to settle the problem. He said that he wanted time to review the whole matter with his colleagues and asked if the U.S. Delegation would be willing to return to Ottawa on February 12. Mr. Johnson agreed to a fourth meeting on the above date and repeated our view that court action would be necessary should Canada continue with its present plans.

49. Letter from JA Beesley, "Canada-United States Co-Operation in the Arctic," July 12, 1968

LAC, RG 25, vol. 15729, file 25-4-1

U.S.A. Division
Legal Division

Security: Restricted
Date: July 12, 1968

Your memo July 10, 1968

Canada-United States
Cooperation in the Arctic

Further to your memorandum under reference we would like to make the following preliminary comments on par. 3.A. of your memorandum.

2. As to the situation of the land in the Arctic Archipelago, following a Cabinet decision of March 8, 1960 "that the Minister should ascertain the general legal position on sovereignty over the islands" a memorandum was prepared on the question and its conclusion on June 27, 1960 was as follows:¹⁰⁷

"Canada has asserted its claim to sovereignty over the Arctic Islands since the 1860s and published the limits of its claims as early as 1895. No protest by other nations has been received apart from that of Norway in 1930 and that was settled. Apart from such formal assertions of sovereignty, Canada has made so many displays of effective sovereignty in so many respects, and for so long a period, as to establish its title to all of the islands in the Arctic Archipelago upon the doctrine of effective occupation in conformity with International Law."

3. Since the conclusion speaks for itself, no further comments are required except that we could not accept any suggestion that any other State might have any sovereign rights on the land of the Arctic Archipelago, and we should guard against any activity by other States which might so suggest.

4. As to the waters of the Arctic Archipelago, we are still bound by a Cabinet decision of March 15, 1956, as stated in a letter from the Privy Council Office dated April 6, 1956 sent to all Department's cautioning them:

¹⁰⁷ Memorandum reproduced in this volume as Document 37

“to take no action that might compromise a later claim by Canada that the waters of the Archipelago are Canadian inland waters.”

“For present purpose these might be taken as waters within a line starting at Resolution Island, southeast of Baffin Island, and running from headland to headland in a rough triangle north to the top of Ellesmere Island and thence southwest to Banks Island and the Arctic coast of Canada.”

5. To summarize there is no doubt concerning Canadian claims to the land of the Archipelago. As to the waters or ice, while the Canadian legal claim is not as strong as is the case with the land, we are bound by the Cabinet decision referred to above to ensure that in all discussions with other States to take no action that could prejudice our claims.

J.A. Beesley
Legal Division

**50. Letter from Ivan Head to Prime Minister,
“Canadian Territorial Claims in the Arctic,” March
10, 1969**

LAC, Ivan Head Fonds, R 12259, vol. 27

CONFIDENTIAL

MEMORANDUM

For: The Prime Minister
From: Ivan L. Head

March 10, 1969

Subject: Canadian Territorial Claims in the Arctic

Introduction

1. Canada may claim Arctic territory on one of three different concepts. These are (in order of increasing magnitude):
 - (a) Land areas alone, on the basis of effective occupation, plus surrounding territorial seas, and selected bays or gulfs on “historical” grounds.
 - (b) land areas, plus all intervening archipelago waters as internal waters by drawing very lengthy baselines around the archipelago.
 - (c) All land, water and ice in the sector bounded on the west by the 141st meridian of west longitude and on the east by an extension of the 60th meridian of west longitude.
2. On whatever concept the claim may be declared formally, it will have no effect upon the submerged minerals offshore of the mainland or the islands for all these land areas are rooted in a single, common continental shelf and are thus Canadian automatically and without the necessity of making any claim. (Where the seabed lies at a depth in excess of 200 meters it is not so deep, I understand, as to be beyond the limits of “exploitability”).
3. Canadian silence heretofore has contributed to the consolidation of her territorial title to land areas by avoiding any possibility of rejections of Canadian claims, and reducing the probability of competitive claims.

Continued silence will not be equally conducive to our water claims, if any. Increasing navigation forces Canada to make some declaration promptly, if she intends to do so.

Argument

Canada's territorial claims in the arctic regions may be classified by their extent, in order of increasing magnitude, as follows:

- (a) claiming the continental land mass, islands of the arctic archipelago, and appertaining territorial seas;
- (b) by extending base lines on a headland to headland basis so as to enclose all of the archipelago islands and the continental land mass within them, and claiming the land mass, the islands, and all intervening straits, channels, bays, and inlets as internal waters (having the same legal quality, territorially, as land);
- (c) by extending the Alaska-Yukon boundary (the 141st meridian of west longitude) north to the pole, and by extending the median line between Baffin, Devon and Ellesmere Islands on the west and Greenland on the east north to the pole (having the 60th meridian of west longitude) and claiming everything that lies between, be it land, water or permanent ice, under the "sector theory".

A variation on claim (a) would be to claim, in addition to the territorial seas, certain, but not all, of the bays and inlets as "historic bays".

The extent of the claims has no bearing on the proprietary rights in minerals submerged off-shore if my understanding is correct that the continental land mass and all the archipelago islands are rooted in a single, common continental shelf. This means that no matter how far Canada extends or modifies her territorial claims (within the three categories above) offshore minerals are Canadian. The Continental Shelf Convention states explicitly that the coastal state exercises sovereign rights over the shelf for the purpose of exploring it and exploiting its natural resources. The Convention further states that these rights are exclusive and cannot be lost by non-use, nor do they depend upon effective or national occupation, or on any express declaration. Where the seabed lies at a depth in excess of the 200 meters specified by the Convention, it is not so deep as to be beyond the limits of exploitability.

The three classifications shall be dealt with briefly, below:

(a) Claiming Land & Territorial Seas

There is no doubt in my mind that Canada's claims to the land areas are incontestable. There have been 4 significant international adjudications or arbitrations dealing with barren or remote territory. The criteria for successful claims set up by those tribunals are remarkably alike and may be met by Canada. These have been stated as: "exercise exclusive authority" (Arbitration - 1931, Clipperton Island Award; France-Mexico); "continued display of authority" (Adjudication - 1933 - Permanent Court of International Justice; Legal Status of Eastern Greenland; Denmark-Norway); "occupation.... must be effective" (Arbitration - 1928 - Island of Palmas; United States - Netherlands).

"Effective occupation" has come to be accepted by all the major publicists as the test to be applied. The Island of Palmas Case was followed in this respect by the Chairman of the Tribunal arbitrating the Rann of Kutch dispute between India and Pakistan. This award was delivered on February 19, 1986, and is the most recent international statement on the subject; the arbitration is the fourth of the group mentioned above. Some parts of the Chairman's opinion are interesting in this respect:

"Territorial sovereignty implies, as observed by Judge Huber in the Island of Palmas Case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested.

"The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems."

later

"... the greater part of the disputed territory is a barren tract incapable of habitation and of any but intermittent use for limited purposes, and that the requirement of occupation ... is less essential in relation to such a territory."

still later

“... the activities undertaken by Kutch in these areas cannot be characterized as continuous and effective exercise of jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet partakes of characteristics which, having regard to the topography of the territory and the desolate character of the adjacent inhabited region, come as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances.”

These criteria, applied in the Arctic, clearly support Canada's claims. Even more important, from Canada's point of view, is the fact that there is no competing claimant. The international legal structure does not require Canada to establish its claims by measuring them in the abstract against some theoretical pro forma. Minimum legal requirements there are, and these Canada satisfies. Thereafter, however, our claim can be defeated only by a superior claimant. As stated by the PCIJ in the Eastern Greenland Case: “Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is stronger ... It is impossible to read the records of the decisions in the cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”

Obviously, Canada's claims to the land areas not only meet the minimum criteria but are superior to those of any other power. The Soviet Union claims its arctic area under the sector theory (the only State so to do) which requires as a corollary that it cannot claim outside the sector. The United States has never disputed any Canadian claims nor made any of its own. The United States had reserved the right to claim on the basis of Peary's overland trip to the pole in 1909 and on Byrd's polar flight in 1926. The literature is silent on the point but it is likely correct to suggest that “reserved” rights (in a sense similar to the old concept of “inchoate” title) will expire if not exercised within a reasonable period of time. In any event, exploratory voyages can in no sense compete with “effective occupation” as a foundation to claims. Even so, apart from Sverdrup's Norwegian

expedition in 1898-1902, every major arctic discovery since Frobisher and Davis in the 16th century has been made by an Englishman.

It need only be added that a three mile zone of territorial seas, measured from reasonable base lines, appertains to each of the islands. Subject to correction by geographers, my impression is that only a single channel in the archipelago is less than 6 miles in width and thus subject to being closed off completely on a baseline projection (it surely not having been regarded previously as a part of the territorial sea or the high seas, not any historic rights of passage having been established through it). I refer to Bellot Strait separating Somerset Island from Boothia Peninsula. Interestingly, however, Amundsen of Norway navigated this channel during his three year westbound voyage through the Northwest Passage in 1903-06. (But examine the width of Nansen Sound).

(b) Claiming the archipelago waters as internal

The legal distinction between internal and territorial gives to the former the legal character of a land-locked lake. In the result no rights of innocent passage exist.

The technique by which Canada could attempt to claim the archipelago waters as internal is that of extending baselines from island to island, thus enclosing the channels on the landward side. The straight base-line system for measurement of territorial seas is a product of the 1951 International Court of Justice decision in the Norwegian Fisheries Case (Norway-United Kingdom) and since made part of conventional international law by inclusion in the Territorial Seas Convention. It is a major variant of the old, "sinuosity of the coastline" system. To apply straight base lines around an archipelago of the size of that in the Canadian arctic would be a grotesque expansion of the words of the Convention:

Art. 4(1) "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed ..."

Art. 4(2) "The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters."

These standards must not be overlooked in any consideration to close off Viscount Melville Sound (120 miles wide), Foxe Basin (240 miles) or Hudson Strait (100 miles).

There are only two other major island archipelagos in the world – Indonesia and the Philippines. Both of these States have laid claim to thousands of square miles of open sea by a base-line enclosure. These claims are denied by virtually every maritime State because their effect is to convert vast areas of high seas into internal waters and to close a number of major shipping routes of long-standing international usage. There are a number of distinctions between these two Asian examples on the one hand, and the Canadian Arctic on the other – closer geographic formation, remoteness, economic interests in common with Canada – yet there is little doubt that any Canadian claim of this nature would nevertheless be resisted by most States if only to deny legitimacy to the Indonesian and Philippine claim.

Incidents which the international community would cite as assertion that these waters are international are such voyages as those of Amundsen in 1903-06, the 1954 forcing of the ice of McClure Strait by the two U.S. icebreakers, and the submerged passage of that same route by the United States nuclear powered submarine Seadragon in 1960. There may be incidents of still other voyages of which responsible Canadian government departments may be aware.

Offsetting the effect of these voyages to an undetermined extent is the statement made in the House of Commons in 1957 by Prime Minister St. Laurent that American vessels servicing DEW line stations were required to apply for waivers of the provisions of the Canada Shipping Act, thus acknowledging Canadian sovereignty of the archipelago waters (because Canada has not jurisdiction to enforce its legislation extra-territorially upon aliens).

A decision by the Canadian government not to claim the archipelago waters as internal through the baseline technique is not inconsistent with claiming either or both of Hudson Bay and the Gulf of St. Lawrence. These latter claims would presumably be made on “historic” grounds, having nothing to do with base lines. It must be remembered, however, that if these two bodies of water are claimed by Canada to be internal, then the provinces will unquestionably contend that the submerged mineral resources should be regarded as being the property of the provinces. At the very least, the provinces bordering these two bodies would argue that the offshore Minerals Reference could scarcely apply inasmuch as it referred to waters, *inter alia*, “outside the harbours, bays, estuaries and other similar island waters”. It will be difficult, if not impossible, politically, to distinguish

between the phrase “internal waters”, and “inland waters” in resisting such an argument.

The advantage to Canada for security purposes of these two bodies of being recognized as internal waters is immense. All foreign shipping would then be by sufferance, not as of right. Should these waters be of the character of high seas, they may be navigated legally by foreign navies, even by submerged submarines. I don't know whether our defence strategies have contemplated a scenario involving a Soviet missile-carrying submarine parked on station in Hudson Bay.

(d) Claiming the Arctic “Sector”

Apart from the occasional grandiose and romantic statements by various Prime Ministers that Canada extends “right up to the pole”, Canada has never formally made such a claim. It is highly unlikely, should such a claim be advanced, that it would be met by any degree of international acceptance (apart from the Soviet Union which itself claims on a sector basis). Indeed the result of a sector claim is to treat indiscriminately water, ice and land as having the national character of the contiguous State. The water and ice, in short, would be internal for purposes of international law.

Challenges to a sector claim would be based on a number of factors including the Arctic voyages already mentioned. Two other feats of navigation, and perhaps more, would also be cited: the submerged navigation of the United States' nuclear-powered submarine Nautilus from Bering Strait, below the pole, to the Greenland Sea in 1958, and the later voyage of the U.S. submarine Skate which surfaced through the ice at the pole in 1959. (It is possible, of course, that a sea-chart might disclose that both submarines stayed outside of the Canadian sector, navigating in the American (Alaska) and Danish (Greenland) sectors.) Both voyages were undertaken with great secrecy and it is virtually certain that Canada was not informed in advance of either, let alone consulted.

Conclusion

Canada has never stated clearly its territorial claims in the Arctic. This silence has contributed to a perfection of title for it has avoided the possibility of other States denying our claims, and has reduced the probability of competitive claims.

All States, in the course of their history, found their territorial claims on various grounds: on discovery, on intended possession, on constructive possession, on actual possession. The list is not

necessarily progressive; the grounds may be regarded as accumulative. This collection of diversified claims to title is recognized in international law and is called "historical consolidation".

Time and circumstances both have favoured Canada in the arctic. Geography, terrain and climate are all losing their deterrent power and Canada's occupation of the land areas is progressively becoming increasingly effective.

Should it be Canada's intention to claim water, however, the same arguments will not favour us. Increased navigation is the product of foreign (largely American), not Canadian, efforts. Should a claim be contemplated, it should be made promptly. Against any real or imagined advantages which would accrue to Canada from such extensive claims must be measured the hostility and resistance of other States.

Even base-lines claims of a proper (i.e. not island to island) sort do not necessarily mature over the years. It may be questioned what progress we have made on Dixon Entrance in the past half century; we have resolutely reserved the right to claim, the United States has resolutely rejected the possible claim.

This being so, it is my view that it would be of immense advantage to Canada (both internationally and domestically) if you and President Nixon could reach some preliminary agreement on the closure of Canadian base lines on both the Atlantic and Pacific (and perhaps Arctic) coasts.

51. Memorandum for Cabinet, "Canadian Sovereignty in the Arctic," March 20, 1969

LAC, RG 12, vol. 5561, file 8100-15-4-2, pt. 5

March 20, 1969

DRAFT

MEMORANDUM FOR CABINET

CANADIAN SOVEREIGNTY IN THE ARCTIC

INTRODUCTION

The purpose of this memorandum is to outline the legal and other considerations relating to Canadian sovereignty over the Arctic islands, waters and offshore resources, and to make recommendations and request instructions in connection with these matters. The memorandum is supported by a number of Annexes and deals with:

- I – The Canadian Arctic Islands
- II – The continental shelf in Arctic areas
- III – The waters of the Polar Basin
- IV – The waters between the Canadian Arctic islands
- V – The "Manhattan" Project

Conclusions and recommendations regarding each of the above headings are grouped together beginning at page 12.

I – CANADIAN ARCTIC ISLANDS

Legal Position: Effective Occupation

2. Canada has complete and unchallenged sovereignty over the islands north of the Canadian mainland. The legal basis for Canada's claim arises mainly out of the doctrine of effective occupation, which under international law is the most generally recognized means of establishing sovereignty. Since falling heir to the rights of Great Britain

in the 1860's, Canada has continuously and progressively asserted its administrative authority over the whole of the Arctic mainland and islands; and since 1904 it has depicted the limits of its claims by the publication of many official maps. Canada has supplied the whole area with a complete framework of lawmaking and law-enforcing organs, and has engaged in detailed acts of administration which have grown tremendously in number and variety to include, for instance, the distribution of Family Allowance cheques to the Eskimos. One leading international authority, Gustav Smedal, cites Canada's handling of its Arctic territories as a good precedent of how to take effective possession of polar regions. (See Annex I for a further discussion of effective occupation and Annex II for a summary of Canadian activities in the Arctic).

Other grounds for Canada's claim

3. The Canadian claim to sovereignty over the Arctic islands is also supplemented by past discoveries and derivative transfers from Great Britain. In addition, Canada's claim is supported under the doctrine of title by prescription (that is, the continuous and undisturbed exercise of sovereignty over a period of years), as well as by virtue of recognition by other states. Since resolving disputes with Norway (in 1930) and Denmark (in 1920) concerning the Sverdrup islands and Ellesmere Island respectively, no foreign state has opposed Canada's claim to the Arctic islands for some forty years. In addition to the fact that they have advanced no competing claims, foreign states have implicitly recognized Canada's title by allowing their nationals to submit to Canadian licensing requirements in respect of scientific expeditions and mineral licensing requirements. Tacit acquiescence is also indicated by the fact that school text-books, maps, scholarly treatises, newspaper articles, and official publications in foreign countries all over the world show the Arctic islands, or refer to them, as being part of Canada. In particular, those foreign states with a special interest in the Arctic – Norway, Denmark, the USSR and the USA – for many years have all demonstrated their acceptance of Canada's claim in a variety of ways.

"Sector Principle"

4. References have been made in the House of Common and in the press to the so-called "sector principle", according to which countries bordering on the Arctic allegedly have a valid claim to the territory which is bounded by their northern coasts and lines projected from the extreme eastern and western limits thereof to the North Pole. Most jurists agree that this theory has a weak foundation in international law. Moreover, Canada's record of adherence to the theory has been

uncertain and fluctuating. For these reasons previous Canadian governments have concluded that it would not be wise for Canada to stress the sector principle in support of its claim to the Arctic islands. Effective occupation is a much surer ground. (Attached as Annex III is a summary of state attitudes towards the “sector principle”).

Implications of Joint Defence and Scientific Effort

5. Although it is clear that Canada’s title to the Arctic islands has been established and accepted beyond any reasonable doubt, questions from time to time have been raised regarding the possible implications of the joint US-Canadian military efforts in the Arctic in the context of North American defence arrangements, particularly where the USA has assumed the major financial burden and responsibility. In addition, in the scientific field the two countries have set up a Joint Arctic Weather Stations Program in respect of which the costs are evenly shared. Questions may arise as to whether such arrangements, even with all possible safeguards for Canada’s rights and with the best of intentions on both sides, might perhaps eventually lead to a situation in which effective authority in Canada’s Arctic, in fact if not in law, would be exercised by the United States. Concern about this aspect of joint cooperation may help to explain the sensitivity occasionally displayed by the Canadian press and public in relation to Arctic matters. Such sensitivity, however, should not be permitted to obscure the fact that Canada’s title to the Arctic islands is unassailable in law and unaffected by the joint arrangements with the USA. It goes without saying, of course, that Canada should do everything possible to safeguard its actual control over those joint defence and scientific efforts, and in fact may wish to go further as suggested under the heading of “Conclusions & Recommendations”.

II – CONTINENTAL SHELF IN ARCTIC AREAS

Legal Position

6. The Geneva Convention on the Continental Shelf gives to the coastal state sovereign rights for the exploration and exploitation of the natural resources if the seabed, and subsoil thereof, adjacent to its coast, to a depth of 200 metres or to the maximum depth at which the exploitation of these resources is a practical possibility. It does not affect the status of the waters or ice formations lying above the shelf. Although the convention was signed by Canada and has come into force, it has not been ratified by this country. However, the convention represents generally applicable principles of international law, under which Canada has assumed jurisdiction over the shelf adjacent to its coasts. Canada’s rights in respect of the resources of the continental

shelf are exclusive and do not depend on occupation or any express proclamation. Moreover, in the terms of the Geneva Convention, "the consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there".

Relation to Claim to Sovereignty

7. As a result of the legal doctrine of the continental shelf Canada's claim to the offshore resources of the Polar Basin and of the channels between the Arctic islands does not depend on any claim to sovereignty over these waters as internal waters or as territorial sea. However, it may be that the so-called "Maltese item" under study in the United Nations will eventually place some significant limitation on the physical extent of the coastal state's jurisdiction over the continental shelf. In that event, a Canadian claim to sovereignty over the waters of the Polar Basin might present some economic advantage. As regards the channels between the Arctic islands, it does not seem likely that the "Maltese item" would so severely restrict the limits of national jurisdiction over offshore resources as to deprive Canada of any part of its shelf within these areas, but this possibility perhaps cannot be entirely discounted.

Boundary Negotiations with USA

8. No boundaries have yet been delimited between the respective continental shelves of Canada and the USA in the Beaufort Sea (or in other areas where the boundary question arises). The basis for the Canadian position in early negotiations with the USA has been approved by Cabinet, except in the case of the Beaufort Sea area in respect of which the basis for the Canadian position is still under consideration by the Departments concerned.

III - WATERS AND ICE OF THE POLAR BASIN

Legal Position

9. Canada has never definitively formulated its position regarding sovereignty over the waters and ice of the Polar Basin lying to the north of Canadian lands. Existing international law provides no clear or firm basis upon which Canada could assert a claim to the Polar basin. The difficulty in attempting to apply the sector principle in this respect is that this theory has never been used to claim sea areas in the Arctic or elsewhere. Moreover, as already indicated the legal validity of the sector principle is considered to be doubtful and has never been tested even as regards claims to land territory; only the USSR has officially

proclaimed the principle (in 1926) and in doing so applied it only to lands known or unknown lying within its sector.

10. It has been argued that either the sector theory or the doctrine of effective occupation can be applied to ice formations in Arctic areas on the grounds that such formations can be more readily assimilated to land than water. The weakness of this argument arises from the relative lack of permanence of ice formations which makes it very doubtful that they can be permanently appropriated and subjected to sovereignty. Furthermore, such an argument would likely be contested on the ground that it would be an infringement of the principle of freedom of the high seas. On the other hand, shelf ice, because it is both immobile and permanently attached to land, might be more easily assimilated to land territory than floes or ice islands lying beyond internal or territorial waters.

11. Another factor which should be borne in mind in determining the Canadian attitude to sovereignty over the waters and ice of the Polar Basin is that the doctrine of sovereignty under international law applies not merely to the surface of the sea but to areas below the surface and the airspace above it. In an era when international commercial transportation by air over the Pole or by submarines navigating under Arctic ice has become a reality, it may be assumed that many countries have real interests in any claim by Canada, the Soviet Union or other states to sovereignty over polar waters and ice. Accordingly it must be expected that their reaction to such claims would be determined largely by the importance of these interests and be influenced as well as by the general defence or military implications which such claims would have for these countries.

IV - WATERS BETWEEN THE CANADIAN ARCTIC ISLANDS

Background

12. The clearest public assertion of a Canadian claim to the waters between the Canadian Arctic islands was made by the then Minister of Northern Affairs and National Resources in the Standing Committee on Mines, Forests and Waters on June 10, 1958, in these terms: "The area to the north of Canada, including the islands and the waters between the islands and areas beyond are looked upon as our own, and there is no doubt in the minds of this Government, nor do I think was there in the minds of former Governments of Canada, that this is national terrain."

13. In 1960, the same Minister recommended to Cabinet that a decision be reached in principle to lay claim to the waters between the

Arctic islands. Subsequently, the Canadian Government decided to advance the claim by application of the straight baseline system in accordance with the 1958 Geneva Convention on the Territorial Sea and the pre-existing decision of the International Court of Justice in the Anglo-Norwegian fisheries case. If this action were successful the waters in question would be internal Canadian waters but could be subject to the right of innocent passage under the terms of the Geneva Convention, which provides that other states have the right of innocent passage in waters which were territorial sea or high seas before being enclosed within straight baselines. That is, the right of innocent passage could be denied only if Canada could prove that the waters concerned were internal before the establishment of straight baselines, i.e. that there was a valid historic title as in the case of Hudson Bay.

14. It was recognized, however, that such action might arouse opposition by the USA which could have the effect of seriously weakening Canada's claim and leading to litigation before the International Court of Justice. It was therefore decided to notify the USA of the intention to enclose the channels of the Arctic islands within straight baselines before actually doing so. This decision was communicated to the United States Government and was included in the law of the sea discussions which Canada held with the USA in 1963 and 1964. The position adopted by the USA in respect of the waters between the islands was that they are and must remain high seas, except for the three-mile territorial sea surrounding each of the islands. The Americans expressed very strong objections to the course of action proposed by Canada on the grounds that it would be legally invalid and, if unopposed by the USA, would constitute a precedent for more sweeping (and in the Canadian view less well founded) claims by the Philippines and Indonesia, to the serious detriment of vital strategic interests of the USA. The US reaction was so strongly adverse that no steps have been taken to implement the decision to draw baselines around the Arctic island group. The claim has not, however, been abandoned and Canadian Government departments have operated in accordance with the original directive cautioning them against taking any action which might compromise Canada's claim to the waters between the Arctic islands or the waters and ice of the Polar Basin.

Modus Vivendi with USA

15. Canada so far has managed to avoid a public confrontation (which would damage Canada's claim) with the United States on the status of the waters between the Arctic islands. A sort of modus vivendi has developed in connection with the entry of United States government or naval vessels in "Canadian" Arctic waters, pursuant to which it has

generally been possible to avoid forcing the issue of the status of these waters, whether territorial or internal, and thus compromising either the United States of Canadian position in this respect. In summary, the adherence to the modus vivendi has been uneven; on some occasions it has tended to support the Canadian claim to sovereignty (because Canadian “concurrence” was obtained for certain USA activities in the Arctic channels), whereas on other occasions the results have been more blurred, with each country maintaining its position while refraining from asserting it in such a manner as to embarrass the other publicly (Details on this subject are provided in Annex IV)

Legal Position

16. There is some evidence of continued Canadian administrative usage over the waters between the Arctic islands, or part of them, which might be of use in asserting an historic root of title (for instance the ministerial statement referred to in paragraph 12 above, and the Orders-in-Council of 1929, 1942, and 1953 which include the water areas in the delimitation of the Arctic Island Game Preserve). However, the legal foundation for Canada’s claim to the Arctic channels in the final analysis rests on the application of the straight baselines system approved in the Anglo-Norwegian fisheries case and substantially incorporated in the 1958 Geneva Convention on the Territorial Sea. In summary, it can be said that the Canadian claim is not strictly inconsistent with the Anglo-Norwegian case or the Geneva Convention. However, an unprecedented expansion or extension of these principles would be required to cover their application to the Canadian situation. Most important of all, from the legal as well as other points of view, is that Canada’s claim is strongly opposed by the United States and also might not be recognized by other countries. The arguments for and against Canada’s claim on the strength of the straight baseline system are discussed in Annex IV.

Advantages of Claiming Sovereignty

17. The major advantages of claiming the Arctic island channels as internal waters, even if subject to the right of innocent passage, may be summarized as follows:

- a) Canada would retain full control over the fish, sea mammals and other living resources of the sea in the areas concerned.
- b) Canada would retain a significant degree of control over the passage of commercial and especially naval vessels of other countries. This would be true despite the right of innocent passage since this right is not as absolute as freedom of

navigation on the high seas, and since the coastal state is in a position to adjudicate whether passage is innocent or otherwise. If the Arctic channels were considered high seas, security considerations would arise since Canada would then have virtually no legal basis for barring the entry of foreign vessels carrying out intelligence or military reconnaissance activities.

- c) By claiming the Arctic channels as internal waters Canada would avoid the risk that other states might undertake icebreaking operations, air and sea rescue services, aerial reconnaissance and perhaps even land surveys and the provision of shore-based facilities (although the latter two would presumably require Canadian consent) for the support of commercial navigation in these waters. Such foreign activities might give rise to objections from the Canadian public and to questions about possible implications for Canadian sovereignty over adjacent lands, which would be avoided by the maintenance of the Canadian claim to the inter-island channels. In exercising sovereignty over the channels Canada could provide the required aids to navigation and help defray their costs by imposing fees on ships making use of them.
- d) From the security point of view the claim to sovereignty over the waters between the Arctic islands would appear to have somewhat similar advantages as the claims to Hudson Bay and the Gulf of St. Lawrence. (Legally speaking the claim to Hudson Bay, but not to the Gulf, has a strong historic basis). Actual or tacit abandonment of the claim to the Arctic channels in the eyes of the Canadian public, if only for reasons of “cartographic chauvinism”, might be considered inconsistent with the maintenance of these other claims and tantamount to a surrender of territory.

Disadvantages of Claiming Sovereignty

18. The major disadvantage of asserting a claim to the waters between the Arctic islands is the effect it could have on Canadian relations with the United States. Other countries such as Japan, Britain, Australia and the Scandinavian states might also object to a Canadian claim to sovereignty over the Arctic channels, either on principle, or on economic grounds connected with the right to exploit fisheries and mamalian resources, or because the Northwest Passage may become an important sea route for international commerce, or because of fears that Canada’s action would support the claims of Indonesia and the Philippines.

V - THE "MANHATTAN" PROJECT

Background

19. This summer, probably in July, three US and British oil companies (Humble, Atlantic Richfield, and British Petroleum) plan to spend approximately \$30 million in sending a specially reinforced oil tanker, the SS "Manhattan", on a test run through the Northwest Passage to Prudhoe Bay on the north slope of Alaska where enormous quantities of oil have been discovered. The purpose of the "Manhattan" trials is to determine the feasibility of this method of transporting Alaskan oil to northeastern United States markets and perhaps to Europe. If the project is successful it could be of great potential benefit to Canada and have a considerable impact on northern development. (Further background information on the project is given in Annex V).

20. The Canadian Government departments concerned welcomed discussions with the sponsoring oil companies and corresponding US agencies in view of the very significant benefits which the "Manhattan" trials may have for northern development. As a result of these discussions a Canadian Coast Guard icebreaker, the "John A. MacDonald" is scheduled to take part in the exercise. A complicating factor, however, has been introduced by the fact that a US Coast Guard icebreaker, the "Westwind", will support the "Manhattan" in the operation. Moreover, it appears that USA military aircraft will also lend support by means of aerial reconnaissance of ice conditions. In the circumstances the trials to be conducted by the "Manhattan" no longer have the simple character of a private project.

Implications for Sovereignty

21. Although the three oil companies concerned have sought the cooperation of the Canadian Government in the "Manhattan" project, it is relevant to note that Canada has not been consulted regarding the participation of the US Coast Guard icebreaker. (There have, however, been discussions between representatives of the US Coast Guard and the Canadian Department of Transport). Under the terms of an arrangement recommended by the Permanent Joint Board on Defence, and approved by the US and Canadian Governments, "public vessels" of the USA and Canada can pass through the territorial or internal waters of the other country upon "notification" to local naval commanding officers (in the case of "operational" or "informal" visits). No such notification has been received concerning the participation of the US Coast Guard icebreaker (which is of course a "public vessel") in the "Manhattan" project. Nor has the State Department conveyed any notification or request for Canadian concurrence in this respect,

although it is understood that such a course of action was proposed to the State Department by the sponsoring oil companies and that the question was also raised with the State Department by the US Coast Guard.

22. The State Department has volunteered to provide a written statement for possible use by the Government of Canada, to the effect that " ... the voyage of the "Manhattan" is not intended to stake out any claim to territory or mineral rights in the Canadian Arctic". (This statement, it will be noted, does not refer to any Arctic waters and also does not specify what the USA considers to be the Canadian Arctic). Washington officials, according to press reports, have also issued denials that Canadian participation in the "Manhattan" project was being discouraged on the grounds that such participation might support Canada's claim to the waters between the Arctic islands. These denials are confirmed by the fact that none of the Canadian Government departments concerned have detected any effort by the US authorities to discourage Canadian participation in the project. The real question at issue is the status of the waters between the Arctic islands, or more precisely whether the US Government will allow the "Manhattan" project to develop into a test of the respective American and Canadian positions regarding the status of these waters.

23. The "Manhattan" project as it has developed so far does not necessarily admit or deny Canada's claim to the waters between the Arctic islands. As for the State Department's attitude, if it is in fact reluctant to request Canadian concurrence for the "Manhattan" project, this would be consistent with its policy of not taking any action which might be interpreted as acceptance of Canada's claim to the waters between the Arctic islands and which would thereby prejudice the US position in this regard. However, Canada's claim could be seriously prejudiced if the project is carried out without either a request for Canadian concurrence or notification on a service to service basis by the US Coast Guard. In this connection it may be significant that the US Navy has expressed great interest in the "Manhattan" project and wishes to give it full support. It is known that in the view of the US Navy the success of the project would lead to increasing military interest in the Arctic and result in a need to assure freedom of the Arctic sea. Also of relevance is the fact that the participation of the US Coast Guard icebreaker is not technically essential for the success of the project, since the "Manhattan" itself will have a better icebreaking potential than the Coast Guard vessel.

Canadian Involvement in the Project

24. As indicated above, the Canadian icebreaker “John A. MacDonald” will accompany the “Manhattan” and the US Coast Guard icebreaker. In order to avoid delicate questions of command (and the implications these might have for recognition or non-recognition of Canadian sovereignty) the understanding which has been developed is that there will be no overall commander of the three ships involved.

25. In addition to the services of the icebreaker “John A. Macdonald” the oil companies participating in the exercise have requested that the Canadian Department of Transport provide reconnaissance, analysis and forecasting of ice conditions, thorough existing facilities (the US Navy, it is understood wishes to play a role in aerial reconnaissance and will in any event be doing so over Alaskan waters). The oil companies have also requested the appointment of a Canadian Government representative on board the “Manhattan”, in order to (i) serve the function of national representation, (ii) provide Canadian Arctic expertise and (iii) act as liaison and coordination agent between the “Manhattan” and the Canadian icebreaker and other Canadian agencies involved in the support of Arctic navigation during the exercise.

26. The oil companies sponsoring the project have also invited the Panarctic Oil Consortium to contribute towards the costs of the project in return for access to the information obtained from the trials. The sponsoring oil companies are also prepared to discuss with the Canadian Coast Guard the terms and conditions under which some limited information would be made available to the Canadian service. These proposals, and other possibilities, are considered under the heading of “Conclusions and Recommendations”.

CONCLUSIONS AND RECOMMENTATIONS

I – CANADIAN ARCTIC ISLANDS

Canadian sovereignty over the islands north of the Canadian mainland has been clearly established by virtue of effective occupation. The United States does not appear in any way to be challenging Canada’s title to or jurisdiction over the islands, and there are no grounds to believe that the activities of USA oil companies carrying out exploration work in the Canadian Arctic - all of them under Canadian permits - derogate from Canadian sovereignty. Indeed it is considered that the activities of foreign companies have constituted a recognition and affirmation of Canadian sovereignty. It has not been possible to find copies of the USA maps allegedly disputing Canadian sovereignty

over certain Arctic areas (as reported by Mr. Diefenbaker and General Foulkes). There is no reason to believe that such maps have any official standing if they do exist; assurances to this effect have been received from the US State Department.

It is recognised that Canada's joint defence and scientific arrangements in the Canadian Arctic do not detract from Canadian sovereignty in law; on the contrary they confirm that sovereignty. Nevertheless, it is recommended that the Government review existing joint arrangements, (and any which may be proposed in the future), to determine whether these may have long range implications for the effective exercise of Canadian jurisdiction and whether it may be advisable for Canada to assume greater or full responsibility for any of the activities involved.

II - CONTINENTAL SHELF IN ARCTIC AREAS

The Geneva Convention on the Continental Shelf provides a satisfactory guarantee that offshore resources in the Canadian Arctic are reserved exclusively for Canada. There is no evidence to suggest that the USA is in any way disputing Canada's rights in respect of these resources. It is likely that the "Maltese item" in the United Nations may eventually have some effect on the extent of the physical limits of Canada's jurisdiction over offshore resources in the Polar Basin. It is less likely that the United Nations initiative would affect Canada's jurisdiction over offshore resources within the channels of the Arctic islands; because of the intimate connection between these waters and islands it is considered undesirable that mineral resource jurisdiction in this area should in any way be limited.

It is recommended that the above considerations be taken into account in the position adopted by Canada in the discussion of the "Maltese item" within the United Nations Committee on the Seabed.

III - WATERS AND ICE OF THE POLAR BASIN

There would not appear to be any overriding reason to revise the view reached in an interdepartmental study of this matter in 1960 when it was concluded that a claim to the Polar Basin would entail few advantages of consequence, while on the other hand involving the likelihood of strong objections by other countries and real disadvantages as precedent for a Soviet claim to the large "sector" lying north of the USSR mainland. Notwithstanding this conclusion, concepts of international law frequently change and future developments could lead to the recognition of certain types of ice as being capable of appropriation.

Consequently, it is recommended that the sector theory should not be repudiated as such (in absence of any pressing need to do so) but be held in reserve for possible use if and when it became advisable to lay claim to sovereignty over any fixed or floating ice in the high seas of the "Canadian sector."

IV - WATERS BETWEEN THE CANADIAN ARCTIC ISLANDS

The status of the waters between the Canadian Arctic islands is not settled internationally. The legal and economic implications of the "Manhattan" project, as well as the attention it has received in the press and in Parliament may make it difficult for Canada to continue the attempt to safeguard its claim to sovereignty while avoiding a possible confrontation on this issue with the United States. Although it is uncertain whether the US Government would accept an arrangement that might avoid forcing the issue of sovereignty without prejudicing either the Canadian or American position, it appears very doubtful that agreement could be reached on an arrangement that would actually support Canada's claim to sovereignty. In any event Canada may be standing on the threshold in respect of its claim to the waters between the Arctic islands and the question will perhaps be resolved one way or another by developments following in the wake of the "Manhattan's" passage. In the present circumstances the following possible courses of action appear to be available to the Canadian Government:

a) Asserting the Claim

- i) Canada could attempt to prevent the erosion of its claim to sovereignty over the waters between the Arctic islands by formally asserting that claim and proceeding with the implementation of the straight baseline system in this area. However, since the United States has threatened litigation if Canada proceeds unilaterally with the closure of these and other waters, such a course could result in the defeat of the Canadian claim, unless Canada evaded an action before the International Court of Justice by pleading the "Connally amendment" against the United States or by qualifying or withdrawing its acceptance of the compulsory jurisdiction of the Court.
- ii) Legal considerations aside, assertion of the Canadian claim could have serious political and economic implications. While it is difficult to foresee how far the United States might go in reacting against the Canadian move, it has been said (in a letter from the American

Secretary of State in September, 1966) that the United States Government would protest directly and publicly, would avail itself of the legal remedies open to it, and would instruct its ships and aircraft to disregard Canadian claims to such areas as the Gulf of St. Lawrence and the Arctic channels as internal waters.

- iii) Leaving aside the possibility of direct economic retaliation (which was raised on an earlier occasion by United States officials) Canada could also be adversely affected if the US Government were simply to refuse to grant special concessions to Canada as the occasion arose for requests of this kind, for instance in connection with the American oil import policy. The possible consequence of asserting the claim to the Arctic channels should also be weighed in the light of the prevailing state of Canada's relations with the United States, and bearing in mind such particular considerations as the negotiation of USA-Canada continental shelf boundaries which is to begin in the near future.

b) Abandoning the Claim

- i) Canada could abandon its claim to the Arctic channels, either explicitly or tacitly, and thereby avoid the risk of defeat before an international tribunal and the possibility of a confrontation with the United States and its attendant consequences. The major disadvantage of abandoning the claim or allowing it to erode is that Canada would then have sovereignty over only a three-mile territorial sea and a nine-mile fishing zone around each island of the archipelago, leaving access to the channels open to all countries as high seas, without legal basis for Canadian control over their activities. Another possible disadvantage to abandoning the Canadian claim would be the adverse public reaction to such a course.
- ii) In considering the possibility of abandoning Canada's claim to sovereignty over the waters of the Arctic archipelago, it is relevant to note that there exists an international trend in favour of a twelve-mile territorial sea. In fact, the United States and the Soviet Union are considering the possibility of calling a conference on the law of the sea to secure international agreement on this limit. In the event of such agreement, Canadian sovereignty in the Arctic channels would extend over a

twelve-mile belt (as compared to the present three miles) of territorial sea around each of the Arctic islands, i.e. a total of 24 miles in the straits and channels between the islands. (According to the terms of the draft convention agreed upon by the USA and the USSR freedom of navigation in international straits would be guaranteed by the maintenance of a high seas corridor in those straits which would otherwise be made completely territorial sea by application of the twelve-mile limit; this provision would affect at least one area of the Northwest Passage which is less than 24 miles wide). It might be considered that adoption of the twelve-mile limit could perhaps make the abandonment of Canada's claim to sovereignty over the whole of the channels more acceptable.

c) Status Quo

- i) Canada could attempt to continue its present policy of maintaining its claim without asserting it in such a manner as to embarrass or provoke a confrontation with the United States. As already indicated, such a course is becoming increasingly difficult but possibly could be pursued successfully for some further period. In the event of success, its advantages are obvious. Its major disadvantage is that it may well not succeed; Canada's claim might then be irretrievably prejudiced in view of the heightened interest in commercial navigation through the Northwest Passage.
- ii) If Canada wishes to assert de facto sovereignty over the Arctic channels while postponing the formal assertion of its claim, it would be vitally important to furnish the required aids to navigation and thus prevent any other country from doing so to the detriment of Canada's claim. Such aids would in any event be necessary to keep pace with and accelerate northern development. What might eventually be required is the kind of supporting services for navigation in ice-congested waters that Canada now provides in the Gulf of St. Lawrence in winter, and in Hudson Bay and Strait, and to a limited extent in the Arctic, in summer. The provision of such services could become expensive (minimum facilities might cost approximately \$50 million over a period of years) but would contribute significantly to the basis of Canada's claim to sovereignty, which, if successful, would allow at

least part of the expenses to be recovered by the imposition of navigation fees.

It is recommended that Canada should not abandon its claim to the waters between the Arctic islands and that the Government should consider instead the advisability of asserting the claim or attempting to maintain the status quo.

V- THE MANHATTAN PROJECT

The course of action to be adopted by the Canadian Government in respect of the “Manhattan” project would of course depend upon the Government’s decision regarding the claim to sovereignty over the waters between the Arctic islands. Thus:

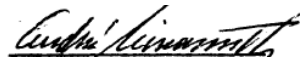
- a) If the Government were to decide to assert the Canadian claim by immediate implementation of the straight baseline system around the Arctic islands, the “Manhattan” project would become part of the broader issue or possible confrontation between Canada and the USA. In these circumstances, if it were to be asserted that the Canadian claim excluded the right of innocent passage, Canada could either insist on a request for consent to the passage of the US Coast Guard vessel (which action would present obvious risks); or, despite the lack of a request for consent, Canada could declare that it had no objection to the passage of the vessel. Alternatively, the Canadian claim could be asserted with the proviso that it did not exclude the right of innocent passage, with specific reference perhaps being made to the “Manhattan” project.
- b) If the Government were to decide to abandon the Canadian claim to the waters between the Arctic islands (excepting the belt of the territorial sea) the “Manhattan” project would present no difficulties from the point of view of Canadian sovereignty and would be of interest to Canada only for practical reasons connected with northern development.
- c) If the Government were to adhere to the status quo by attempting to continue its present policy of maintaining the Canadian claim without asserting it in such a way as to provoke a confrontation with the USA, it would not be appropriate to require that the State Department officially request Canadian consent or concurrence to the passage of the US Coast Guard vessel. This would be virtually equivalent to seeking US recognition of the Canadian claim or firmly

asserting that claim. It would, however, be appropriate to attempt to obtain official notification of the US Coast Guard participation in the project on a service to service basis pursuant to the terms of the PJBD agreement regarding public vessels. If service to service notification is received the Canadian claim to sovereignty would be protected and could be further reinforced by a substantial degree of Canadian participation in the "Manhattan" trials. However, if service to service notification is not received but a public controversy With the USA is nevertheless avoided, Canada could attempt to minimize the consequent prejudice to its claim by supporting and participating in the "Manhattan" project and thus giving it the appearance and character of a joint undertaking. With or without notification Canada could:

- ii) Give official and public approval to the transit of the Northwest Passage by the "Manhattan" and the US Coast Guard vessel "Westwind", with mention being made of the support to be given to the project through aerial reconnaissance by US military aircraft.
- iii) Approve the participation of the DOT icebreaker "John A. MacDonald" in the project on the understanding that it will operate under its own independent command.
- iv) Authorize the Department of Transport to provide aerial reconnaissance of ice conditions and to assume responsibility through its Meteorological Branch for the coordination of all ice reconnaissance and information analysis and dissemination.
- v) Select and appoint an official Canadian Government representative on board the "Manhattan", who in addition to his representative capacity would act as a technical adviser and coordinator of Canadian support for the operation.
- vi) Accept the invitation extended by the sponsoring oil companies for the Canadian Government to purchase a participating share in the "Manhattan" project at a cost of \$500,000, through the medium of the Panarctic Oil Consortium or some other appropriate agency. This would stress the Canadian participation in the exercise and give Canada access to the valuable

information it will provide regarding Arctic navigation and icebreaker-tanker design.

- vii) Designate the Department of Transport Marine Services as the Canadian Government agency for direct liaison with the sponsoring oil companies and with the US Coast Guard in the planning of the operation, subject, however, to consultation with the Department of External Affairs and to the general supervision of the Task Force on Northern development.
- viii) Assign a public relations officer to the Canadian Coast Guard icebreaker "John A. MacDonald" to insure that due publicity is given to the Canadian participation in the project.



Chairman
Combined Sub-Committee
Of the Interdepartmental
Committee in Territorial
Waters and Advisory
Committee on Northern
Development.

EFFECTIVE OCCUPATION OF
CANADIAN ARCTIC ISLANDS

Legal Considerations

Effective occupation implies taking possession of and setting up an administration over a territory. The customary form of administration in polar regions consists of the maintenance of police posts, customs houses, post offices, schools, hospitals, and scientific, wireless and weather stations. In general, where the climate is severe it is sufficient that administrative control be exercised only when weather conditions permit travel. It is unnecessary for state authority to be asserted without interruption in all parts of the land all year round. Nor is it necessary to occupy everyone of a group of islands provided that order can be maintained in all of them from those which are occupied; military and police forces may be used for this purpose.

Departmental Jurisdiction and Activities

2. The Minister of Indian Affairs and Northern Development is charged with the responsibility for the development of the north and the general coordination of federal activities in the area. The Commissioner of the Northwest Territories is appointed by the Federal Government and is responsible for the administration of the Territories under the direction of the Minister of Indian Affairs and Northern Development, who is responsible for the administration and development of the area's natural resources. Other Federal Government agencies, such as the Department Health Services of the Department of National Health and Welfare and the Royal Canadian Mounted Police, are responsible for health and police services, with the Territorial Government sharing costs. The Department of Transport operates mainline airports throughout the north and the Canadian Broadcasting Corporation provides special shortwave northern broadcasts and maintains a growing number of local stations in the Territories. Federal cost-shared national assistance programs within the competence of the Territorial Government are available to it on the same conditions which apply to the provinces.

Oil and Gas Exploration

3. In the administration of natural resource the Department of Indian Affairs and Northern Development has the authority to issue

licences for the exploration of minerals, including oil and gas, in the Arctic Islands, the Arctic mainland, and the continental shelf offshore from these areas.

The Department has issued oil and gas permits covering a large portion of the Queen Elizabeth Islands, the Mackenzie Delta, the continental shelf in the Beaufort Sea, and the continental shelf between many of the Arctic Islands. Figure 1 attached shows the area in the Northwest Territories, the Yukon and the Arctic islands at present under lease or licence for oil and gas exploration. These oil and gas permits have been issued primarily to Canadian citizens and companies incorporated in Canada, some of which may be regarded as Canadian owned and others as subsidiaries of US, French and British corporations. On January 30, 1969, a sale of offshore oil permits amounted to \$15,491,561. These permits include a "work bonus bid", which is a commitment guaranteed by a deposit of money, bonds, etc., to do exploratory work over and above what is specified by the permit regulations during the original term (six years for an ocean area). Already three wells have been drilled for oil in the Arctic Islands and two more wells are expected to be drilled this year. Firm commitments have been made for as many as fifteen wells to be drilled in the north over the period of the next three years.

4. The active drilling program, the number of companies engaged and the infrastructure committed in the form of camp sites, emergency airstrips, and the like, all of which are subject to Canadian Government regulations, together constitute a clear indication of Canada's sovereignty over the area. The exploratory work being carried out in the field of drilling, geology and geophysics, as well as transport, is being done almost exclusively by Canadian contractors. The issuance of mining and oil rights, the conduct of exploratory work and the maintenance of facilities at Resolute, Inuvik, and other centres in the far north, all contribute to effective occupation, development and use of the region, and clearly demonstrate in a practical manner Canada's sovereignty over all the land areas (and consequently the continental shelf) in the region. With more than 115 million acres in permits in the Arctic off-shore area, there is a commitment for extensive exploration. Extensive geological and geophysical surveys will be conducted and these will doubtless be followed by some wildcat drilling. One further demonstration of Canada's effective occupation of the north has been the Polar Continental Shelf Project which has been conducted by the Department of Energy, Mines and Resources for the past ten years. Figure 2 shows the work of the Canadian geological survey without which the present Arctic exploration for minerals, oil and gas, would not have been possible.

SUMMARY OUTLINE OF CANADA'S ADMINISTRATIVE AND
OTHER ACTIVITIES IN THE CANADIAN ARCTIC ISLANDS
OVER THE YEARS

The Canadian Government has:

- (1) Engaged in considerable exploration of the Arctic Islands, surveying and mapping unknown regions.
- (2) Sent forth numerous official scientific expeditions to carry out investigations in nearly every scientific field but chiefly in the fields of geography, geology, hydrography, biology, and archaeology.
- (3) Taken aerial photographs of nearly all of the islands, and since 1904 has compiled and published official maps which show them as part of Canada.
- (4) Through the R.C.M. Police it has brought law and order to the whole region. Since 1900 the Police have carried out patrols throughout the Archipelago. At present, eleven R.C.M.P. detachments are in operation on Baffin, Cornwallis, Victoria, Banks and Ellesmere islands.
- (5) Established schools on Cornwallis, Baffin and Victoria islands; installed nursing stations and other medical care services; conducted regular medical patrols; given inoculations against disease; provided an "air ambulance service" to fly patients from the area to outside centres for treatment; developed relief measures for destitute Eskimos, and extended Family Allowance, Old Age Pensions and other national welfare programs to the inhabitants of the region.
- (6) Introduced orders-in-council, statutes and ordinances to regulate civil affairs and the disposition of natural resources such as furbearing and game animals, sea mammals, migratory and non-migratory birds, oil, gas and minerals, and has charged licence fees for the exploitation of these.

Moreover, since 1926, under "An Ordinance Respecting Scientists and Explorers" made by the Commissioner in Council of the Northwest Territories, scientists or explorers who wish to enter and conduct research in any part of the N.W.T. including the Arctic islands, must apply and receive from the Commissioner a special licence to do so. Special permits or

licences and also issued to scientists who wish to undertake archaeological investigations or to take wildlife specimens and migratory and non-migratory birds. Such provisions have been observed by the nationals of many countries, including those with particular interests in the Arctic.

- (7) Established Post Offices in sixteen settlements on Baffin, Cornwallis, Ellesmere, Eller Ringnes, Prince Patrick, Banks, Victoria and Southampton islands; compiled a population census; and appointed personnel to receive applications for citizenship and to act as customs and immigration officers.
- (8) Established a radio communications system and through the R.C.A.F. conducts an Arctic search and rescue service. In addition it has established three weather stations on Banks and Baffin islands. Since 1947, it has installed five weather stations with the U.S.A. under the Joint Arctic Weather Stations Program on Ellesmere, Ellef Ringnes, Prince Patrick, and Cornwallis islands. (In the operation of this program, although no formal exchange of notes has taken place between the two countries, the U.S.A. has respected Canadian sovereignty and has complied with Canada's wishes in the area.)
- (9) In mid 1960 passed the Canada Oil and Gas Land Regulations providing for the issuance of oil and gas exploration permits and leases in the Arctic islands and in the submerged lands of the Arctic continental shelf. By early 1969, over 4180 permits were issued covering in excess of 204 million acres and representing almost 90 percent of the island and channel areas of the Canadian Arctic island group, in addition to 230 permits covering in excess of 10 million acres in the Beaufort Sea region.
- (10) Licensed the drilling of "Dome et al Winter Harbour No. 1", located in September 1961 on the south coast of Melville Island. The well, abandoned at 12,543 feet on March 24, 1962, cost over \$2 million.
- (11) Licensed the drilling of "Canso et al Bathurst Caledonian River J-34" located in September 1963 on the east-central coast of Bathurst Island. The well, abandoned at 10,000 feet in February, 1964, cost more than \$2.1 million.
- (12) Licensed "Lobitos et al Cornwallis Resolute L-41" located in September 1963 near Resolute on the south coast of Cornwallis Island. The well, abandoned at 4840 feet on December 15, 1963, cost over \$1.5 million.

- (13) Entered into partnership on December 12, 1967 with a consortium of 20 mining and oil and gas companies and individuals, in Panarctic Oils Ltd. The Government granted \$9 million to the Company for which it obtained a 45 percent equity. The Company initiated a \$20 million massive exploration assault in the Arctic islands in the spring of 1968. Three airstrips over 4000 feet long, for staging this operation, have been constructed on Melville Island and others will be built on many other islands during the next few years. At least two wells are being located in March, 1969 on Melville Island, and Panarctic Oils alone will drill at least 15 more wells on other islands in the Queen Elizabeth Group.
- (14) Sold 22 permits covering blocks containing a total of almost 1.2 million acres in the Beaufort Sea in water depths ranging up to 700 feet, for approximately \$15.5 million of work bonus commitment.
- (15) Exploratory work commitments associated with oil and gas permits in the Arctic Island and Arctic offshore well, to the end of 1972, will total more than \$100 million. This exploration activity will support a great increase in the tonnage of goods transported by convoyed ships into the Arctic islands. The increased activity has already permitted two scheduled flights per week to be flown to Resolute from Edmonton by Pacific Western Airlines and from Montreal by Nordair.

Military Activities in the Canadian North in 1968

<u>Type of Activity</u>	<u>Remarks</u>
1) Canadian Forces Radio Stations	- 177 Military Personnel
- ALERT	- 200 Military and 7 civilian Personnel
- INUVIK	
2) DEW Line Main Sites at:	- Sites are maintained and managed by the Federal Electric Corporation under contract to the USAF. Each site includes 5 Canadian Forces personnel including the Military Commander. Sites are visited periodically by Canadian
- CAPE DYER	
- HALL BEACH	
- CAMBRIDGE BAY	
- CAPE PERRY	

Forces aircraft.

3) Search and Rescue
Operations

- In 1968 there were four major searches conducted north of the 60th parallel involving 100 flying hours.

4) Maritime Patrol Flights

- Four reconnaissance flights were conducted in 1968 by Maritime Command aircraft.

5) Land Forces Exercises

- During the year a tactical exercise was conducted at Fort Churchill. The aim of the exercise was to evaluate new short-range radio sets for tactical communications in the Arctic and to conduct limited field trials of certain land vehicles.

6) Support for DEW Line re-supply operations

- Two naval clearance diving teams assisted in eastern and western DEW Line re-supply operations during July, August and September.

7) Support of the British
Trans-Arctic Expedition

- Four re-supply airdrops by 6 C130 aircraft.

ATTITUDES OF NATIONS WITH SPECIAL INTERESTS IN
THE ARCTIC AREA REGARDING ACCEPTANCE OF THE
SECTOR PRINCIPLE

- (1) The U.K. used the sector principle in official declarations in 1917, 1923 and 1925 relating to the Falkland and Ross sectors in the Antarctic. In 1916 it tacitly accepted a Russian claim to islands north of Siberia on the grounds of "geographical continuity". However, in 1930 it tacitly recognized the Soviet sector.
- (2) By a Decree of April 15, 1926, the U.S.S.R. officially recognized the sector principle and included as part of the territory of the U.S.S.R.

"all lands and islands already discovered, as well as those which are to be discovered in the future, which at the moment of the publication of the present decree are not recognized by the Union of Soviet Socialistic Republics as the territory of any foreign state, and which lie in the Northern Frozen Ocean north of the coast of the Union of Soviet Socialistic Republics up to the North Pole..."

- (3) The U.S.A. has never committed itself. It has usually put forward effective occupation as the basis for sovereignty in polar regions and has opposed the application of sectors in Antarctica.
- (4) Denmark, although never specifically declaring adherence to the principle, in practice is partly committed to it because of its claim to Greenland on the basis of the "essential unity of the whole area."
- (5) Norway has never claimed a sector. When it accepted the Canadian position with regard to the Sverdrup Islands in 1930, it stated that its recognition was in "no way based on any sanction whatever of what is named the sector principle."

WATERS BETWEEN THE
CANADIAN ARCTIC ISLANDS

Modus Vivendi With the U.S.A

In the case of U.S. convoys supplying installations in the Arctic, the American practice has been to request waivers of the provision of the Canada Shipping Act which reserve the coasting trade to Canadian ships. On occasion these U.S. convoys entered Canadian territorial waters within three-miles from shore; and the waivers issued by the Canadian Government could therefore be interpreted as applying only to such entries within the three-mile limit, in which case they would not constitute acquiescence in Canada's claim beyond three miles. This arrangement is no longer in effect since Canada has assumed the responsibility for the annual resupply by sea of the DEW-line installations and of the Joint Arctic Weather Stations.

2. The first submarine passage through the waters between the Arctic islands occurred in 1960 where the "Seadragon", traversed Lancaster Sound, Viscount Melville Sound and McClure Strait. (Earlier, in 1958 and 1959, the U.S. submarines, "Skate", "Nautilus" and "Sargo" had made extensive cruises in the Polar Basin but reportedly did not enter the inter-island waters.) The "Seadragon's" voyage was made after the U.S. Navy had obtained Canadian "concurrence" in the proposed cruise on a service to service basis pursuant to the Permanent Joint Board of Defence agreement regarding "public vessels" of the U.S.A. and Canada. A similar procedure was followed at about the same time in connection with a cruise by the U.S. submarine "Archerfish" in Hudson Bay, Ungava Bay, Foxe Basin, Frobisher Bay and Cumberland Sound. In these two cases the procedure followed was such that it could be taken as acquiescence in Canada's claim to sovereignty. In 1962, however, the USS "Skate" and another submarine traversed the inter-island waters without a request for concurrence; in this case the procedure followed was that of simple notification. It is relevant to note that passage by a submarine in another country's territorial sea, according to the 1958 Geneva Convention on the Territorial Sea, to be "innocent" must be on the surface and not underwater. Thus a foreign submarine cannot navigate submerge in territorial waters without the consent of the coastal state; in the Arctic, of course, the object of using submarines is to avoid the ice barrier to surface navigation.

Arguments for Canadian Claim to Sovereignty

3. Article 4 of the Geneva Convention specifies that straight baselines may be used “where the coastline is deeply indented or cut into or if there is a fringe of islands along the coast in its immediate vicinity”. The baselines should follow the “general direction of the coast” and the sea areas and land must be “closely linked”. Against these criteria the Canadian claim to the waters between the Arctic islands is supported by the fact that this formation constitutes a coastal rather than an outlying or oceanic archipelago. The Arctic islands represent an extension of the continental land mass, and have a geographical unity with the Canadian mainland which makes the Arctic archipelago similar in this respect to the formation involved in the Anglo-Norwegian fisheries case and helps to distinguish it from such oceanic archipelagos as the Philippines and Indonesia.

4. The linkage between the sea areas and the land domain is at least as pronounced in the Canadian Arctic as along the Norwegian coast. The islands are a completely dependent area where human activity and life is only possible with close and constant support from the mainland. Another factor which should weigh on this point is that the water areas are frozen or impassable most of the year, some of them never being free of ice all year round. They are therefore more assimilable to land than water. This factor supplies an element of physical unity between the land and the frozen water which is unique. Moreover, the icebound channels of the Arctic islands could not normally be navigated (except by submarine) without Canadian assistance by means of icebreakers, aerial reconnaissance and other aids to navigation; this factor again distinguishes the Arctic channels from international straits having the character of high seas.

5. An important consideration (which would no doubt influence the views of other countries in respect of Canada’s claim of the waters between the Arctic islands) is that Canada presumably would allow foreign vessels the right of innocent passage, pursuant to article 5 of the Geneva Convention, in the event that these channels were closed as internal waters by means of straight baselines. Much of the opposition to the claims of Indonesia and Philippines stems from fears that application of the straight baseline system to these oceanic archipelago would imperil freedom of navigation and consequently strategic interests as well.

Arguments Against Canadian Sovereignty

6. Although the Arctic islands form a coastal archipelago, its configuration is not that of a “fringe” in the terms of the Geneva Convention. Or, what is much the same thing, the massiveness of the

formation tells against its qualifying under the Norwegian formula adopted in the Convention. The Canadian claim to the Arctic archipelago exceeds in terms both of area and length of lines the Norwegian precedent by such a magnitude that it becomes difficult to reconcile the two situations. An enclosure involving baselines which total 3000 miles, it can be argued, is very different from a baseline system hugging a shore with a trend line of about 650 miles in all.

Indications of Canadian Sovereignty

7. Since the "C.D. Howe" was acquired in 1950 the Canadian Coast Guard has provided the Eastern Arctic Patrol which was formerly done by other vessels. This service has been in operation since 1903 when the Department of Transport chartered the "Neptune" to show the flag in northern waters. In 1904 the Department sent its own steamer the "Arctic", under Captain Bernier, which carried out a series of patrols lasting until 1925, after which more voyages were made by chartered vessels until the building of the "C.D. Howe" in 1950. Since Canada assumed the responsibility for the annual resupply by sea of the DEW-Line and Joint Arctic Weather Stations, the Department of Transport has organized the chartering and stevedoring services for the annual sea lift and has also provided icebreaker support and the landing craft and other equipment necessary for the over-the-beach movement of cargo.

8. Each summer when not actively employed in supporting the vessels of the sea lift, Canadian Coast Guard icebreakers have been used to conduct hydrographic and oceanographic investigations and to make exploratory probes in various parts of the Arctic. In the western Arctic each year since 1960 a Canadian Coast Guard icebreaker has been sent to support the movement of cargo for the replenishment of DEW-line stations in the western Arctic sent by the Mackenzie River route. In addition to icebreaking services, the same vessel also lays aids to navigation.

THE “MANHATTAN” PROJECT

Background

The intention of the oil companies concerned with development of the oil fields on the north slope of Alaska are that initially the oil should be fed into the Western United States market by tanker to a west coast terminal. However, the dimensions of the field are such that in order to exploit it to the full, access to the United States eastern market and perhaps to Europe is necessary. There are a number of alternative routes to achieve this which are being studied by the oil companies using – all pipeline, pipeline and tanker, and tanker only. Tanker transport through the Northwest Passage is the most economically favourable method if it is technically feasible. Preliminary studies show that very large tankers of about 250,000 tons deadweight reinforced for operation in ice and with extra power can probably transit the Northwest Passage. However because of the limitation of our knowledge of ice conditions in winter in the Arctic, some sort of a trial and further information-gathering is necessary in order to prove the thesis. The oil companies have therefore chartered the SS “Manhattan” to do this.

2. The “Manhattan”, at 114,000 tons displacement, is a little over half the size of the tankers that would be required and her own ability to make the passage is problematical. Nevertheless, as a half-scale model she will provide information on the performance of very large bulk carriers in ice that should enable the oil companies to make the decisions they require. She is now in US yards cut into three pieces for strengthening, for the fitting of a completely new icebreaking bow, and for instrumentation to make precise measurements of the stresses and conditions to which she should make the passage from the US to Alaska through the deep water Northwest Passage (see attached map for possible alternative routes for the “Manhattan”) under controlled conditions of precise measurements of stress, power expenditure for measured ice conditions, effect on ship, structure and strength of ice and so forth. If she completes the passage from east to west a decision will then be taken on whether to retrace the route or to proceed on into the Pacific around the tip of Alaska. The original hope was that trial would be done in May when Arctic ice conditions are still characteristic of winter. However, the ship will not now be able to enter the Parry Channel before the end of July when conditions may be a good deal less severe. If, too, it is a relatively easy season the test may not give all the information needed and it may be necessary to repeat it later in the winter.

Request for Canadian Participation

3. Soon after the decision was taken by the oil companies to undertake the trials, informal contact was established with the Department of Transport and other Departments with interests in the Arctic by the Humble Oil Company acting as the operating agent for the companies involved in the project. The expectations of the oil companies for Canadian support and assistance in the project are:

1. Provision of an icebreaker to accompany the "Manhattan". It was fully realized by both sides that the icebreakers available have limited capability in polar ice and that the "Manhattan" will probably have a better icebreaking potential than the icebreakers. Nevertheless, for emergency and for general help it is essential that there should be icebreaker support for the tanker. Originally it had been hoped that the "Louis St. Laurent", which will be the most powerful icebreaker in the world outside Russia, would be available but there have been so many delays in the completion of this ship that she will not be ready in time and the icebreaker to accompany the "Manhattan" will be the "John A. MacDonald".
2. Canadian provision of reconnaissance of ice conditions, analysis and forecasting through the Department of Transport organization which already exists for this purpose. It is understood that the U.S. Navy would also wish to have a part in this role and would in any event be doing the ice reconnaissance over Alaskan waters, but it is still the hope of the oil companies that Canada would take the major part and be responsible for the coordination of the whole function.
3. The appointment of a Canadian representative on board the "Manhattan" who, it is hoped by Humble Oil, will combine the three functions of – national representation; the provision of Canadian Arctic expertise; and coordination between the "Manhattan" and the Canadian icebreaker and other Canadian agencies involved in the support of Arctic navigation during the actual operation.
4. The provision of an icebreaker during the first passage of the "Manhattan" is not a serious problem since Canadian icebreakers are operating in the Arctic at that time of year in any event and all that is required is a diversion from regular duties at no extra. cost, though at some inconvenience to other Arctic activities. In view of the potential importance of

the "Manhattan's" operations to Canada, this inconvenience should be accepted.

5. The coordination and provision of ice reconnaissance, analysis and information, the first phase of the trial in July and August requires little more than approval to take the lead in this activity and to provide the necessary information to the "Manhattan" as the Department of Transport normally is active in this field for the annual resupply of Arctic installations. If a second trial of the "Manhattan" in winter is necessary, additional programmed ice reconnaissance activities will be necessary involving the provision of aircraft and personnel. Tentative estimates of cost are approximately \$150,000.
6. The selection of the official Canadian representative involves finding someone with the qualities to help in coordination between the civilian, para-military and government non-military elements of a Canadian/ American group as well as having a sufficient knowledge of the Canadian Arctic and of navigation in ice to be able to give technical advice to the Captain of the "Manhattan". The oil companies have already decided on the individual they believe to be most suitable and whom they know to be acceptable to their own people, to the U.S. Coast Guard and to the Canadian Coast Guard. They hope that he will be the individual selected by Canada, but will of course abide by any choice made by the Canadian Government. Because of the limitations of space in the "Manhattan", they are anxious not to have to duplicate any of the positions earmarked for representatives and technicians, but if the Government appoints a person who in their opinion is not suitable, they are prepared to accept him as a token Canadian representative and to retain their own on behalf the Canadian of their choice.
7. The planning of the operation has now reached a stage when it is important that a decision on Canadian participation should be taken.

Information Obtainable from "Manhattan" Project

8. The Humble Oil Company (which is the chief sponsor of the project) has offered to release to the Panarctic Oil Consortium the information obtained during the trial run of the "Manhattan" through the Northwest Passage, in the same terms as those offered to other oil companies. These are:

a) a payment of \$500,000 now, and

b) a payment of \$2 million if the information is used in the design of an ice-breaking tanker before 1976.

In return Humble would provide Panarctic with all the scientific and technical data obtained during the trials and agree to Panarctic having an observer on board "Manhattan". It is understood that both British Petroleum and Atlantic Richfield have already paid \$2 million each for substantially the same rights, and that Phillips Petroleum, are considering acceptance of a similar offer, which will be open until April 30, 1969, after which the price of participation will probably be increased. It is also understood that the offer made to Panarctic would also apply alternatively to some other Canadian Government agency.

9. In the event that the Canadian Government did not agree to Humble's offer (involving the payment of \$500,000), the oil company is prepared to discuss with the Canadian Coast Guard the terms and conditions under which some limited information would be made available to that service. It has been suggested that any such information would only be made available on condition that:

a) the information would not be passed on to any commercial users, and

b) the information would only be limited to what was needed for designing an Arctic rescue icebreaker and/or for control and regulation purposes.

10. The advantages of obtaining the "Manhattan" information might be even greater if the trials are not completely successful than otherwise. If the trials were completely successful it would be demonstrated that ships can be built to navigate in the Arctic all year round. If the trials are only partly successful, Canada could obtain information which would extend the shipping season for Baffin Island, and for Panarctic, from two months to perhaps eight or even ten months. Detailed information on the trials would be required if it was to be used to speed northern development.

CANADA LANDS ARE ADMINISTERED BY THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT. NORTHWARD OF THE HEAVY LINE. OFFSHORE AREAS ELSEWHERE ARE ADMINISTERED BY THE DEPARTMENT OF ENERGY, MINES AND RESOURCES.

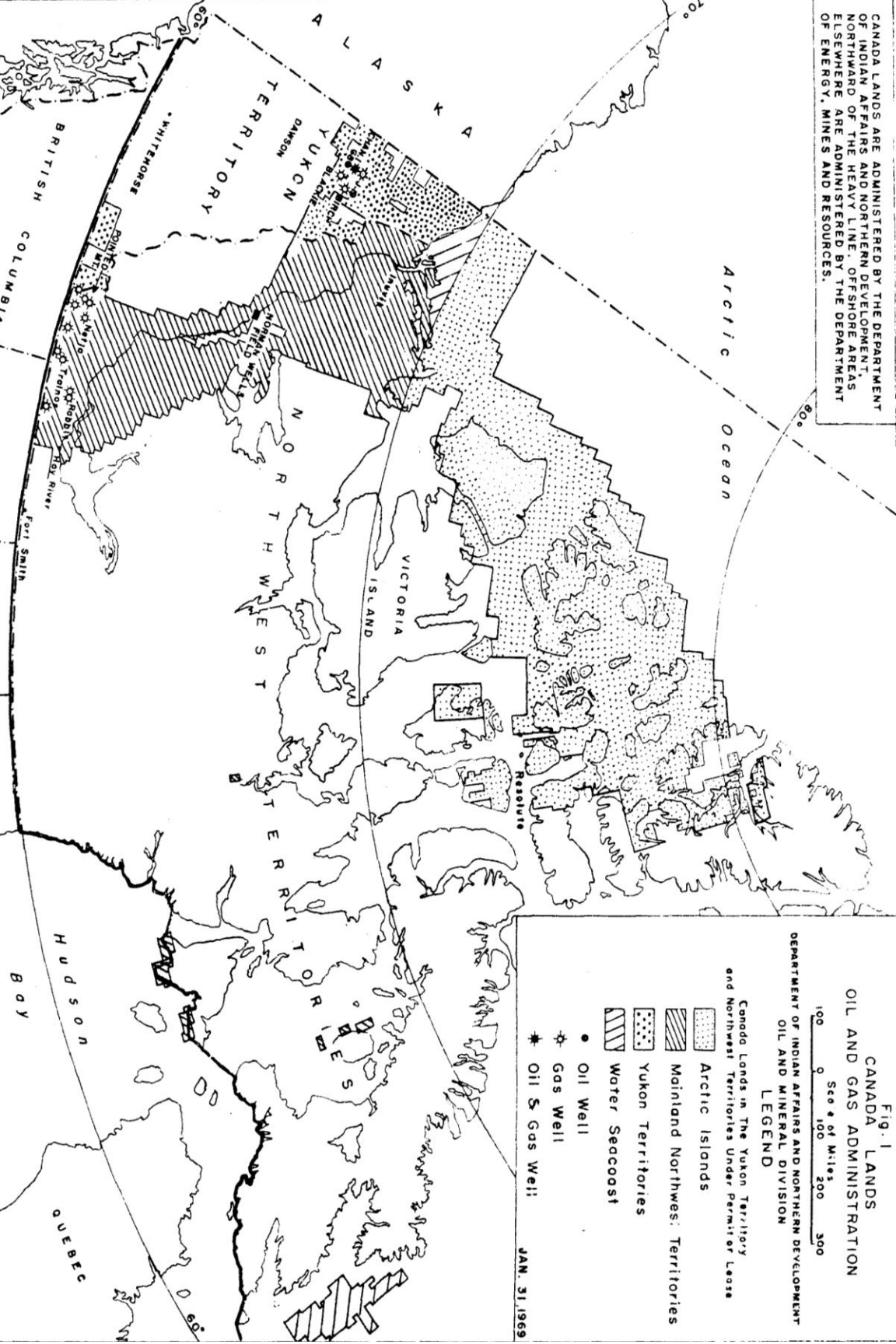


Fig. 1
CANADA LANDS
OIL AND GAS ADMINISTRATION

Scale of Miles
100 0 100 200 300

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
OIL AND MINERAL DIVISION
LEGEND

- Canada Lands in The Yukon Territory and Northwest Territories Under Permit or Lease
- Arctic Islands
 - Mainland Northwest Territories
 - Yukon Territories
 - Water Seacoast
 - Oil Well
 - Gas Well
 - Oil & Gas Well

JAN. 31, 1969

Fig 2

POLAR CONTINENTAL SHELF PROJECT

Scale of Miles
0 100 200 300 400

Legend



AREAS OF SPECIAL INVESTIGATIONS



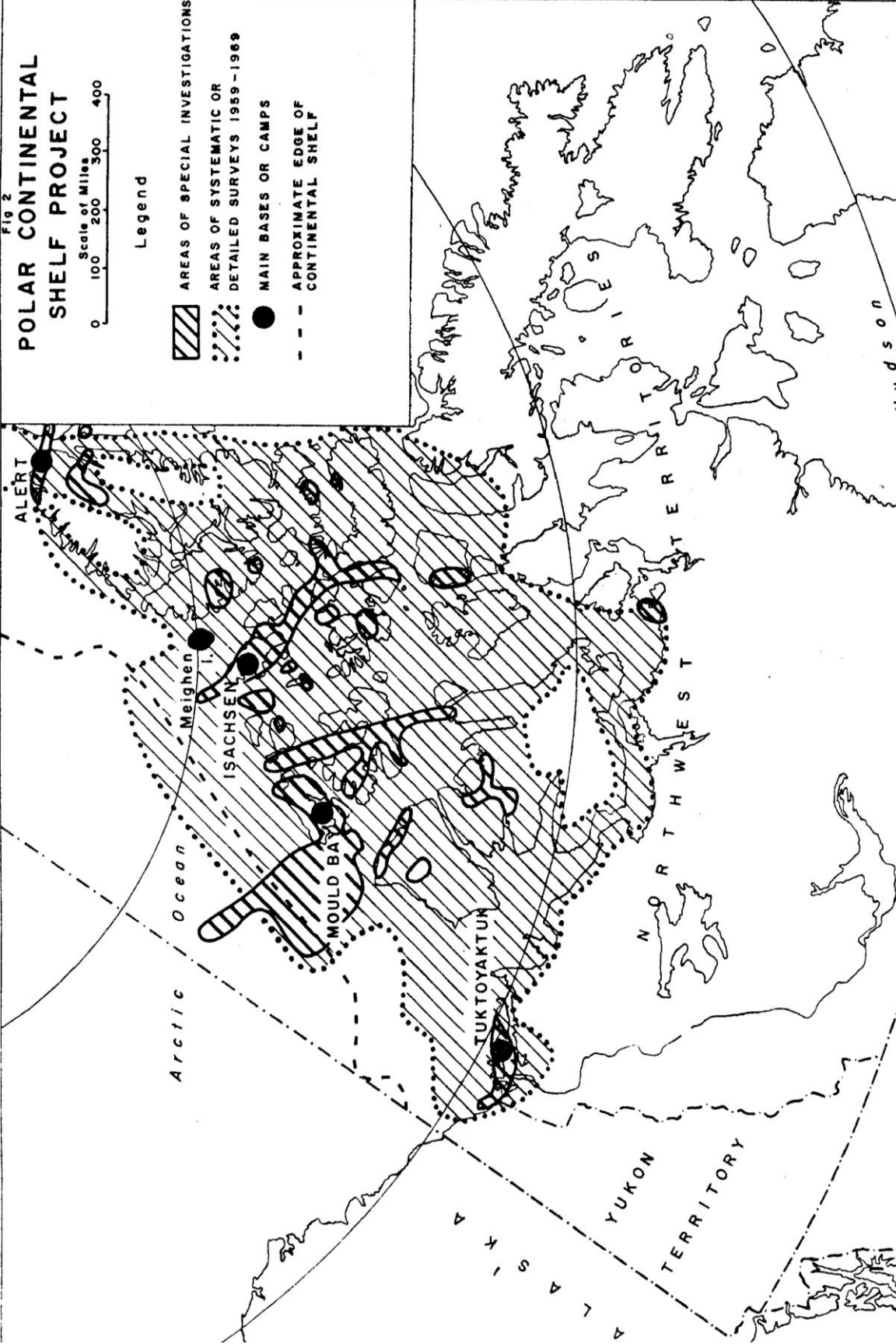
AREAS OF SYSTEMATIC OR
DETAILED SURVEYS 1959-1969



MAIN BASES OR CAMPS

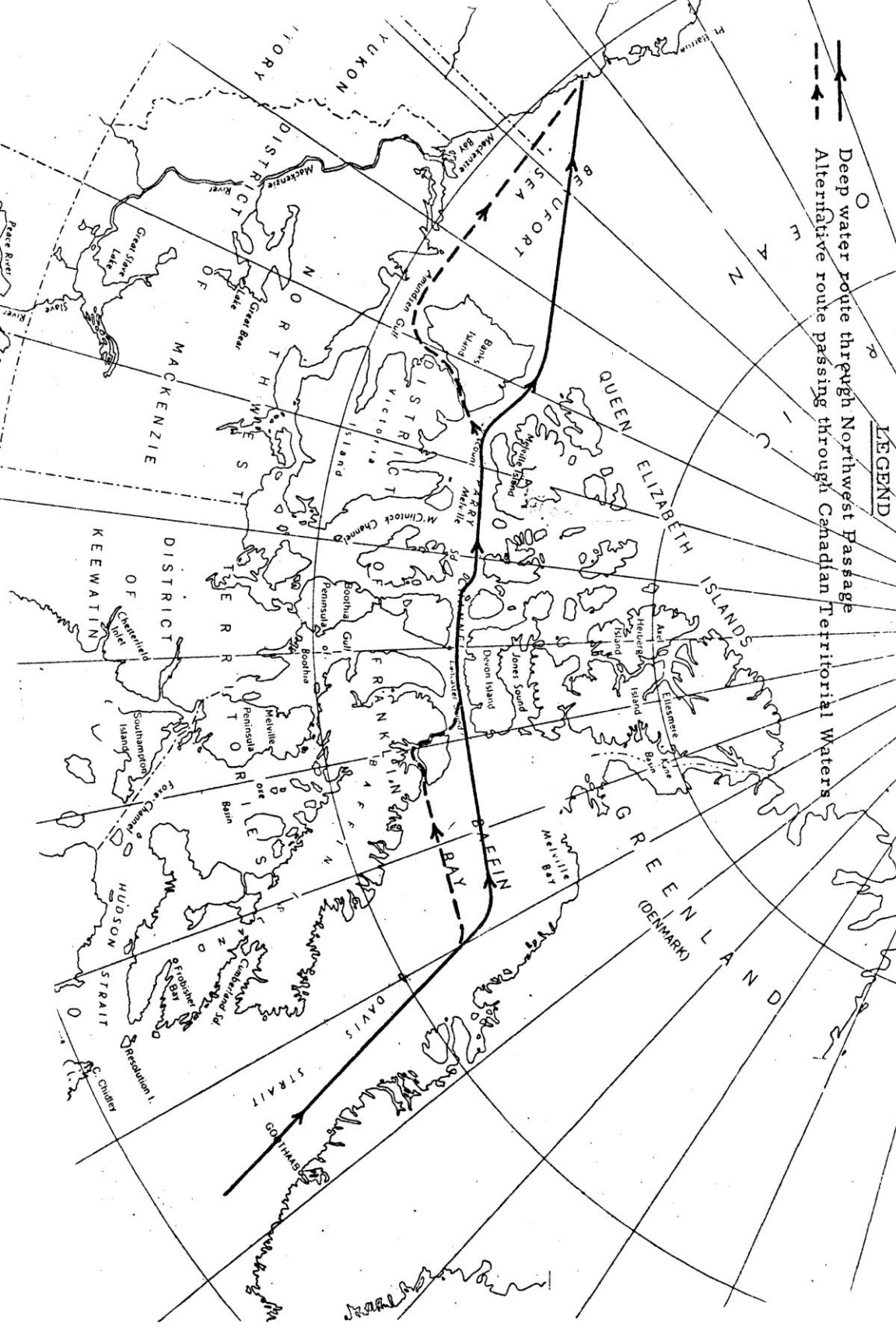


APPROXIMATE EDGE OF
CONTINENTAL SHELF



Deep water route through Northwest Passage
 Alternative route passing through Canadian Territorial Waters

LEGEND



**52. House of Commons, *Debates*. May 15, 1969, 28th
Parliament, 1st Session, p. 8720**

Right Hon. P. E. Trudeau (Prime Minister): Mr. Speaker, honourable members will recall my indicating recently that the government would make a policy statement regarding the question of Canadian sovereignty in the Arctic. I should like to make that statement at this time.

[*English*]

I have already informed the house that Canada's sovereignty over its Arctic regions, including the islands of the Arctic archipelago, is well established and that there is no dispute concerning this matter. No country has asserted a competing claim; no country now challenges Canada's sovereignty on any other basis; and many countries have indicated in various ways their recognition of Canada's sovereignty over these areas. The government is not aware of any maps allegedly disputing Canadian sovereignty over certain Arctic lands. I can assure the house that if any such maps do exist they have no official standing and do not affect Canada's position in any way. The Arctic mainland and islands form an integral part of Canada and we have extended to them the administrative legislative and judicial framework which applies to all parts of Canada.

With reference to offshore resources in the Canadian Arctic, as elsewhere, the Geneva Convention on the Continental Shelf provides that the coastal state exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources. These sovereign rights do not depend on occupation or on any express proclamation. No one may explore or exploit the continental shelf off any of our shores without our express consent. Canada's sovereign rights over the continental shelf in the Arctic follow from Canada's sovereignty over the adjacent lands, and again there is no dispute on this matter. No country has asserted a competing claim to the resources in question no country has challenged Canada's claim on any other basis, and none can do so under international law. Foreign companies carrying out exploration activities on the continental shelf in Canada's Arctic areas operate under Canadian permit and license and in so doing expressly recognize Canada's sovereign rights. The same is true, of course, of foreign oil companies operating on any of our lands in the Arctic or elsewhere.

With respect to the waters between the islands of Canada's Arctic archipelago, it is well known that in 1958 the then minister of northern affairs stated the Canadian position as follows:

The area to the north of Canada, including the islands and the waters between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is national terrain.

[Translation]

It is also known 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. The law of the sea is a complex subject which, as can be understood, may give rise to differences of opinion. Such differences, of course, would have to be settled not on an arbitrary basis but with due regard for established principles of international law.

I should point out that the legal status of the waters of Canada's Arctic archipelago is not at issue in the proposed transit of the Northwest Passage by the ships involved in the *Manhattan* project. As the house is aware, this project is sponsored by a number of oil companies and consists of a trial run through the Northwest Passage and into the Beaufort Sea off Alaska by the ice-strengthened tanker *Manhattan*, accompanied by ice-breakers of the Canadian and US Coast Guards. The exercise is intended to test the feasibility of transporting oil by this method from Alaska's Prudhoe Bay to the northeastern United States and perhaps to Europe.

Needless to say the trials of the *Manhattan* may be of considerable significance for the development of Arctic navigation. Such development is consistent with both Canadian and international interests, and I do not see that any conflict need arise between Canada's national policy and international responsibility in this connection. Arctic 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.

[English]

For these reasons the 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 co-ordination 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.

Hon. Robert L. Stanfield (Leader of the Opposition): Mr. Speaker, I am a little puzzled by the length of the statement and the content of the statement made by the Prime Minister (Mr. Trudeau), with one exception, in that it does not seem to take matters any farther than the ground he had previously covered, and I find somewhat disturbing the comment he has made with regard to the waters between the northern islands.

The Prime Minister refers to positions taken by previous governments and quotes the then minister of northern affairs in a statement made in 1958, laying claim to the islands and the waters between the islands and the areas beyond. I cannot help but wonder whether the effect of the statement made by the Prime Minister this afternoon is to abandon that claim which was asserted previously, leaving the matter strictly on the basis of following scrupulously what the Prime Minister refers to as the principles of international law, which principles are not always as clear as they might be.

I wonder whether this is the attitude that the government of Canada followed when it decided to extend Canadian jurisdiction over our seas. At that time the government of Canada did not set out to follow scrupulously the principles of international law, and of course other governments, for example the government of Iceland, have not done so.

But, Mr. Speaker, I do not rise to argue about the principles of international law but simply to raise the question of whether the Prime Minister in effect has abandoned a position asserted by previous Canadian governments, and to ask what is the reason for this abandonment if my interpretation is correct. Further, Mr. Speaker, if my interpretation is correct I think this will be regarded by the Canadian people as a matter of rather keen disappointment.

Sir, I would hope that the government would reconsider and bear in mind the fact that the principles of international law are not necessarily all that clear. At least the government should assert our position vigorously and aggressively. As I say, I am disturbed by the

manner in which the Prime Minister seems to have abandoned the position taken by previous governments with regard to the assertion of our sovereignty.

Mr. T. C. Douglas (Nanaimo-Cowichan-The Islands): Mr. Speaker, I am sure that all members welcome the Prime Minister's statement asserting Canada's sovereignty over the Arctic regions and his intention to maintain that sovereignty. I would feel happier if the statement of the Prime Minister with reference to the waters between the islands of the Arctic archipelago had been more forthright. It seems to me that if there is uncertainty with respect to international law concerning these areas, the Canadian government would be well advised to state its sovereignty and allow any other countries that wish to dispute it to refer the matter to whatever international court or international jurisdiction exists, for a judgment on it. It seems to me that if the Canadian government leaves this matter in an indefinite state we are almost inviting someone else to suggest that we do not have jurisdiction, and that this is a question upon which we are prepared to compromise. I think the Canadian government ought to make its position clear beyond any shadow of doubt.

It is not only important that we categorically state our sovereignty over the Arctic regions, but we also remember that this parliament has a responsibility with reference to the resource development of those regions. A great part of the settled areas of Canada is already under the control of foreign oil companies and foreign investors. In many cases this is because provincial governments do develop these resources themselves or to set up a Canadian consortium for that purpose. But in these regions which come directly under the jurisdiction of the federal government, the Canadian parliament has an opportunity to set up a Canadian consortium with a majority of public ownership and control so that the development of these vast areas will rebound to the benefit of Canadians today and Canadians of future generations. The Panarctic consortium which has been established is controlled in the main by United States oil companies. It seems to me that if this assertion of our sovereignty is to have any meaning it must go beyond merely asserting our control over territory; it must also assert Canada's intent to develop the resources of that area for the benefit of Canadians.

[Translation]

Mr. Real Caouette (Temiscamingue): Mr. Speaker, the members of the Ralliement créditiste are pleased to hear the Prime Minister (Mr. Trudeau) say that Canada actually has sovereign rights on the Arctic islands, but there is some confusion as regards the surrounding

waters.

At all events, we hope we never have to cross American, Russian or Chinese waters in order to reach any region in Canada.

Mr. Speaker, at any rate, the statement made by the Prime Minister makes it clear that Canada is sovereign, as far as those Arctic areas are concerned.

I approve also what the leader of the N.D.P. (Mr. Douglas) said, that if Canada rules the Arctic, we should endeavour to proceed with the development of the tremendous natural resources of that area, instead of letting foreigners take them over, to the prejudice of Canadians. To encourage foreign investments is perfectly in order, but it is not proper that foreigners should exploit all those resources to their advantage. A share should at least be given to Canadians who deserve, I believe, to benefit from the development of the natural resources of their country, especially in the Arctic.

**53. House of Commons, *Debates*, May 20, 1969, 28th
Parliament, 1st Session, p. 8826**

Mr. David Lewis (York South): I wish to address a question to the right hon. Prime Minister. Would the right hon. Gentleman inform the house whether the United States has laid claim to the waters between the islands in the northern archipelago, and whether discussions are going on between officials of the United States and Canadian Governments with respect to the sovereignty of these waters?

Right Hon. P.E. Trudeau (Prime Minister): Mr. Speaker, I have no knowledge of a claim to those waters by the United States government, nor indeed of any other claim apart from that of the Canadian government. I made a statement last week about the whole position of Canada in the Arctic and I indicated of course that claims established by previous Canadian governments over certain aspects of the waters were not recognized by all states. It is this aspect of the policy which we wish to study further in preparation for negotiations. However, 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.

Mr. Lewis: I have a supplementary question, Mr. Speaker. When the Prime Minister said in his statement that Canada's sovereignty over the waters in question was not admitted by all states, did he refer specifically to the United States or were governments of any other countries laying claim to them; and if no country has laid claim to these waters would the Prime Minister inform the house how he is able to say that all countries do not accept Canada's declaration of sovereignty?

Mr. Speaker: Order, please. It seems to me that the third question is a little too far out. I think the first and second questions might be in order. Perhaps the Prime Minister might want to answer them.

Mr. Trudeau: I do not wish in any way to give publicity to our claims which may be contrary to Canada's long term interest. I think it is of general knowledge that not all seafaring nations are anxious to have such vast areas of ocean claimed by any one state. This is obvious in the case of the two other large archipelagos of the world, and we have been given notice that this would be the position of certain countries with regard to the Canadian archipelago in the north. However I repeat that I do not think it would be in the best interests of Canada to give any publicity to our claims until we ourselves are in a position

either to substantiate them with even greater force, or alternatively to withdraw them if it is in Canada's interest to do so.

Mr. Lewis: I have a further supplementary question, Mr. Speaker. Without indicating what other governments are involved, can the Prime Minister inform the house whether there are currently discussions on this issue among governments of nations, including the government of Canada, and have they been going on for some time?

Mr. Trudeau: My answer is yes, discussions are going on with regard to the general proposition of closing such archipelagos. Some nations have laid claim to them and other nations, which claim that these waters are part of international trading lanes, are contesting them. This is the type of general exchange that is going on. However may I repeat that I do not think it would be useful to be more precise in the case of Canadian claims. I can tell hon. members that there has been a lack of recognition of Canadian claims by important nations, either stated verbally or in writing.

54. Note from Canadian to US Government, "Note Verbale," June 17, 1969

LAC, RG 12, vol. 5561, file 8100-15-4-2, pt. 2

The Department of External Affairs refers to the Aide-Memoire dated April 4 concerning certain aspects of the policy of the U.S. Government regarding jurisdiction over Arctic areas, which was left with the Under-Secretary of State for External Affairs by the United States Minister, the Honourable Rufus Smith, on Saturday, April 5. The position of the Canadian Government on these questions is set out below.

The Canadian Government has taken note of the statement of the U.S. government that it asserts no claim of sovereignty to the islands of Canada's Arctic archipelago. Although the Canadian Government is grateful for confirmation of the position of the U.S. Government on this question, Canada's sovereignty over its Arctic regions, including the islands of the Arctic archipelago, is long since well established and beyond dispute in fact and law. As was pointed out by the Right Honourable Pierre Elliott Trudeau in the House of Commons on May 16, many countries, including, of course, the U.S.A., have indicated in various ways their recognition of Canada's sovereignty over these areas. (The Canadian Government has been made aware informally by the U.S. authorities that the U.S. Government is not aware of any U.S. maps allegedly disputing Canadian sovereignty over certain Arctic islands and that if any such maps do exist they have no official standing. Such maps in any event could not affect Canada's sovereignty in any way.)

With reference to offshore resources in the Canadian Arctic, as pointed out in the Prime Minister's statement, the Geneva Convention on the Continental Shelf and relevant court decisions recognize that the coastal state exercises over the continental shelf exclusive sovereignty rights for the purpose of exploring it and exploiting its natural resources. Canadian legislation and state practise have for many years been based on these principles. Canada's sovereign rights over the continental shelf in the Arctic follow from Canada's sovereignty over the adjacent lands, and again this matter is beyond dispute.

With respect to the waters between the islands of Canada's Arctic archipelago, it will be recalled that in 1958 the then Minister of Northern Affairs of Canada stated as follows: "The area to the north of Canada, including the islands and the waters between the islands and

areas beyond, are looked upon as our own, and there is no doubt in the minds of this Government, nor do I think was there in the minds of former Governments of Canada, that this is national terrain."

In the view of the Canadian Government the status of the waters of Canada Arctic archipelago is not at issue in the proposed transit of the Northwest Passage by the ships involved in the "Manhattan" project.

The Canadian Government has welcomed the "Manhattan" exercise, has concurred in it and will participate fully in it. The oil companies concerned and the U.S. Coast Guard have consulted with appropriate Canadian authorities in the planning of the operation. Evidence of the interests of the Canadian Government is its support of the trials by means of the Canadian Coast Guard icebreaker "John A. MacDonald", and the provision of aerial ice reconnaissance and the assumption of responsibility for the coordination of such reconnaissance. The Canadian Government has also selected and appointed an official representative on board the "Manhattan" who will act as technical advisor and as coordinator of Canadian support for the operation.

The trials of the "Manhattan" may, of course, be of considerable significance for the development of Arctic navigation. Such development is consistent with both Canadian and U.S. interests and the Canadian Government does not see that any conflict need arise between Canada's national policy and international responsibility. Arctic navigation will be an important factor in the general development of Northern Canada and will consequently be encouraged rather than restricted by the Canadian Government.

In the statement made by the Right Honourable Pierre Elliott Trudeau in the House of Commons on May 15, 1969, the Prime Minister gave a fuller exposition of the position of the Canadian Government on the matters considered above.

The development of the Northern regions of Canada and the United States will no doubt involve many matters of mutual concern to both countries and present opportunities for further cooperation between them. The Canadian authorities will of course be prepared at all times to consider and discuss such possibilities as they arise and to cooperate to the fullest possible extent in appropriate projects and initiatives.

Ottawa, June 17, 1969

**55. Canada, House of Commons, Debates, October 24,
1969, 28th Parliament, 2nd session, pp. 30-40**

...

[Mr. Trudeau] Membership in a community, Mr. Speaker, imposes – and properly – certain limitations on the activities of all members. For this reason, while not lowering our guard or abandoning our proper interests, Canada must not appear to live by double standards. We cannot, at the same time that we are urging other countries to adhere to régimes designed for the orderly conduct of international activities, pursue policies inconsistent with that order simply because to do so in a given instance appears to be to our brief advantage. Law, be it municipal or international, is composed of restraints. If wisely construed they contribute to the freedom and the well-being of individuals and of states. 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.

It is in this mood that the government is studying its claims to the waters lying off the islands of the Arctic archipelago. To close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty, as some commentators have suggested, would be as senseless as placing barriers across the entrances to Halifax and Vancouver harbours. We would certainly prove by those acts that we were masters in our own house, but at immense cost economically by denying shipping of importance to Canada. On the other hand, if we were to act in some misguided spirit of international philanthropy by declaring that all comers were welcome without let or hindrance, we would be acting in default of Canada's obligations not just to Canadians but to all the world.

In the Canadian Arctic are found the breeding grounds, sometimes the only breeding grounds, of many species of migratory birds. Bylot Island is the site of the nesting ground of the total population of the Greater Snow Goose. It is the site as well of the nesting colonies of some six million sea birds. Along 12 miles of the coast of Somerset Island are the nesting grounds of four million birds. Large numbers of air breathing mammals, whales, seals, walrus inhabit the waters lying throughout the Canadian archipelago. The existence of these and other animals and birds is dependent upon an uncontaminated environment; an environment which only Canada can take the lead in protecting. The beneficiaries of this natural life are not only Canadians; they are all the peoples of the world.

For those reasons, I say in this place, Mr. Speaker, that Canada regards herself as responsible to all mankind for the peculiar ecological balance that now exists so precariously in the water, ice and land areas of the Arctic archipelago.

Some hon. Members: Hear, hear.

Mr. Trudeau: We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of that environment from pollution or artificial deterioration. Canada will not permit this to happen, Mr. Speaker. It will not permit this to happen either in the name of freedom of the seas, or in the interests of economic development. We have viewed with dismay the abuse elsewhere of both these laudable principles and are determined not to bow in the Arctic to the pressures of any state. In saying this, we are aware of the difficulties faced in the past by other countries in controlling water pollution and marine destruction within their own jurisdictions.

Part of the heritage of this country, a part that is of increasing importance and value to us, is the purity of our water, the freshness of our air, and the extent of our living resources. For ourselves and for the world we must jealously guard these benefits. To do so is not chauvinism, it is an act of sanity in an increasingly irresponsible world. Canada will propose a policy of use of the Arctic waters which will be designed for environmental preservation. This will not be an intolerable interference with the activities of others; it will not be a restriction upon progress. This legislation we regard, and invite the world to regard, as a contribution to the long-term and sustained development of resources for economic and social progress. We also invite the international community to join with us and support our initiative for a new concept, an international legal régime designed to ensure to human beings the right to live in a wholesome natural environment. In pursuit of this concept I shall be holding discussions shortly about this and other matters with the Secretary General of the United Nations. A combination of an international régime, and the exercise by the Canadian government of its own authority in the Canadian Arctic, will go some considerable distance to ensure that irreparable harm will not occur as a result of negligent or intentional conduct.

Canadian activities in the northern reaches of this continent have been far-flung but pronounced for many years, to the exclusion of the activities of any other government. The Royal Canadian Mounted Police patrols and administers justice in these regions on land and ice, in the air and in the water. The Canadian Armed Forces carry out

continuous surveillance activities; Canadian postal services, health services and communications networks criss-cross these territories to serve those who live and work there. Among these persons are the Canadian Eskimos, who pursue their food and conduct their activities over the icy wastes without heed to whether that ice is supported by land or by water. In all these activities, and in others, ranging from geophysical explorations to the distribution of family allowance cheques, Arctic North America has, for 450 years, progressively become the Canadian Arctic.

Sone hon. Members: Hear, hear.

Mr. Trudeau: Hon. members know that there is not now, nor is it conceivable that there will ever be, from any source, challenges to Canadian sovereignty on the mainland, in the islands, in the minerals lying in the continental shelf below the Arctic waters, or in our territorial seas. This happy situation is the result of quiet, consistent policies in the past on the part of all Canadian governments. The present government pledges to be equally consistent. Those policies will reflect Canada's proper interest not only in the preservation of the ecological balance which I have already mentioned, but as well in the economic development of the north, the security of Canada, and in our stature and reputation in the world community.

56. House of Commons, *Debates*, October 24, 1969, 28th Parliament, 2nd Session, p. 88

Hon. Robert L. Stanfield (Leader of the Opposition): Mr. Speaker, I should like to direct a question to the Prime Minister. In view of the Prime Minister's statement last Friday about pollution control and international agreements, is it the position of his government that Canada now exercises and intends to assert full sovereign control over all the waters of the Canadian Arctic and particularly over the waters between the islands of the Arctic?

Right Hon. P. E. Trudeau (Prime Minister): I can say yes, Mr. Speaker. This government does take the position that it exercises sovereignty over all the waters of the Canadian Arctic.

Some hon. Members: Hear, hear.

Mr. Robert Simpson (Churchill): I have a supplementary question, Mr. Speaker. Has the Prime Minister received the recommendation from the Standing Committee on Indian Affairs and Northern Development that the government take action as quickly as possible to declare Canada's sovereignty over these waters, which, incidentally, was a unanimous recommendation?

Mr. Trudeau: I have not received this communication yet but I will look into it.

Mr. G. W. Baldwin (Peace River): A supplementary question, Mr. Speaker. Could the right hon. gentleman take some time in the next two or three weeks and possibly table a map showing what in his opinion is the Canadian Arctic and the related seas?

Mr. Trudeau: Well, I could take some time to consider it, and in the meantime, if the hon. member would draw some lines on a map, they might help me.

Mr. Stanfield: Mr. Speaker, I wish to direct a further supplementary question to the Prime Minister. In order to avoid any possibility of misunderstanding, am I to take it from what the Prime Minister said that Canada does claim jurisdiction and sovereign control over all the waters between the islands in the Canadian Arctic?

Mr. Trudeau: Mr. Speaker, if the Leader of the Opposition is talking about the Canadian Arctic, then I repeat, yes, we do exercise jurisdiction and we intend to exercise our sovereignty over that part of the world.

Mr. Stanfield: In order to avoid any misunderstanding, would the Prime Minister directly answer my question whether or not the government of Canada claims jurisdiction and is going to exercise jurisdiction over all the waters between the islands of the Canadian Arctic, for example, all the waters in the Canadian archipelago - the waters between the islands?

Mr. Trudeau: Mr. Speaker, the answer once again is that the waters which Canada claims as its own will be the object of the exercise of sovereignty by the Canadian government, but I am not prepared to state at this particular time where the lines will be drawn.

Mr. Stanfield: As a further supplementary question, am I to take it then that the Prime Minister has not yet made any statement with regard to Canada's claim over the waters between the islands and, if so, how does Canada propose to exercise pollution control with respect to the waters between the islands?

Mr. Trudeau: Mr. Speaker, the Leader of the Opposition is asking me to anticipate the bill which we have said we will introduce in this session of Parliament. That bill will indicate how we intend to exercise control over pollution of these waters.

Mr. Stanfield: One further supplementary question, Mr. Speaker. Will the bill also indicate the areas and define the waters over which Canada intends to exercise pollution control?

Mr. Trudeau: Yes, Mr. Speaker, but I repeated during the debate on the Speech from the Throne that if there are any constructive suggestions from the Opposition, if they could indicate where in their opinion the lines might be drawn, this might permit us, before introducing the bill, to alter our projected drawings.

57. Memorandum to Cabinet, "Legislation to Prevent Pollution of the Arctic Seas," January 19, 1970

LAC, RG 25, vol. 15729, file 25-4-1

SECRET

MEMORANDUM FOR THE CABINET

January 19, 1970

Legislation to Prevent Pollution of the Arctic Seas

Object

1. The object of this memorandum is to seek Cabinet approval for the preparation of legislation that would enable the Federal Government to take action to protect the "Arctic Seas" from the danger of pollution.

Scope and Nature of the Legislation

2. In the Speech from the Throne at the beginning of the current session of Parliament the Government announced its intention to "introduce legislation setting out the measures necessary to prevent pollution in the Arctic Seas". Since then an interdepartmental committee has considered alternative forms the legislation might take. Possibilities are:

- (a) Amendments to existing or previously proposed statutes (e.g. amendment of the Territorial Sea and, Fishing Zones Act to authorize the Governor-in-Council to extend the boundaries of fishing zones beyond the twelve mile limit and, by amending the Fisheries Act, to extend the new anti-pollution provisions of that Act to apply not only to Canadian territorial waters but also to any fishing zones established under the amended Territorial Sea and Fishing Zones Act). This approach which would apply to all coastal waters would have a possible advantage in not seeming entirely new and unrelated to previous action, and therefore being a logical extension of what has been done in the past. It would not, however, emphasize our concern about the pollution of our coastal waters, particularly Arctic waters, from a number of

points of view, including not only the protection of fisheries and other resources of the sea, but also the welfare of aboriginal peoples and others who live by the sea or depend on the sea for their livelihood and the flora and fauna of the adjacent land areas.

(b) New legislation applying to all Canadian coastal waters (not simply to the waters of the Arctic). The advantages of this would be:

(i) In practice the threat of pollution on the east and west coasts is an important concern of many Canadians, and may be of equal importance to the pollution of Arctic waters in a global sense. General legislation would permit general preventative action;

(ii) Legislation confined to Arctic waters might be viewed internationally as a transparent attempt by Canada to assert sovereignty over these waters, and might therefore be more likely to be challenged by other countries, particularly the United States.

The disadvantages of this approach are the converse of the advantages cited below for the third option.

(c) New legislation relating to the Arctic Seas alone.

The advantages here are:

(i) The Arctic presents a special case with respect to pollution in several respects: the risks of pollution are proportionately greater because shipping is more hazardous there because of ice conditions and the fact that total darkness prevails for half the year. The problems of cleaning up pollution are particularly difficult, and the area is as yet unspoiled. In addition, although much has yet to be learned about the delicate ecological balance in the region, it is an important factor lending support to pollution control measures in the Arctic. The argument for unprecedented action is thus especially strong if limited to the Arctic.

(ii) This unique conservation interest together with a concern for the welfare of the aboriginal inhabitants of the Arctic should tend to ensure strong popular support for Canadian action at the public level even in countries

that might be disposed to object, and thus tend to reduce the likelihood of strong opposition from foreign governments.

- (iii) The problem of the extent and nature of liability for damage resulting from pollution becomes much greater when one is dealing with populated coastlines. It would be extremely difficult to have legislation at an early date to cover this kind of problem and the financial limits of liability would create great difficulty. Legislation limited to Arctic waters would be much simpler as a first stage.
- (iv) Fewer international interests would be directly affected by legislation confined to Arctic waters and this would reduce the risk of objection.

In the light of these considerations it is proposed that the Government put forward legislation relating to the threat of pollution in the Arctic Seas only. The government will likely be criticized for failing to deal concurrently with the threat of pollution on the east and west coasts. Consequently, when the proposed legislation relating to the Arctic is introduced it will be important to explain that more comprehensive measures to prevent pollution on Canada's other coasts are being considered.

3. It is proposed that the legislation deal with all potential sources of pollution of the Arctic Seas from operations on and in the waters of the Arctic Seas, beneath these waters on the continental shelf, or on land areas immediately adjacent to these waters where such land based operations pose a threat of pollution to the Arctic Seas. In practice, the legislation would apply primarily to resource exploitation and shipping activities that threaten pollution of the Arctic Seas.

The Legislation

4. It is proposed that the legislation, entitled an Act to Prevent Pollution in Arctic Seas, begin with a preamble in which Parliament would state its concern [illegible] result of recent developments in resource exploitation and transportation technology and its determination to fulfil its responsibility for the welfare of the aboriginal inhabitants of the Canadian Arctic and for the preservation in the interest of all mankind, of the peculiar ecological balance that now exists in the water, ice and land areas of the region.

Area to Which the Act would Apply

5. There are a number of possibilities concerning the definition of the area of Arctic waters to which the legislation would apply. These possibilities (shown on the attached map– Annex A) are:

- (a) The legislation might not specify the geographical limits of its application, other than by reference to “Arctic Seas” in the title. This would make it possible for the Canadian Government to “reach out” and declare any particular area a pollution control zone when the circumstances appear to so warrant. The advantage of this approach is that it would make it difficult for other states to attack the legislation unless and until it had been applied in a particular area where presumably the need would be manifest. A disadvantage is that, unlike other Acts which do not specify geographical limits such as the Criminal Code which applies only to Canada or to Canadians outside Canada in certain limited circumstances, the proposed legislation is intended to apply to ships and nationals of foreign states. It is reasonable that such ships and states demand to know in respect of what area we are intending our legislation to apply. A further disadvantage is that the legislation might be attacked on the grounds that it was not limited in geographical scope and would appear on the face of it to apply to areas off the coast of other Arctic-bordering states like Norway or the U.S.S.R. For these reasons it is considered undesirable to have no definition of the area of application.
- (b) To define the area by means of lines enclosing the so-called “Canadian sector”; i.e. those areas of the Arctic seas within the sector formed by lines projected from the extreme eastern and western limits of Canadian territory, except in the area between Greenland and the Canadian Arctic islands where the equidistance line would apply. The Southern limit of the area might be the 60th parallel. The advantage of this approach is that it would give coverage to the widest possible area short of areas claimed by other countries. The disadvantage of this approach is that the pollution control legislation might be viewed by other countries as a disguised means of applying the much disputed sector theory and might therefore attract opposition. It is considered that for this reason the sector approach would be inadvisable. A variation of this approach which might be more acceptable internationally would be to avoid the use of the term “sector” and for the western limit refer only to the area of the seas adjacent to Canadian territory extending northward from the Canada-Alaska boundary. Recent

research by the Boundary Commissioner provides some historical evidence that this boundary may have been intended to extend northward beyond the territorial sea. On balance it is considered that this alternative would be subject to essentially the same defects as the straight sector approach.

- (c) The area of application might be defined in terms of the Canadian continental shelf with the lines of demarcation of the sea areas being coterminous with the subjacent continental margin. The advantage of this approach is that it would serve more than one purpose in appearing to demarcate Canada's northward claims (in itself desirable action particularly in the light of a U.N. resolution just passed which calls on states not to extend their offshore jurisdiction), while also giving some legal basis for some types of pollution control over the area in question. (As pointed out in paragraph 14 below that part of the legislation purporting to control resource exploitation on the continental shelf has a sound basis in international law as distinct from that part of the legislation purporting to restrict the freedom of passage of ships deemed likely to create pollution hazards.) The disadvantage of this approach is that the other states, particularly the U.S.A., might look on it as an attempt to give evidence to the so-called "continental shelf doctrine" espoused by certain Latin American countries and Iceland pursuant to which such states claim sovereignty over the superjacent waters of the continental shelf. In addition, insofar as the legislation relates to the threat of pollution from shipping, there is no logical connection between the continental margin and the pollution threat. Finally, there would be problems of precise definition on the surface of an area that relates to a submerged and gradual formation.
- (d) The Act might apply to all areas of the Arctic seas within 100 miles of Canadian land. The major advantage of this approach is that it would provide protection over an extensive area beyond the actual waters of the Arctic archipelago and it could be argued that the area of application coincides with the area within which states may, within certain limited circumstances, take some kinds of anti-pollution measures pursuant to international conventions. A further advantage of the 100-mile concept is that it can be more clearly identified with the threat of pollution from shipping and is thus less open to challenge as a disguised assertion of sovereignty over Arctic waters. The area so defined (i.e., in relation to a distance from land) would not require the drawing of baselines in the Arctic and would avoid the argument that we were trying to establish baselines

for sovereignty purposes which go beyond what international law would so far support. On balance, it is considered that this approach is the least objectionable of the possible alternatives and it is recommended that the outer limit of waters to which the Act would apply be defined as 100 miles from Canadian land except where the line of equidistance between Greenland and the Canadian Arctic islands is less than 100 miles from shore, in which case the line of equidistance would apply.

Substantive Provisions of the Legislation

6. The substantive provisions setting forth the precise legal regime that could apply within the defined area would be of three separate kinds, namely:

- (a) prohibitions (with penalties sufficient to provide an effective deterrent to deliberate or negligent acts of pollution);
- (b) preventative requirements (designed to prevent pollution before it happens);

and

- (c) financial responsibility and liability provisions.

7. As regards prohibitions, the most obvious of these would be a prohibition directed against anyone who knowingly or negligently deposits or permits the deposit of “waste” (basically as that term is defined in the proposed new Canada Water Act) in any waters within the area to which the Act applies or on adjacent land areas where such waste threatens to pollute said waters.

Appropriate penalties would have to be devised directed against any person engaged in exploitation of the resources of the continental shelf or land areas adjacent to Arctic waters and against the owner or operator of a ship whose master or crew contravenes the prohibition. Such a provision would not come into play where the incident resulting in pollution occurred otherwise than as a result of some blameworthy act or omission, e.g. not where the incident was the result of an accident.

Insofar as the prohibition relate to shipping, it is proposed to reverse the usual international approach of relying on prosecution in the flag state by providing for violations to be prosecuted in Canada. It

is also proposed that the legislation empower the enforcement agency to arrest and detain a ship involved in a violation of the Act.

8. Because of the difficulty of foreseeing all of the problems that may be involved in devising an adequate as well as flexible regulatory scheme designed to safeguard against incidents resulting in pollution, it is proposed to include a power in the Governor-in-Council, to make regulations for “regulating and preventing” the pollution of any waters to which the Act applies.

9. For the purpose of exercising control over shipping in Arctic waters in order to prevent pollution it is proposed that the Bill would authorize the designation (or subsequent change) of special “shipping safety control zones” by Order of the Governor-in-Council, within which preventative provisions of the Act related to shipping would apply as appropriate in relation to each situation. Such zones could be established anywhere within the area to which the Act applies. A requirement would be included in the legislation whereby proposals for the establishment of such zones would be published in advance of formal action, thus permitting the Governor-in-Council to receive and consider representations including representations from other countries, before formally committing itself by legal action. It is not, however, recommended that any such Orders when made should be subject to parliamentary review before taking effect. This approach would permit control over shipping in Arctic waters for the purpose of preventing pollution to be extended gradually so as to minimize the risk of opposition.

10. As regards the preventative requirements, related to shipping, it is proposed to give power to the Governor-in-Council to make regulations prohibiting the entry of any ship into any waters within a shipping safety control zone except upon such conditions as might be prescribed by the regulations. The prescribed conditions would be basically concerned with whether or not a ship complied with certain technical requirements, such as the ability of its hull to stand up to heavy ice conditions, whether its cargo is adequately protected, whether it carries the proper equipment, e.g., radio and navigational aids, required in northern latitudes, and whether it must be escorted by an icebreaker. In the regulations, it will be necessary to balance the government’s interest in northern development against its responsibility to protect the Arctic waters from pollution.

Preventative measures related to oil exploration and production are already contained in the Oil and Gas Conservation Act including the amendments now before Parliament. It will be necessary to re-

examine this Act to ensure that the protection provided is adequate to meet the special problems that could arise in the Arctic.

11. As regards financial responsibility and liability provisions it is proposed that the regulations governing entry into a shipping safety control zone include a provision requiring shipping companies to provide evidence of financial responsibility, in the form of either bonding or insurance, as a condition precedent to their ships entering those waters. The level of the required bonding or insurance would be determined under the regulations by a formula that would take into account gross tonnage, kind of cargo and other factors specified in a general way in the legislation. Similar evidence of financial responsibility would be required from companies engaged in exploitation of resources of the continental shelf or on land adjacent to Arctic waters where such operations presented a threat of pollution of Arctic waters.

12. Consideration was given to the degree of liability that should be imposed on persons operating in the Arctic for damages resulting from an incident causing pollution. At the recent Brussels Conference on Pollution of the Sea by Oil, Canada took a strong stand in favour of having the shipowner and the shipper bear unlimited liability for incidents of pollution. Such a regime would seem to be feasible and justifiable in an international context where the cost of insurance can be spread over the very large volume of seaborne oil cargos. However, if the concept of unlimited liability were applied to all operations in the Arctic this would have the effect of seriously inhibiting northern development. It is proposed therefore to employ the more flexible concept of limited liability with the limitations related to economic realities. It is intended that the amount of bonding or insurance determined under the regulations as indicated above would constitute a limit on the liability that might be incurred with respect to an incident of pollution. In practice this limit as applied to large scale movements of oil through the Northwest Passage might be very high indeed, whereas the limit applied to small scale resource exploration might be considerably lower.

It is further proposed that the legislation expressly confer a right on the Federal Government to recover, as a debt, any costs reasonably incurred by it in mitigating damage caused by an incident resulting in pollution. Such claims of the Federal Government would rank pari passu which claims of other persons arising out of the same incident and all such claims would be subject to the aforementioned limit of liability.

Administration and Financial Considerations

13. It is envisaged that there will be a need for administrative machinery, possibly in the form of an advisory committee, to bring together the various interests involved prior to the designation of shipping safety control zones. With respect to enforcement, decisions will have to be made as to the authority in whom the power of arrest or of seizure and detention is to be vested. Similarly some department, presumably the Department of Transport, will have to be given primary responsibility for ensuring compliance with Hull Safety and Equipment Regulations, although several departments will have an interest in this matter. The administration of the financial responsibility provisions will likely engage the resources of other departments.

With respect to the financial implications of the proposed legislation, Ministers have previously received estimates compiled by the Interdepartmental Committee on Territorial Waters (Cab. Doc. 955/69) which indicated that the costs of maintaining effective supervision of substantial oil shipments through the Northwest Passage would amount to \$143.6 million in capital costs over a five-year period and annual operating costs of \$8.6 million. This estimate includes the capital and operating costs of three new polar icebreakers as well as support facilities and navigation aids.

International Implications

14. The international community is giving increasing attention to the control of pollution of the seas as well as in other environments. The proposed Arctic seas pollution control legislation is one measure whereby Canada can attempt to lead the way in contributing to the development of international law in this field in much the same way in which Canada pioneered in the development of the exclusive fishing zone concept by the adoption of the 1964 Territorial Sea and Fishing Zones Act. There is not as yet, however, a basis in international law, either customary or conventional, for a unilateral assertion by the coastal state of pollution control jurisdiction beyond 12 miles from the baselines of the territorial sea except for that part of the legislation directed to controlling pollution resulting from exploitation of the resources of the continental shelf for which there is an existing basis in international law, reflected in the Geneva Convention on the Continental Shelf. While Canada has maintained its claim that the channels between the Arctic islands constitute internal Canadian waters, and while historic claims and the straight baseline system are accepted principals under international law, the application of these concepts to the waters of the Arctic archipelago is disputed. The U.S.A.

has repeatedly expressed concern through our Embassy in Washington and their Embassy here as to any unilateral action by Canada to exercise jurisdiction over the waters of the Arctic archipelago, while expressing "sympathy" with any action intended to control pollution by international agreement. These representations have been based on the longstanding U.S.A. position that the waters of the Arctic archipelago beyond Canada's present 3-mile territorial sea constitute high seas. (Consistent with this position, the U.S.A. has proposed an approach to the whole Arctic region based on the Antarctic Treaty, which would regulate activity in the area by agreement amongst interested states and would presumably include, as does the Antarctic Treaty, a disclaimer and "freeze" on claims to sovereignty.) The possibility of strong U.S.A. opposition to the proposed legislation must therefore be taken into account.

Canada is a party to the 1954 Convention for the Prevention of Pollution of the Sea by Oil (as amended in 1962) which establishes prohibited zones in which the deliberate discharge of oily mixtures by ships is forbidden. However, jurisdiction in respect of violations of these prohibitions is vested in the flag state rather than the coastal state, which can only take note of such violations and bring them, to the attention of the flag state. Canada's proposed Arctic seas pollution control legislation goes well beyond these provisions the Canadian legislation will include prohibitions and penalties to deter both deliberate and negligent discharge of "waste" (as opposed to oil only) and will reverse the provisions of the Convention by vesting jurisdiction over offending ships in the coastal state (Canada) rather than in the flag state. Another convention negotiated at the International Legal Conference on Marine Pollution Damage in Brussels last November and not yet in force, deals with accidental pollution of the sea by oil and would permit the coastal state to intervene on the high seas to prevent or minimize major pollution damage where a marine accident threatening or actually causing pollution has already occurred. This right to intervene would apply only to the particular ship involved in the accident and only as between coastal and flag states parties to the convention. The proposed Canadian legislation therefore goes considerably beyond the provisions of this convention as well, in that the legislation will vest extensive jurisdiction in Canada to prevent marine accidents (by imposing strict technical conditions which ships would have to satisfy before being allowed to enter the proposed pollution control zone) rather than merely providing for Canada's right to intervene after a marine accident has already occurred and is threatening or actually causing pollution. In essence, the Brussels Convention does not derogate from the flag state's jurisdiction over its own ships on the high seas but simply gives coastal states the right 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 or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.” The Canadian legislation, on the other hand, would give Canada jurisdiction over foreign ships similar to and perhaps greater than that which Canada would enjoy over these ships in its own territorial sea, in an area to which Canada has not made a formal claim of sovereignty.

For the foregoing reasons, given the vulnerability of parts the proposed Canadian legislation under international law and the strong likelihood of opposition by the U.S.A, it would seem desirable:

- (a) to inform the U.S.A. before announcing the legislation to be adopted by Canada; and
- (b) to submit a new reservation to Canada’s acceptance of the compulsory jurisdiction of the International Court of Justice which would protect Canada against the possibility of court action by the U.S.A. or some other state (acting either independently or on behalf of the U.S.A) in respect of the proposed legislation.

A possible alternative way of proceeding that might overcome these international problems is set out in Annex “B”.

Recommendations

I recommend that:

- (a) Cabinet approval be given for the preparation of the proposed legislation for the prevention of pollution in Arctic Seas to be introduced as soon as possible in the current session of Parliament;
- (b) the Minister of Indian Affairs and Northern Development in consultation with other Ministers concerned prepare such detailed drafting instructions with respect to the proposed legislation as may be necessary to supplement this memorandum and make recommendations to Cabinet concerning the administration of the Act;

- (c) the Secretary of State for External Affairs prepare a memorandum to Cabinet recommending any action the government should consider to deal with possible international reaction to the proposed legislation and consider, in consultation with me, the extent, nature and timing of discussion with other countries that will be interested in and may react to the legislation.

The Prime Minister.

Annex "B"

An Alternative Basis for Legislation to Prevent Pollution of the Arctic Seas.

A possible alternative to the course proposed in this memorandum would be:

- (a) to confine the application of legislation establishing pollution control over ships to an area extending 12 miles from Canada's territorial sea baselines, (thereby establishing a 9 mile contiguous pollution control zone); and
- (b) to rely on the pollution control provisions of the Oil and Gas Conservation Act to prevent pollution of Arctic waters from exploitation of the resources of the continental shelf.

Such an approach would provide control over one of the major potential sources of pollution (offshore resource exploitation) while at the same time establishing a Canadian pollution control zone from shore to shore at the midpoint of the Northwest Passage, thereby ensuring that any ships intended for transport of oil from Prudhoe Bay or the Beaufort Sea to the eastern U.S.A. seaboard would have to be in compliance with Canadian pollution control legislation. The main advantage of this approach is that it might be less open to question under international law and thus might not necessitate a new reservation to the jurisdiction of the International Court. A further advantage is that it may be less likely that the U.S.A. would oppose such an approach, although this is not certain since the legislation would assert a right to establish standards for vessels passing through channels that the U.S.A. considers to be international waters connecting areas of open sea. The disadvantage of such an approach is that it would not provide pollution control over ships throughout the waters of the Arctic archipelago and surrounding high seas. It would not, thus, be credible in genuine pollution-prevention terms, and Canada's interference with the right of innocent passage could, therefore, less readily be defended on grounds relating to pollution.

**58. House of Commons, *Debates*, April 16, 1970, 28th
Parliament, 2nd Session, p. 5953**

...

Mr. Aiken: Yes, Mr. Speaker. I should like to ask the minister a question so that we can be perfectly clear about his position on the 12-mile limit, particularly under Bill C-203, although we have been discussing the two bills. Regarding the Arctic Islands, will Bill C-203 draw geographic lines of the 12-mile limit around each island or is it intended to draw a line enclosing all the Arctic Islands? In other words, will the territorial sea as defined in Bill C-203, include areas between Arctic Islands of more than 24 miles?

Mr. Sharp: Since obviously we claim these to be Canadian internal waters we would not draw such lines, Mr. Speaker.

...

59. Memorandum, "Status of the Arctic Archipelagic Waters, Status of Special Bodies of Water and Extension of Fisheries Jurisdiction in the Arctic," November 28, 1975

LAC, RI 2069, vol. 145, pt. 8

CONFIDENTIAL

MEMORANDUM TO THE CABINET

STATUS OF THE ARCTIC ARCHIPELAGIC WATERS,
STATUS OF SPECIAL BODIES OF WATER AND
EXTENSION OF FISHERIES JURISDICTION IN THE ARCTIC

SUMMARY

On June 30, 1976, Cabinet decided that the question of the extension of fisheries jurisdiction in the Arctic, the timing for drawing straight baselines around the perimeter of the Arctic archipelago and Canada's claims to other special bodies of water adjacent to Canada's coast would be considered in September or October of 1976. This Memorandum addresses these three separate issues and recommends that the Government decide the extend fisheries jurisdiction to 200 miles in the Canadian Arctic by a specified date such as March 1, 1977, the date for U.S. extension in the Arctic. It further recommends against drawing baselines around the Arctic archipelago at this juncture, maintaining the status quo until the international climate would be more propitious to such action, and that the status of the special bodies of water be reconsidered by Cabinet in greater depth by mid 1977.

1. With respect to extension of fisheries jurisdiction in the Arctic, it is recommended that:

- (a) the Government, through the Secretary of state for External Affairs, make a statement of policy on or about the date on which the proposed Order: in-Council extending fisheries jurisdiction on the East and West coasts is published in the Canada Gazette, that the Government recognizes the need to safeguard the fishing interest of native peoples in the north and is committed to extend fisheries jurisdiction to 200 miles

by a specified date to be decided by Cabinet now (such as March 1, 1977, the date for U.S. extension);

- (b) the extension of fisheries jurisdiction be effected by an Order-in-Council declaring a fishing zone extending 200 miles seaward from the (undefined) baselines of the territorial sea, without specifying geographical co-ordinates, except in the boundary areas with the U.S. and Greenland, and without publishing charts;
- (c) the lateral boundaries of such extension will be delimited, on the western side, by the 141st meridian of longitude, and on the eastern side by the Canada-Denmark continental shelf boundary and in the Lincoln Sea by a median line.

2. With respect to the timing for the drawing of baselines around the perimeter of the Arctic archipelago, it is recommended that:

- (a) the drawing of baselines around the perimeter of the Arctic archipelago be deferred until the international climate, in particular developments at the Law of the Sea Conference and the U.S. reaction to the Canadian position on the Arctic Exception "package deal", would be more propitious to such action by Canada.

3. With respect to claims by Canada to other special bodies of water, it is recommended that:

- (a) the matter be reconsidered in greater depth by Cabinet in mid-1977 and;
- (b) as an interim measure until that time, the government use appropriate occasions to reaffirm the position that these special bodies of water are Canadian internal waters, and, Government Departments and Agencies be instructed to act in a manner consistent with this position and so as not prejudice the Canadian claim in any manner.

MEMORANDUM TO THE CABINET

STATUS OF THE ARCTIC ARCHIPELAGIC WATERS,
STATUS OF SPECIAL BODIES OF WATER AND
EXTENSION OF FISHERIES JURISDICTION IN THE ARCTIC

I. PROBLEM

Pursuant to Cabinet's decision of July 30, 1976, there is a need for the Government to consider and, as appropriate, to take further decisions with respect to:

- (a) The extension of fisheries jurisdiction in the Arctic;
- (b) The timing for the drawing of straight baselines around the perimeter of the Arctic archipelago;
- (c) Canada's claim to other special bodies of water adjacent to Canadian coasts – the Bay of Fundy, the Gulf of St. Lawrence, Dixon Entrance, Hecate Strait and Queen Charlotte Sound.

II. OBJECTIVES

- 2. The objectives of this Memorandum are to review and make recommendations on the above questions.

III. FACTORS

A. Background

(1) Extension of Fisheries Jurisdiction in the Arctic

3. Cabinet decided on February 12, 1976 that Canada will extend its fisheries jurisdiction off the East and West coasts on the basis of the need to protect dangerously depleted fish stocks. Subsequently, it was decided by Ministers to effect the extension on January 1, 1977. This decision did not provide for extension of fisheries jurisdiction in the Arctic. U.S. legislation was enacted providing for a 200 mile fisheries jurisdiction extension on March 1, 1977, to include, unlike the planned Canadian extension of jurisdiction, extension in the Arctic, in the Beaufort Sea off the Alaskan coast. U.S. extension poses the question of whether Canada should take parallel action to safeguard its boundary claims.

4. Because of the complexities of the issues involved, there is little prospect of an agreement on the maritime boundary in the Beaufort Sea - which would include the continental shelf as well as the water column - being agreed upon between Canada and the U.S. prior to the U.S. extension on March 1, 1977. Although U.S. extension of jurisdiction in the Arctic would not in itself alter the legal arguments with respect to the boundary issue, nevertheless failure by Canada to assert similar jurisdiction could work to Canada's disadvantage on this issue and may trigger adverse public reaction. Canada has already asserted its claim to jurisdiction up to a maritime boundary along the 141st meridian of longitude, on the basis of existing treaties and, under the Arctic Waters Pollution Prevention Act, out to a distance of 100 miles. Hydrocarbon exploration permits have been issued by Canada, up to the 141st meridian, however, there would be no definitive assertion of Canadian jurisdiction to match the U.S. claim beyond 100 miles from shore, apart from a dormant and highly questionable claim to the entire "sector" extending up to the pole.

5. On the Eastern side of the Arctic there is no comparable basis in treaty or international law for delimiting the maritime boundary between Canada and Denmark (Greenland) along the meridian line. There have been to date no definitive claims to jurisdiction on either side in waters north of these land areas, other than on the basis of the sector theory, referred to in paragraph 4 above. In the absence of any special circumstances, the maritime boundary would be determined by the median line reflected in the Continental Shelf Convention of 1958 to which both Canada and Denmark are parties. This could call into question Canada's reliance on the sector theory (it was recommended in a memorandum to Cabinet of February 1 1960, that Canada neither affirm nor deny the sector theory) but since the 60th meridian falls inside the median line, it could be argued that the sector theory has not been abandoned.

6. Although the most recent rounds of fisheries negotiations with the U.S. have been aimed at arriving at a long term agreement which would facilitate a boundary settlement, it now appears that the negotiations have reached a stage where it may only be possible to negotiate on the basis that the objective is a short term agreement on fisheries which would avoid a confrontation in the boundary regions. The negotiations thus far have touched only on fisheries problems off the Atlantic and Pacific Coasts. (There is, at present, no operational need for Canada to extend fisheries jurisdiction in the Arctic, whereas the U.S. has a large foreign fishing effort in the Bering Sea off Alaska.) While a declaration of intent by Canada to extend in the Arctic when necessary to protect Canadian interests would probably not complicate the fisheries negotiations, publication in the next few

weeks of the co-ordinates of an Arctic fisheries zone would introduce a new element. There are no practical fisheries issues in the Arctic to be addressed in any interim fisheries agreement. However, the U.S. side would likely perceive publication of co-ordinates of an extended fisheries zone as injecting another boundary problem into the fisheries negotiations and make even more difficult the job of arriving at some interim solution, or modus vivendi, to deal with fisheries problems.

7. There is at present no commercial fishing (domestic or foreign) in the eastern or western Arctic in areas within a Canadian 200 mile fisheries zone. However, there is some future potential for commercial fishing, including fishing by foreign vessels, and in this regard the interest and perceptions of the Inuit must be taken into account. Although small in absolute terms, fishing and the taking of marine mammals (seals and whales) is of great significance to the Inuit communities in parts of both the eastern and western Arctic. Failure to extend fisheries jurisdiction in the Arctic, at the same time as extension off the East and West coasts, could be perceived by the Inuit as failure to afford them the same level of protection as that given to southern Canadian fishermen and could leave the Government unable to guarantee the Inuit any exclusive fishing rights beyond 12 miles from land (the limits of the territorial sea) throughout and outside the archipelago. Furthermore, some native spokesmen could characterize government inaction in this regard as neglect on the part of the Government in safeguarding waters which the Inuit regard as comprising their natural heritage. Such criticism is particularly likely at a time when they have formulated and submitted to the Government proposals, which the Inuit Association is now refining, respecting their claims in the Arctic. Adverse reaction to failure to extend fisheries could be forestalled by a clear statement of government policy with respect to its commitment to the protection of Inuit fishing rights, including a commitment to extend fisheries jurisdiction in the Arctic by a precise date. Were such a statement of policy to be made in conjunction with the publication on October 31, 1976 of the required Order-in-Council, which would extend jurisdiction off the East and West coasts, it may obviate the need to actually extend fisheries jurisdiction in the Arctic simultaneously with the extension of jurisdiction in the southern areas. A reasonable delay would not prejudice Inuit interests but it would have the advantage of permitting Canada-U.S.A. negotiations on fisheries jurisdiction in southern boundary areas to proceed unimpeded by the complication of an additional boundary problem in the Beaufort Sea.

(2) Timing for the drawing of Straight Baselines around the Arctic Archipelago

8. Cabinet decided in its decision of July 30, 1976, Canada's intention to draw straight baselines, at an appropriate time and in accordance with accepted principles of internal law, around the perimeter of the Arctic archipelago, thereby delimiting the waters within the archipelago regarded by Canada as internal waters. This intention has been expressed privately to the U.S. authorities in the context of the Law of the Sea Conference.

9. Canada managed to secure insertion at the Law of the Sea Conference of a provision in the Revised Single Negotiating Text (RSNT) which would ensure Canada's right to pass and enforce domestic environmental legislation with respect to Arctic waters within the limits of the economic zone. In order to secure agreement on this so-called "Arctic Exception" article at the Conference, U.S. support is essential, and the U.S. indicated at the March-May, 1976 session that it was prepared to support the Arctic Exception as part of a "package deal" in exchange for Canada's support on certain other provisions in the draft text. The elements of this "package deal" were outlined in an earlier Cabinet Memorandum, Cabinet decided that:

- (a) the Government reaffirm Canada's historic claim that the waters within the Arctic archipelago, including the Northwest Passage, are internal Canadian waters;
- (b) Canada accept the U.S. "package deal" involving U.S. acceptance of the Arctic Exception article in exchange for Canadian support in the present draft text for international straits;
- (c) acceptance of the "package deal" be conveyed to the U.S. delegation to the Conference, with particular care not to make any comment which would jeopardize Canada's claim to the waters of the Arctic archipelago, including the Northwest Passage, and other special bodies of water.
- (d) the U.S. delegation be advised that Canada reaffirms its historic claim that the waters within the Arctic archipelago, including the Northwest Passage, are internal Canadian waters and that Canada intends at an appropriate time to draw baselines around the Arctic archipelago; however, Canada would reassure the U.S. that this is not intended to restrict access to, or transit of, these waters by military vessels of the U.S. operating in pursuance of common defence interests.

10. These points were conveyed to the U.S. head of delegation at the Law of the Sea Conference in August, 1976. No reaction to the proposals has been received from the U.S. and therefore a judgment cannot be made on the final U.S. position regarding each of the foregoing elements. It can be expected however, that the U.S. would react adversely at this time to Canadian action to promulgate baselines around the archipelago. Moreover, such action would be seen by a number of other important maritime states, including the U.K. and many European states as being unduly acquisitive and disruptive, coming at a time when the status of archipelagic waters generally is a subject of discussion and negotiation in the Law of the Sea Conference.

11. At the time of the passage of the Arctic Waters Pollution Prevention Act in 1970, protests were received from virtually all major maritime powers, and it has been only with great reluctance that states have been ready to acquiesce in the inclusion of an Arctic Exception article in the draft text. Canada has stopped short of taking actions earlier to reinforce claims to the Arctic waters by drawing baselines because of the possibility of major international controversy, and perhaps litigation, which could have the effect of eroding the legal basis of these claims. These same considerations led to the development of a functional approach to Arctic waters, evidenced by the Arctic Waters Pollution Prevention Act. This approach has allowed Canada to bolster gradually the basis for the exercise of jurisdiction over these waters. The Arctic Exception article would further bolster Canada's right, as a minimum, to pass, adopt and enforce laws for the protection of the environment applicable to all waters within the archipelago, including the Northwest Passage. This provision and other articles in the RSNT of special interest to Canada (such as provision for special coastal state rights in respect of salmon fisheries) may be placed in jeopardy if Canada alienates support of key delegations by taking action on straight baselines at this time. From a sovereignty protection and, in particular, a law enforcement viewpoint, the advantages of a clarification of the precise limits of Canadian internal and territorial waters in the Arctic, do not outweigh the tactical disadvantages inherent in drawing baselines at this time.

12. When circumstances will favour such action is difficult to foresee. While the drawing of straight baselines during the course of the Law of the Sea Conference could be prejudicial to Canada's general objectives at the Conference, i.e. a new Law of the Sea treaty, could have a bearing on Canada's position with respect to the status of these waters and the drawing of straight baselines. However, assuming the present RSNT provisions on various relevant issues are not

significantly changed, it would appear to be to Canada's overall advantage to defer action on straight baselines in the Arctic.

13. An extension of a fisheries zone to 200 miles north could be made without drawing straight baselines at the present time. Without drawing straight baselines, there are 2 methods of extending fisheries jurisdiction. One method would be by drawing arcs of circles with the radius measured outward 200 miles from selected points along the coasts (i.e. according to the sinuosities of the coast); another method would be to declare a fishing zone extending 200 miles seaward from the (undefined) baselines of the territorial sea without specifying geographical co-ordinates at this time, except in boundary areas with the U.S. and Greenland, and without publishing charts. The second method is similar in effect to the action Canada took in extending its territorial sea to 12 miles in 1970, when Canada refrained from indicating the precise baselines or outer limits of the territorial sea in the areas of the special bodies of water and in the Arctic, either through the drawing of straight baselines or issuing charts. Under the first approach, it would be clear that Canada has not employed a straight baseline system and it might be alleged that Canada was in effect abandoning the straight baseline system in the Arctic. Under the second approach, there would be no implicit abandonment of a straight baseline system and it would not be inconsistent, therefore, with the earlier expressed intent of Cabinet to draw straight baselines in the Arctic at an appropriate time. Nor would it require the issuance of new co-ordinates for the outer limits of the new 200 mile zone when such action is eventually taken.

(3) Canada's Claim to Special Bodies of Water

...

[This omitted section discusses the Bay of Fundy, the Gulf of St. Lawrence, Dixon Entrance, Queen Charlotte Sound, and Hecate Strait]

IV. Alternatives:

23. There are a number of alternatives available for each of the issues addressed in this Memorandum.

1. The extension of fisheries jurisdiction in the Arctic

With respect to this question, the following courses of action would appear to be available:

- (a) The Government could extend fisheries jurisdiction in the Arctic at or about the same time as extension of jurisdiction on the East and West Coasts.
- (b) The Government, at the time of the publication of the proposed Order-in-Council extending fisheries jurisdiction on the East and West coasts on January 1, 1977, could make a statement of policy with respect to the protection of Inuit concerns in Arctic waters and a commitment regarding extension of fisheries jurisdiction to take place by a precise date (one possibility being March 1, 1977, the date for the U.S. extension)
- (c) The Government could take no action at this time with respect to extension in the Arctic.

24. While actual extension in the North at the same time as on the East and West coast would avoid criticism from the Inuit, a statement of policy, at the time of promulgation of the proposed Order-in-Council, indicating that the Government intends to extend in the North by a precise date, as outlined in alternative (b), would meet many of the Inuit concerns. Deferring extension of fisheries jurisdiction in the Arctic, as outlined in alternative 1 (b), would allow for further progress in Canada-U.S. fisheries talks.

2. The timing for drawing baselines around the perimeter of the Arctic Archipelago:

25. The following options would appear to be available:

- (a) The Government could draw straight baselines now around the Arctic archipelago including the Northwest Passage.
- (b) the Government could defer the drawing of baselines around the perimeter of the Arctic archipelago until the international climate, in particular developments at the Law of the Sea Conference and the U.S. reaction to the Canadian position on the Arctic Exception "package deal", would be more propitious to such action by Canada.

26. Although, as noted in para 11 above, there would be advantages in clarifying the precise limits of internal and territorial waters in the Arctic from a sovereignty protection and law enforcement viewpoint, on balance these considerations do not outweigh the disadvantages of such action at this time. Moreover, given the decision in principle taken by Cabinet on July 30, 1976, as outlined above, whereby the

Government reaffirmed Canada's historic claim that the Northwest Passage, are internal Canadian waters and that all Government Departments and Agencies act consistent with this claim, Canadian jurisdiction for all functional purposes will be preserved. (If, however, the Government were to decide upon alternative (a), as well as to decide to extend fisheries jurisdiction at a specified date, these two actions would best be taken in conjunction).

3. Claim to other special bodies of water

27. The following options would appear to be available with respect to the special bodies of waters as a group:

- (a) The Government could take no decision at this point regarding Canadian claims to the special bodies of water.
- (b) the government could decide to assert Canadian claims to these bodies of water as internal Canadian waters by means of promulgating straight baselines across their entrances, where fisheries closing lines at present exist.
- (c) the Government could use the appropriate occasions to reaffirm that the special bodies of water are Canadian internal waters and Departments and Agencies could be instructed to act in a manner consistent with this position.

28. Given the complexity of the legal and other issues involved, it is considered inadvisable to make any definitive recommendations for action at this time with respect to these bodies of water as a group. It is, therefore, proposed that the matter be considered in greater depth by Cabinet in mid-1977 and that as an interim measure, the course of action recommended in option (c) could be followed

V. FINANCIAL CONSIDERATIONS

29. There appear to be no immediate direct financial implications resulting from the alternative courses of action outlined above. Assuming general international acceptance of, or acquiescence in, any eventual jurisdictional changes with respect to Arctic waters, there is not expected to be any immediate requirement for an increase in surveillance activity over the present level, although the adequacy of the present level of surveillance will have to be kept under review.

VI. FEDERAL-PROVINCIAL AND TERRITORIAL CONSIDERATIONS:

30. There are no apparent direct implications for Federal-Territorial relations The Government of the Northwest Territories and the Yukon

will be informed of any decision respecting the extension of fisheries jurisdiction and the drawing of straight baselines. The Territorial administrations will provide appropriate support facilities, within their competence, for any measures designed to safeguard the interests of northern residents. The present and future status of the special bodies of water is of interest to the coastal provinces.

VII. PREVIOUS CONSIDERATIONS BY CABINET:

31. A Memorandum to Cabinet of February 1, 1960 recommended that a decision in principle be reached to lay claim to sovereignty over the waters within the perimeter of the archipelago and that, with respect to the sector principle, it be held in reserve and not repudiated by the Government. A further report was requested by Cabinet on legal issues relating to sovereignty over the islands of the archipelago. No decision was made with respect to the substantive recommendations in the February 1, 1960 Memorandum concerning the waters of the archipelago, partly due to the desirability of awaiting the outcome of the 1960 Law of the Sea Conference. In a Memorandum to Cabinet dated February 7, 1961, it was recommended that instructions be given as to the way in which the straight baseline system should be implemented with respect to the Gulf of St. Lawrence, the Newfoundland Bays and the Bay of Fundy on the East coast, Hudson Bay, Hudson Strait and the Arctic archipelago in the North and Dixon Entrance and Hecate Strait on the West coast but that publication of such baselines be deferred until such time as it is clearly evident that such action would not prejudice the chances of a multilateral convention. A number of related memoranda on Law of the Sea issues have, from time to time, been considered by Cabinet. On February 12, 1976, Cabinet decided to extend Canadian fisheries jurisdiction to 200 miles on the East and West coasts. On July 30, 1976, Cabinet agreed to the U.S. "package deal" on the Arctic Exception article, subject to certain specific conditions.

VIII. INTERDEPARTMENTAL CONSIDERATIONS:

32. The Departments of External Affairs, Fisheries and Environment, Justice, Indian and Northern Affairs and National Defence were consulted in the preparation of this Memorandum.

IX. PUBLIC RELATIONS CONSIDERATIONS:

33. Given the high visibility and media-appeal of issues respecting the status and foreign use of Arctic waters (as evidenced in the "Manhattan" voyage in 1969), it is safe to conclude that intense public and media criticism and questions in parliament could result from inaction on the part of the Government which may be portrayed as

prejudicing Canadian claims over Arctic waters. On the other hand, action at the present time actually to draw baselines in the Arctic or in southern bodies of water, would likely give rise to protests from the major maritime and possibly other states. A decision in principle, deferring until an appropriate time the actual drawing of baselines, would avoid such opposition and allow the Government to meet domestic concerns by providing assurances that the Government is prepared to undertake whenever action may be necessary to protect Canadian interests. Similar criticism may result from Inuit or native interests concerning inaction respecting fisheries jurisdiction in the Arctic.

X. LIBERAL PARTY POLICY CONSIDERATIONS

XI. CACUS CONSULTATIONS:

XII. RECOMMENDATIONS:

43. With respect to extension of fisheries jurisdiction in the Arctic, it is recommended that:

- (a) the Government, through the Secretary of State for External Affairs, make a statement of policy, on or about the date on which he proposed Order-in-Council extending fisheries jurisdiction on the East and West coasts is published in the Canada Gazette, that the Government recognizes the need to safeguard the fishing interests of native peoples in the north and is committed to extend fisheries jurisdiction to 200 miles by a specified date to be decided by Cabinet now (such as March 1, 1977, the date for U.S. extension);
- (b) the extension of fisheries jurisdiction be effected by an Order-in-Council declaring a fishing zone extending 200 miles seaward from the (undefined) baselines of the territorial sea, without specifying geographical co-ordinates, except in the boundary areas with the U.S. and Greenland, and without publishing charts;
- (c) the lateral boundaries of such extension will be delimited, on the western side by the 141st meridian of longitude, and on the eastern side by the Canada-Denmark continental shelf boundary and in the Lincoln Sea by a median line.

35. With respect to the timing for the drawing of baselines around the perimeter of the Arctic archipelago, it is recommended that:

- (a) the drawing of baselines around the perimeter of the Arctic archipelago be deferred until the international climate, in particular developments at the Law of the Sea Conference and the U.S. reaction to the Canadian position on the Arctic Exception “package deal”, would be more propitious to such action by Canada.

36. With respect to claim by Canada to other special bodies of water, it is recommended that:

- (a) the matter be reconsidered in greater depth by Cabinet in mid-1977 and;
- (b) as an interim measure until that time, the Government use appropriate occasions to reaffirm the position that these special bodies of water are Canadian internal waters, and, Government Departments and Agencies be instructed to act in a manner consistent with this position and so as not to prejudice the Canadian claim in any manner.

Secretary of State for External Affairs

Minister of Indian and Northern Affairs

[signed]

Minister of Fisheries and the Environment

60. Record of Cabinet Committee Decision, 'Status of the Arctic Archipelagic Waters Status of Special Bodies of Water and Extension of Fisheries Jurisdiction in the Arctic,' October 28, 1976

LAC, RG 25, vol. 3, file 8100-15-4-29(s)

SECRET

The Cabinet committee on External Policy and Defence

RECORD OF COMMITTEE DECISION

Meeting of October 20, 1976

CONFIRMED BY THE CABINET ON OCTOBER 28, 1976

Status of Arctic Archipelagic Waters Status of Special Bodies of water and Extension of Fisheries Jurisdiction in the Arctic

The Committee agreed:

1. With respect to the extension of fisheries jurisdiction in the Arctic, that:
 - (1) the Government, through the Secretary of State for External Affairs, make a statement of policy, on or about the date on which the proposed Order in Council extending fisheries jurisdiction on the East and West coasts is published in the Canada Gazette, that the Government recognizes the need to safeguard the fishing interest of native peoples in the north and is committed to extend fisheries jurisdiction to 200 miles by March 1, 1977;
 - (2) the extension of fisheries jurisdiction in the Arctic be effected by an Order in Council, published in the Canada Gazette no later than 60 days before March 1, 1977, declaring a fishing zone extending 200 miles seaward from the undefined baselines of the territorial sea, without specifying geographical coordinates, except in the boundary areas with the U.S. and Greenland, and without publishing charts;

- (3) the lateral boundaries of such extension will be delimited, on the western side, by the 141st meridian of longitude, and on the eastern side by the Canada-Denmark continental shelf boundary and in the Lincoln Sea by a median line.
2. With respect to the timing for the drawing of baselines around the perimeter of the Arctic archipelago, that:
 - (1) the drawing of baselines around the perimeter of the Arctic archipelago be deferred until the international climate, in particular developments at the Law of the Sea Conference and the U.S. reaction to the Canadian position on the Arctic exception "package deal," would be more propitious to such action by Canada.

With respect to claims by Canada to other special bodies of water, that:

- (1) the matter be reconsidered in greater depth by Cabinet by the end of 1976;
- (2) meanwhile,
 - (a) the Government use appropriate occasions to reaffirm the position that these special bodies of water are internal waters of Canada, and
 - (b) Government Departments and Agencies should act in a manner consistent with this position in order not to prejudice the Canadian claim to these special bodies of water in any matter.

Hilda Finley (mo.)

Le depositaire des documents du Cabinet
R.F. Charron
Supervisor of Cabinet Documents

October 28, 1976

61. "Law of the Sea: The Arctic Exception Article," 1976

LAC, RG 25, vol. 3, file 8100-15-2(s)

CONFIDENTIAL

LAW OF THE SEA: THE ARCTIC EXCEPTION ARTICLE

SUMMARY

This Memorandum deals with the Arctic Exception article in the Revised Single Negotiating Text emerging from the last session of the Law of the Sea Conference, and which would confirm for Canada special legislative powers for environmental protection in the Arctic under an eventual Law of the Sea treaty. It appears that agreement can be achieved on such a provision; both the U.S. and USSR, the two states principally concerned, are ready to agree on the present language of the draft provision. The U.S., however, has conditioned its agreement on, among other things, the right of military vessels to transit freely all waters to which the Arctic Exception provision applies and Canadian support for the provisions in the present draft text on international straits. While securing the Arctic exception provision in an eventual treaty is an important objective for Canada - it would confirm in a treaty the basis for the 1970 Arctic Waters Pollution Prevention Act - it has become apparent that there are certain disadvantages in reaching agreement with the USA on such a provision without advising the USA in advance that Canada asserts title to the waters within the archipelago as internal waters and that at an appropriate time the Government intends to draw straight baselines enclosing the waters within the archipelago. Given U.S. concerns that the waters of the archipelago remain open to vessel transit, and the U.S. contention that the Northwest Passage is an international strait, it is important therefore that Canadian negotiators at the Law of the Sea Conference be in a position to make clear to their U.S. counterparts that while Canada continues to seek a provision allowing for environmental legislation within the Arctic archipelagic perimeter, the waters within the islands are internal Canadian waters. To thus clarify the Canadian position regarding the status of these waters, while at the same time indicating Canadian willingness to allow U.S. military and commercial vessels to transit the waters of the archipelago (including the Northwest Passage), would avoid any misunderstanding and limit possible adverse, U.S. reaction to a formal assertion of such a claim.

It should be noted that a further Memorandum will be presented to Ministers shortly outlining legal and other factors relating to the extension of fisheries jurisdiction in the Arctic and the drawing of baselines around the perimeter of the archipelago and recommending courses of action with respect thereto. In the meantime, a decision in light of the recommendations contained in the present Memorandum would not prejudice future contained in the present Memorandum would not prejudice decisions regarding the timing and method by which Canadian claims to these waters can be implemented.

It is recommended that:

- (a) Canada accept the U.S. “package deal” and that such acceptance be conveyed to the U.S. Delegation;
- (b) the U.S. Delegation be advised that:
 - ii) Canada reaffirms its claim that waters within the Arctic archipelago, including the Northwest Passage, are internal Canadian waters;
 - iii) Canada intends at an appropriate time to draw straight baselines, in accordance with accepted principles of international law, around the perimeter of the Arctic archipelago, thereby delimiting the waters regarded by Canada as internal; and,
 - iv) Canada assures the USA that this reaffirmation and the future delimitation of the Canadian claim to the waters of the archipelago will not affect long standing arrangements under joint Canada/USA defence cooperation for U.S. military transit through the archipelago (including the Northwest Passage) and that, subject to Canadian laws, foreign commercial vessels will be allowed to use these waters

MEMORANDUM TO CABINET

LAW OF THE SEA: THE ARCTIC EXCEPTION ARTICLE

I. PROBLEM:

At the time of the passage of Canada's Arctic Waters Pollution Prevention Act in 1970, the USA and other major maritime states protested it as being contrary to international law. As a consequence, Canada attempted in the six years since the Act was passed to develop pre-existing international law to bring it in line with the legal basis for the act. As a means to achieving this objective, during the four sessions to date of the current Law of the Sea Conference, Canada has attempted to secure the inclusion of a provision giving states the right to adopt and enforce, in ice-covered areas within exclusive economic zones, higher national standards concerning vessel-source pollution than those generally agreed internationally. This so-called "Arctic Exception" article would give rights to coastal states beyond those otherwise accorded for the preservation of the environment in the economic zone and would be consistent with legislation like the Arctic Waters Pollution Prevention Act.

2. Canada, the USA and USSR, as major Arctic powers, have agreed on an Arctic Exception article which is included in the Revised Single Negotiating Text (RSNT), which emerged from the last session of the Law of the Sea Conference. The USA which had initially been hostile to proposals for an Arctic Exception regarding it as an infringement on freedom of navigation, is now agreeable to the text, but only as part of a "package deal." The elements of the package are as follows:

- (a) The USA would support inclusion of an article in the draft treaty which would allow for the adoption and enforcement of national laws for preserving the marine environment in ice-covered areas within the economic zone, thereby applicable to the Canadian Arctic and providing a recognized international legal basis for (i.e. "legitimizing") Canada's Arctic Waters Pollution Prevention Act passed in 1970;
- (b) foreign warships, naval auxiliary and non-commercial state vessels and aircraft would be exempt from any environmental laws passed regarding the waters to which the Arctic Exception applies;

- (c) disputes regarding the application of the Arctic Exception (other than disputes arising out of the military vessel exemption) would be subject to the binding international disputes settlement provisions set out in a Law of the Sea Convention;
- (d) the USA has offered to refrain from applying the RSNT provisions to such straits as Juan de Fuca and Head Harbour Passage, leaving such matters for bilateral negotiation outside the Law of the Sea Conference;
- (e) in return for U.S. agreement on the Arctic Exception provision, Canada would (i) support publicly the provisions in the RSNT on international straits connecting the high seas (as well as economic zones) - this public support would not have to be expressed for the provisions on straits connecting the high seas and the territorial sea and (ii) not press for national rules and standards for the prevention of vessel-source pollution in non-ice-covered areas beyond the territorial sea, and not support the claims of other coastal states (such as India) to adopt and enforce national rules and standards in designated "special areas" in their own economic zones.

II. OBJECTIVES:

- 3. To seek a decision of Ministers, before the resumption of the next session of the Law of the Sea Conference, August 2 - September 17 in New York, on whether Canada should accept this proposed "package deal" with the USA.

III. FACTORS:

Background:

4.

- (a) Canada passed the Arctic Waters Pollution Prevention Act in 1970, asserting environmental jurisdiction in Arctic waters up to 100 miles from the coastline. At the time of the passage of the Act, the Prime Minister and Secretary of State for External Affairs stated that the Act was passed in view of the inadequacies in international law in protecting the interests of coastal states. As well, these statements noted Canada's willingness to permit navigation in Arctic waters provided it does not threaten Canada's environment or security. Simultaneously with the introduction of this legislation,

Canada withdrew its acceptance of the jurisdiction of the International Court of Justice over disputes concerning Canada's rights to legislate regarding protection of the marine environment in marine areas adjacent to its coast.

- (b) When the Arctic Waters Pollution Prevention legislation was introduced in the House of Commons, the USA protested very strongly that the legislation was a unilateral assertion of jurisdiction in the high seas, unwarranted under international law. Canada rejected the U.S. protests in a diplomatic Note dated April 16, 1970, pointing out the overriding right of coastal states to protect their vital interests from threats from major pollution damage in particularly sensitive areas such as the Arctic, and stating that the legislation constituted a lawful extension of a limited form of jurisdiction (as opposed to an assertion of sovereignty) to meet particular dangers.
- (c) Since 1970, Canada has sought international recognition for the legal basis of the Arctic Waters Pollution Prevention Act. In a series of delicately balanced negotiations with the delegations of the USSR and USA at the Law of the Sea Conference, Canada has attempted to secure authority for coastal states to pass environmental legislation in ice-covered areas. The Soviets have only recently accepted the importance of the provision; Canada has succeeded in convincing the USSR that since Soviet environmental legislation in their Arctic areas is similar to that of Canada, they, like Canada, have a direct interest in an Arctic Exception article. Soviet reluctance to agree to the article had been based on a concern that the disputes settlement provisions part of the "package", could be used by the USA to litigate the issue of Soviet Arctic claims. It proved difficult to achieve agreement on a text with the USA as well, given their interests in ensuring that their own vessels (military and non-military) and government aircraft would not be restricted in entry to and transit of Canadian (and Soviet) Arctic waters and the superjacent airspace. After negotiating sessions, the three delegations managed to agree tentatively on a text. Both the USA and USSR have confirmed that they could accept the wording of the Arctic Exception provision which was inserted in the RSNT as Article 43 of Part III. The provision reads as follows:

"Coastal states have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the

economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection of the marine environment based on the best available scientific evidence.”

- (d) The USA, however, will only agree to the inclusion of any such provision if the other elements of the “package deal”, outlined above, are agreed to by Canada. Late in the recent session of the Law of the Sea Conference, the Head of the U.S. Delegation told the Canadian side that the U.S. Delegation had obtained Presidential authority to accept the package, and that Canada would have to agree to the package forthwith or the “deal” would be off. The Secretary of State for External Affairs approved an immediate reply as follows: i) in the short time since the package came together, Ministers have not had an opportunity to consider the matter; (ii) given the major and long-term importance of this issue to Canada, Ministers would need to examine the matter carefully, together with the text of the international straits provisions; iii) the Secretary of State for External Affairs would refer the matter to his ministerial colleagues following the conclusion of the session, based on a considered interdepartmental review of the outcome of the session; iv) nonetheless, Canada should certainly not be considered as having rejected the package, and while a definitive position could not be indicated at that time, and while further clarifications were required, the disposition of the Secretary of State for External Affairs was to look positively on the package, as recommended by the Deputy Head of the Canadian Delegation.

Advantages and Disadvantages of the “Package Deal”

5. The following are positive factors and possible advantages to Canada in agreeing to the U.S. package proposal:

- (a) Agreement with the USA on the package proposal will ensure U.S. support for the Arctic Exception provision as it is drafted at present. While it is not certain that U.S. support of itself will ensure acceptance of the Arctic Exception provision by the Conference, U.S. support is essential to any hope to secure inclusion of the provision. Conversely, lack of U.S. support

would likely prove fatal to any Canadian objectives in this regard.

- (b) Inclusion of an Arctic Exception Article in an eventual treaty would provide a firm international legal basis for the Arctic Waters Pollution Prevention Act and “legitimize” the Government’s assertion of jurisdiction over Arctic waters 100 miles outward from the coast for purposes of protecting the marine environment. It is of considerable significance that after close to six years of bargaining on this issue the USA, which as noted above strongly protested Canada’s assertion of jurisdiction under the Arctic Waters Pollution Prevention Act, is prepared to admit Canada’s claims to legislate for environmental protection in this area.
- (c) A further point of importance is that an Arctic Exception provision in the treaty would oblige Canada to withdraw its reservation to the compulsory jurisdiction of the International Court of Justice.
- (d) Inclusion of the Arctic Exception in the text of a treaty could be correctly portrayed as a major Canadian diplomatic achievement. A considerable amount of negotiating effort has been directed toward securing agreement on such a provision, and Canadian prestige is therefore at stake. Conversely, failure to achieve agreement on an Arctic Exception provision could be viewed as a defeat for a major Canadian objective at the Conference.
- (e) Under the present RSNT coastal state powers to enforce environmental legislation in coastal waters would be strictly limited in the absence of an “Arctic Exception” clause such as that which now appears in the RSNT. In the economic zone, coastal states are likely to be restricted to legislating only to the extent of implementing internationally agreed standards regarding marine pollution from vessels. Within the territorial sea (i.e., 12 miles from the coastline), the present RSNT prohibits coastal states from passing laws which affect the design, construction, manning and equipment of foreign ships, major elements in environmental protection legislation. The absence of an Arctic Exception, therefore, would greatly limit Canada’s ability to regulate the Arctic environment.
- (f) In the absence of an Arctic Exception provision, Canada might be faced with a difficult choice between amending major

sections of the Arctic Waters Pollution Prevention Act or declining to sign a new Law of the Sea Convention which might emerge from the Conference. The other alternative could be to make the Canadian position clearly known by means of a reservation to the treaty; whether reservations will be allowed at the time of signature or ratification is not yet certain.

- (g) Although the U.S. Government would not be accepting the Canadian Government's claim that the waters within the Arctic archipelago are internal Canadian waters, nor that the Northwest Passage is not an international strait, by agreeing to the Arctic Exception article the USA would be recognizing Canada's right to legislate to protect the Arctic environment and accepting the fact that navigation through the Northwest Passage and other straits in the archipelago would be subject to Canadian environmental controls (with the exception of military vessels as noted above). The Arctic Exception provision under the present RSNT would apply notwithstanding any provisions providing for "unimpeded transit" through most international straits; therefore, even if the Northwest Passage were held, pursuant to international litigation, to be an international strait, the right of Canada to pass national environmental legislation with respect thereto would be ensured.

6. The following are negative aspects and possible disadvantages of the package deal:

- (a) The package deal includes an exemption for warships and a compulsory dispute settlement provision restricting the application of the Arctic Exception to all non-military vessel transit. Given the requirement in the present version of the Arctic Exception for Arctic legislation to have "due regard to navigation", it might be possible for other states to employ the disputes settlement provision in combination with the "due regard for navigation" clause to challenge internationally Canadian environmental legislation on grounds of any alleged "undue" hindrance to navigation.
- (b) The package deal would not in itself protect Canada from challenges to the Canadian claim to the archipelagic waters as internal waters. It is a matter of speculation, however, how strongly or actively the U.S. Government particularly in an election year, might react to any formal assertion of such a claim by Canada (e.g., by drawing straight baselines around

the perimeter of the archipelago), if at the same time Canada were to put in place a practical “modus vivendi” which would leave U.S. transit arrangements essentially undisturbed. Indeed, if Canada accepted the Arctic Exception package but took no action to reaffirm its claim to the archipelagic waters as internal waters, the USA might be led to assume that Canada contemplated no future action in this regard. They could assume that Canadian acceptance of the package deal would mean that Canada would be seeking nothing more than the Arctic Exception provision throughout all the Arctic waters - i.e., that Canada would not press its internal waters claim and/or that, in the event of such a claim, Canada would be prepared to accept the exemption of foreign warships from environmental laws in the Northwest Passage. If Canada were subsequently to assert formally the claim to the waters of the Northwest Passage as internal waters (thereby possibly denying foreign warships any immunity from Canadian jurisdiction), the USA could argue that such action would be tantamount to bad faith on the part of Canada since it would introduce a significant new element in the “deal” as agreed. However, if it were made clear privately to the USA that the waters within the archipelago remain Canadian internal waters, and the Canada would, at some future point, perhaps at the conclusion of the Conference, be drawing straight baselines around the archipelago as a means of clarifying the status of the waters, it would be difficult for the U.S. Delegation to raise subsequent allegations of bad faith.

- (c) The USA insists on public Canadian support for the RSNT provisions on international straits. It is likely that - at a minimum - the USA would expect an affirmative Canadian vote, although a more positive manifestation of Canadian support would likely be requested. If there is no vote, it may be that Canada could live up to its end of the bargain by simply not opposing the present draft provisions on international straits. However, the present international straits provisions, ambiguously drafted, are far from satisfactory from Canada’s point of view. Other states could argue that the Northwest Passage and other non-Arctic straits such as the straits of Belle Isle and Juan de Fuca, and Head Harbour Passage, are included within the definition of a “strait used for international navigation” and are therefore subject to the right of non-suspendable innocent passage by vessels.
- (d) Approval of the Arctic Exception provision, which provides a higher standard of jurisdiction to coastal states in ice-infested

waters than those to be accorded generally, could become linked to the interests of certain other states (e.g., India and Tanzania) to be given rights in a treaty to legislate for what they regard as "special areas" within their economic zones. "Special area" jurisdiction is opposed by the major maritime powers. Canada has maintained close contact and cooperation with those coastal states supporting "special area" jurisdiction, and may be laced in an undesirable position, having secured agreement with the USSR and the USA on an Arctic Exception article, in not being able to support these states in their desire for additional rights for "special areas". These states could block acceptance of the Arctic Exception provision if their concerns are not met on "special areas".

7. An additional factor in weighing the advantages and disadvantages of the package deal is that, as part of the understanding relating to public Canadian support for the provisions on international straits connecting two parts of the high seas, the USA and Canada would continue to agree to disagree on the status of the Northwest Passage and neither would raise this issue at the Conference. Additionally, the USA would refrain from applying the international straits provisions of the Law of the Sea Convention to non-Arctic straits, in particular Head Harbour Passage and Juan de Fuca, leaving problems to be negotiated bilaterally. This element of the package may well be an advantage for Canada; resolving the status of these straits depends upon the legal status of the various bodies of water of which they are comprised or which they connect. Cabinet will be presented in 1977 with a full analysis of the legal and other factors pertaining to the status of these waters.

8. The RSNT accords coastal states sovereign rights over the Continental Shelf, consistent with the 1958 Convention on the Continental Shelf, and the exclusive right to regulate the construction, operation and use of artificial islands and drilling or mining installations both on the Continental Shelf and within the exclusive economic zone. In support of these rights, coastal states are given the authority to pass national laws to control pollution resulting from artificial islands, installations and structures under their jurisdiction. Absence of the Arctic Exception article would not, therefore, affect Canada's sovereign jurisdiction over seabed activities on the Continental Shelf or in the economic zone, and therefore its right to pass anti-pollution legislation with respect thereto, although it would severely limit Canada's authority to regulate vessel-source pollution.

The result is that those provisions of the Arctic Waters Pollution Prevention Act dealing with exploration or exploration of natural resources or undertakings in the Arctic waters, apart from vessels, would appear to be supported by the RSNT even without the Arctic Exception. For example, the RSNT provisions would support the exercise of Canadian sovereignty respecting Beaufort Sea drilling activity and the legislation standards applicable thereto.

9. To avoid any misunderstanding with the USA, it would be important to inform them in advance of our intentions in respect of transit of U.S. warships, submarines and military aircraft. Canada could give assurances to the USA that a reaffirmation and eventual delimitation of the Canadian claim to the waters of the archipelago as internal waters enclosed by straight baselines, would not in any way affect long-standing arrangements under Canada/USA defence cooperation for U.S. military access to these waters. In particular, U.S. warships would continue to have Canadian consent to transit the Northwest Passage. The USA would probably state their concern in strong terms that while the Canadian claim would not as a practical matter affect Canada/USA defence cooperation (and they may desire a treaty commitment to this effect), it would create what they would regard as an undesirable precedent for other countries which might have similar claims (such as Malaysia and the Philippines, and even for states with off-lying archipelagos such as India and Spain) and that they could therefore not acquiesce to such a claim. The objective in this case would be to try to ensure that the USA does not see fit to oppose the Canadian claim actively, and make an issue of it in our bilateral relations. It could be pointed out that while the Canadian authorities understand their concern to maintain maximum mobility for their warships and submarines on a global basis, they should understand the Canadian defence concern to control and if necessary deny Soviet military access to Canadian archipelagic waters.

IV. ALTERNATIVES:

10. The following alternatives emerge from the foregoing analysis:

- (a) Canada could accept the package deal with the USA as it now stands, thereby assuring U.S. support for the Arctic Exception provision in the RSNT. In the absence of any concurrent indication to the contrary by Canada, it could be assumed by the USA and other states that Canada intended to apply the Arctic Exception throughout the archipelagic waters (in all "ice-covered areas") and raise the inference that Canada was tacitly abandoning any claims to the status of these waters as internal waters.

(b) Canada could accept the “package deal”, but concurrently inform the USA (and USSR) that Canada intends to take parallel steps to reaffirm its claim to the waters of the archipelago as internal waters by drawing straight baselines around the perimeter of the archipelago. At the same time Canada could give the USA assurances that such reaffirmation and delimitation of this claim would not in any way affect the long established arrangements for transit of U.S. warships through these waters under Canadian/U.S. joint defence agreements.

(c) Canada could reject the package deal.

V. INTERDEPARTMENTAL CONSULTATIONS:

11. The Departments of External Affairs, Justice, Environment and Indian and Northern Affairs have participated in the preparation of this Memorandum. The Department of National Defence has been closely consulted in its preparation. In addition, the Memorandum was reviewed by a working group on the Interdepartmental Committee on the Law of the Sea.

VI. PUBLIC RELATIONS COMMUNICATIONS:

12. It is safe to conclude that any suggestions in the media or elsewhere that Canada has prejudiced its sovereignty claims in the Arctic, or has accommodated U.S. interests by agreeing to a package deal which does not fully safeguard Canadian sovereignty, would entail serious adverse public reaction, including from the Inuit Tapirisat. On the other hand, notifying the USA that Canada asserts full jurisdiction over all waters within the archipelago and claims them as internal waters would probably provoke reaction from the USA although it is hoped that the U.S. reactions can be minimized.

VII. FINANCIAL IMPLICATIONS

13. There appear to be no immediate direct financial implications resulting from the alternative courses of action outlined above. Assuming general international acceptance of, or acquiescence in, any eventual jurisdictional changes with respect to Arctic waters, there is not expected to be any immediate requirements for increased surveillance activity, although the adequacy of present levels of surveillance will have to be kept under review.

VIII. FEDERAL-TERRITORIAL CONSIDERATIONS

14. No Federal-Territorial implications are foreseen. The Governments of the Yukon and the Northwest Territories will be kept informed of developments by federal officials.

IX. LIBERAL PARTY CONSIDERATIONS:

X. CAUCUS CONSULTATIONS:

XI RECOMMENDATIONS

17. It is recommended that:

(a) Canada accept the U.S. "package deal" and that such acceptance be conveyed to the U.S. Delegation:

(b) the U.S. Delegation be advised that:

- ii) Canada reaffirms its claim that waters within the Arctic archipelago, including the Northwest Passage, are internal Canadian waters:
- iii) Canada intends at an appropriate time to draw straight baselines, in accordance with accepted principles of international law, around the perimeter of the Arctic archipelago, thereby delimiting the waters regarded by Canada as internal: and
- iv) Canada assures the USA that this reaffirmation and the future delimitation of the Canadian claim to the waters of the archipelago will not affect long standing arrangements under joint Canada/USA defence cooperation, for U.S. military transit through the archipelago (including the Northwest Passage) and that, subject to Canadian laws, foreign commercial vessels will be allowed to use these waters.

Secretary of State for External Affairs
Minister of Justice
Minister of Indian and Northern Affairs
Minister of National Defence
Minster of the Environment

62. Discussion Paper, "Status of Arctic Waters and of Certain Other Bodies of Water off Canada's Coasts," January 19, 1979

LAC, vol. 5561, file 8100-15-4-2, pt. 3

DRAFT DISCUSSION PAPER

CONFIDENTIAL

January 19, 1979.

STATUS OF ARCTIC WATERS AND OF CERTAIN OTHER BODIES OF WATER OFF CANADA'S COASTS

I. OBJECT

1. The object of this Paper is to outline several alternatives for action by the Government regarding the legal status of the waters of the Arctic archipelago as well as of the so-called special bodies of water – the Bay of Fundy, the Gulf of St. Lawrence, Hecate Strait, Dixon Entrance and Queen Charlotte Sound.

II. BACKGROUND

A. The Arctic Waters

2. In recent years, there has been a dramatic increase in economic activity in the far north. Companies such as Dome Petroleum in the Beaufort Sea and Panarctic Oils on Melville Island are at present engaged in major hydro-carbon exploratory activity. Both the Polar Gas Consortium and Petro-Canada have applications before the NEB to tranship Arctic natural gas to southern markets; Polar Gas wishes to construct a gas pipeline from the high arctic to southern Canada; Petro-Canada has recently proposed transporting high arctic gas to markets in the south by LNG tankers.

3. At present, the legal status of the waters of the Arctic archipelago is not clear in Canadian law. While statements have been made on behalf of the Government of Canada over the years that the waters of the Arctic archipelago are claimed as internal waters of Canada and hence under full Canadian sovereignty, no affirmative action has been taken to reinforce this claim in Canadian law.

4. Certain specific laws do apply in Canadian Arctic waters, however. The *Arctic Waters Pollution Prevention Act*, 1970, establishes pollution-

control jurisdiction over Arctic waters extending [illegible] around and within the islands of the Arctic archipelago. Fisheries jurisdiction has been extended to 200 miles in the Arctic as of March 1, 1977, under the *Territorial Sea and Fishing Zones Act*. As well, Part XX of the *Canada Shipping Act*, which deals with marine pollution from vessels, applies throughout the 200-mile fishing zone in the Arctic. However, in none of the instances above have baselines been drawn in the Arctic, setting out the outer limits of internal waters and the inner limits from which the 12-mile territorial sea of Canada is to be measured. While previous Cabinet decisions have outlined the policy of the Government, that the waters of the archipelago are internal waters of Canada, under Canadian law there is strong doubt that, in the absence of baselines, the waters of the Arctic archipelago can be held to be internal waters in a legal sense. In strict legal terms, the most that could be said is that the territorial sea of Canada extends from the low-water mark surrounding the coast of the Canadian mainland and islands in the Arctic to a breadth of 12 miles. Beyond 12 miles, international law considers the waters to be high seas and open to navigation by ships of all nations

5. The question of Canadian sovereignty over Arctic waters was considered by Cabinet in July, 1976 in the context of the so-called "Arctic-exception" article negotiated at the U.N. Law of the Sea Conference (UNCLOS) and in October, 1976 in the context of the extension of fishing zones in the Arctic. Cabinet decided at that time while in principle baselines should be drawn around the perimeter of the archipelago, and that while the U.S. should be informed of the Government's position, until the international climate and developments at UNCLOS were more favourable to such action, baselines should not for the time being be drawn around the archipelago.

B. The Special Bodies of Water

6. The so-called special bodies of water at various [illegible] have been the subject of statements of policy by the Government and by Ministers regarding their status as internal waters of Canada under full Canadian sovereignty. Given the differing legal and political history of each of these bodies of water, the merits of any Canadian claim must be considered separately with respect to each. The detailed legal picture of each area has been reviewed in depth in earlier Memoranda. Without reviewing this previous research and analysis, in sum, it appears that the claim to full sovereignty over the Bay of Fundy on the basis of its status as a historic bay appears to be well assured; the claim to the Gulf of St. Lawrence as a historic body of water, apart from claims to smaller bays within the Gulf, is less secure but

accession of Newfoundland to Confederation in 1949 could help fortify the claim; there are arguments which could be used in respect of the status of Dixon Entrance and Hecate Strait as internal waters but the historical evidence regarding British, and subsequently, Canadian assertions of sovereignty is not free from challenge; the claim to historic title to Queen Charlotte Sound is the least secure of all Canada's claims.

7. The special bodies of water have been enclosed by fisheries closing lines made in 1971 pursuant to the *Territorial Sea and Fishing Zones Act* and therefore are "Canadian fisheries waters" and "fishing zones of Canada" under Canadian law. Baselines were not made across the entrances to enclose these waters; nor has it been specified whether the territorial sea of Canada is measured from the low-water mark along the coast within these areas or outward from the fisheries closing lines. As in the Arctic, considerable doubt remains under Canadian law where internal waters end and the territorial sea begins in these coastal areas.

8. The status of the special bodies of water was [illegible] by Cabinet at the [illegible] Minister of Justice on October 28, 1976, in conjunction with a review of the status of the waters of the Arctic archipelago and the extension of fisheries jurisdiction in the Arctic. At that time, Cabinet decided that the question of the status of these bodies of water would be deferred until the end of 1976, but that in the meantime, the Government should use appropriate occasions to reaffirm the position that these waters are internal waters of Canada. The proposed in depth review was postponed to spring, 1977, in order to undertake historical research into Governmental files. In May, 1977, a Memorandum to Cabinet recommending deferral of action enclosing the special bodies of water by baselines was prepared, but because of differences over the recommendations the matter was not referred to Cabinet at that time on the request of the Minister of Justice concurred in the Secretary of State for External Affairs. It was agreed that the question of enclosing the special bodies of water by promulgating baselines would continue under review at the official level.

III. FACTORS

A. International Law on the Question of Historic Title and Straight Baselines

9. The foregoing is a brief background of the position of the Arctic waters and the special bodies of water based on historic claims to sovereignty which Canada might be able to sustain before an international tribunal. The basis of claims to historic title under international law rests on (a) the exercise of authority by a state; (b)

the continuity of such authority over a considerable period of time and (c) the general toleration of states to such exercise of authority. As noted above, these legal requirements require application to individual cases, and, in Canada's case, the historic basis of title to the Arctic waters and to the special bodies of water is not of uniform strength.

10. As far as the waters of the Arctic archipelago are concerned, a recent in depth analysis of the legal situation prepared under the auspices of the Department of External Affairs, has concluded that it might be difficult for Canada to meet the stringent legal requirements for proof of historic waters. One of the most difficult obstacles is the strong rejection by the U.S.A. in 1970 of Canada's right to legislate over areas which the U.S.A. regarded as high seas. An additional difficulty is the lack of unequivocal affirmation by Canada over the years that these waters were legally claimed as internal waters. Various Government statements, some of them ambiguous or contradictory, have detracted from the strength of historical evidence of title. In spite of this fact, however, the study has concluded that Canada might be able to invoke the general legal principle of *quieta non movere* – the historical consolidation of title on the basis of Canada's historic activities in the maritime areas in question. But it would be unwise for Canada to rely exclusively on this principle.

11. In addition to utilizing baselines to affirm historic title, international law allows states to use baselines to enclose coastal waters where there is a fringe of islands along the coast of a state or where the coastline is deeply indented or cut into. These rules are an exception to the low-water mark rule and are based upon the 1951 Anglo-Norwegian Fisheries Judgement of the International Court of Justice. They have been codified in large part in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. At issue is whether these rules could be used as the basis for drawing baselines around the perimeter of the Arctic archipelago and for enclosing the special bodies of water.

12. In the 1951 Fisheries Judgement, the [illegible] Norway had [illegible] straight baseline system to enclose the "skjaerjaard", the archipelago bordering the western coast of Norway. The External Affairs study referred to above has concluded that the principles enunciated in the ICJ Judgement with respect to Norway could well have application to the Canadian Arctic archipelago. In drawing baselines around a coastal archipelago, the Court held that while in general such baselines must not depart from the general direction of the coast, the geography of the region as a whole rather than a particular sector must be considered. Additional criteria enunciated

by the Court were that there must be a sufficiently close relationship between the water and land areas to treat the enclosed waters as internal waters (the close link requirement) and that regional economic interests may be taken into account in justifying the drawing of such baselines.

13. The rules and criteria for drawing baselines have been codified in the 1958 Convention on the Territorial Sea, to which Canada is *not* a party. It would be preferable for Canada to apply the more liberal approach of the ICJ Judgement than to base action on the more narrow rules of the Convention, which, in any event, is not binding on Canada. Importantly, under the 1958 Convention, the waters thus enclosed are subject to the right of innocent passage if they were previously considered either territorial sea or high seas. The ICJ Judgement makes no reference to the right of innocent passage following the drawing of baselines across coastal waters.

B. International Relations

14. An important factor in taking action to publish straight baselines around the Arctic archipelago is the anticipated reaction of other states to such action by Canada. At the time of passage of the *Arctic Waters Pollution Prevention Act* in 1970, following the voyage of the U.S.S. "Manhattan", the U.S.A. vigorously protested that action by Parliament in this regard was contrary to international law as infringing upon freedom of the high seas. Other major maritime states also strongly protested Canadian action. It is reasonably certain that these states would hold similar views, and would make those views known, were Canada to enclose the waters of the Arctic archipelago by baselines thereby demonstrating publicly that these are internal waters of Canada. The possibility of litigation before the International Court of Justice contesting Canadian action cannot be discounted (and Canada's reservation to the jurisdiction of the Court only exempts disputes over maritime pollution and fisheries jurisdiction). Short of international litigation, there is the real possibility of strong diplomatic pressure being brought to bear on Canada by maritime states, putting strains on Canada's bilateral relations with those states.

C. Present Canadian Jurisdiction and Sovereignty in the Arctic

15. A further factor to consider is whether drawing baselines around the Arctic archipelago and thereby formally declaring the waters therein to be internal waters of Canada and under full Canadian sovereignty will significantly add to Canadian jurisdiction and control over Arctic waters. As pointed above, the *Arctic Waters Pollution Prevention Act* applies throughout the waters of the archipelago and out to 100 miles beyond to control pollution, whether by vessel or by

man-made structures, such as drilling rigs. As well, the marine pollution provisions of the *Canada Shipping Act* apply throughout the 200-mile fishing zones in the Arctic. Hydrocarbon exploration and production on the continental shelf in the Arctic is already subject to Canadian law. The Criminal Code applies to all offences committed within the territorial sea of Canada in the Arctic, and to offences committed on board Canadian-registered vessels or [illegible] on non-Canadian vessels beyond the territorial sea. If new continental shelf legislation is eventually adopted, the *Criminal Code* as well as the full range of Canadian laws in other areas will be made applicable to all offshore resource activity on Canada's Arctic continental shelf.

16. On the other hand, certain problems will continue to recur in terms of Canadian law enforcement in the Arctic in the absence of baselines formally declaring the waters within the baselines to be internal waters of Canada. As matters now stand, under Canadian law the waters of the Canadian arctic beyond 12 miles from the coast are high seas (even though they are subject to Canadian fisheries law and the provisions of the *Arctic Waters Pollution Prevention Act* and the *Canadian Shipping Act*) and, as such, a Canadian court would likely decline to accept the applicability of Canadian laws, except in the above-noted areas, to Arctic waters. It would seem therefore that continued enforcement of Canadian customs and excise jurisdiction beyond the contiguous zone (a belt of 12 miles beyond the territorial sea) or other Canadian laws such as the *Narcotics Control Act*, the *Food and Drugs Act*, will rest on an insecure legal foundation. Similar factors apply with respect to the ability of law enforcement officers to enforce Canadian laws beyond the territorial sea in the Arctic.

17. In addition to the problem of the applicability and enforcement of Canadian laws in the Arctic, there are broader questions of Canadian sovereignty involved. At present, Canada claims the waters of the archipelago, including the Northwest Passage, as internal waters. In large part, this claim is founded upon the exclusiveness of Canadian presence and effective occupation of the waters based, inter alia, upon a long history of British and Canadian expeditions of discovery and subsequent [illegible] of Canadian laws throughout the islands and waters of the archipelago. In order to maintain such a claim, it is necessary to ensure that, at minimum, Canadian law itself is not subject to ambiguity insofar as the status of these waters are concerned. Secondly, in order to avoid prejudicing the position of Canada internationally, it is equally important that other nations not be misled by the lack of distinction under Canadian law between those areas of Arctic waters which are subject to full Canadian sovereignty and those areas which comprise the territorial sea of Canada and high seas beyond. As pointed out above, in the absence of baselines drawn

pursuant to the *Territorial Sea and Fishing Zones Act*, a Canadian court might well conclude that all waters beyond the 12-mile territorial sea of the mainland and the islands in the Arctic consist of high seas. And whatever may be the views of a Canadian court on the subject, the absence of baselines would seem to justify the same conclusion by other nations of the world.

18. The Northwest Passage poses a complex problem, Canada rejects the suggestion that the Passage is a strait used for international navigation and consequently open to unimpeded innocent passage by all ships, including warships of other nations. Whether the Northwest Passage can be legally defined at present as an international strait, increased commercial usage of the passage by both Canadian and foreign-flag vessels will strengthen arguments as to its status as an international strait and subject to the right of innocent passage. Enclosing the waters of the archipelago, including the Northwest Passage, by straight baselines will help safeguard Canada's claims to sovereignty. At the same time, as the Government stated during consideration by Parliament of the *Arctic Waters Pollution Prevention Act*, the Government does not intend to close the Northwest Passage to [illegible]. There would seem to be no inconsistency between a claim to sovereignty over a given maritime area while simultaneously permitting international transportation through that area (e.g. the St. Lawrence Seaway).

19. In light of the discussion in paragraph 14, there will be international implications resulting from any action by Canada to enclose the waters of the archipelago by means of straight baselines. The most vigorous reaction will come from the major maritime powers, particularly the U.S.A. (The U.S.A. has already been informed of the Government's decision in principle to enclose Arctic waters by baselines and has reserved their position). Part of any Government decision in this regard should be clear indications to the international community that international shipping, subject to Canadian laws, will be permitted in the Northwest Passage. In addition concerns of Canada's NATO allies should also be taken into account by advising these states that Canada will allow foreign vessel entry to Canadian Arctic waters pursuant to bilateral or multilateral defence arrangements. In addition, the U.S.A. should be informed before hand of any Canadian action, and told, as was done in 1976, that such action is subject to and without prejudice to future bilateral defence arrangements.

IV. ALTERNATIVES

20. With respect to the waters of the Canadian Arctic archipelago, there are the following alternatives:

- (a) to take no action at the present time but to reaffirm Government policy in accordance with previous decisions by Cabinet;
- (b) to not publish baselines at the present time, but for the Secretary of State for External Affairs, in consultation with the Minister of Justice, to make a statement asserting the waters within the archipelago are internal waters of Canada, and that foreign shipping and navigation and other economic activity in the said waters will continue to be permitted subject to full Canadian sovereignty and to Canadian law;
- (c) to publish baselines in conjunction with a statement along the lines set out in (b), above.

21. In addition to the foregoing alternatives concerning Canadian Arctic waters, there are the following alternatives regarding the special bodies of waters:

- (a) to take no action at the present time but to reaffirm Government policy in accordance with previous decisions by Cabinet whether or not action is taken with regard to Canadian Arctic waters;
- (b) to take action similar to action which may be taken under either alternatives (b) and (c) above with respect to Canadian Arctic waters.

V. FINANCIAL CONSIDERATIONS

22. There do not appear to be any direct financial considerations involved in this matter. Any decision to formally declare offshore areas under full Canadian sovereignty would not necessarily entail greater enforcement and surveillance capacity than that currently programmed.

VI. FEDERAL-PROVINCIAL-TERRITORIAL CONSIDERATIONS

23. Action by Canada to formally enclose the Arctic waters by means of baselines would be viewed positively by the people and Government of the Yukon and Northwest Territories. As well, enclosing the special bodies of water would likely be viewed positively

in the provinces, particularly British Columbia. As far as the East coast is concerned, enclosing the Bay of Fundy and the Gulf of St. Lawrence by baselines [illegible] received. The Government would be prudent to point out that such action would be without prejudice to future solutions regarding administration and management of offshore resources in the areas concerned.

VII. OTHER CONSIDERATIONS

(to be completed)

VIII. INTERDEPARTMENTAL CONSIDERATIONS

(to be completed)

IX. PUBLIC INFORMATION CONSIDERATIONS

(to be completed)

X. CONCLUSION

(to be completed)

63. Memorandum for Ministers, “Status of Canadian Archipelagic Waters,” October 5, 1979

LAC, vol. 5561, file 8100-15-4-2, pt. 3

CONFIDENTIAL – CANADIAN EYES ONLY

October 5, 1979

MEMORANDUM FOR MINISTERS

STATUS OF CANADIAN ARCHEPELAGIC WATERS

I. PROBLEM

In recent years, there has been a dramatic-increase in economic activity in the far north. Several companies are at present engaged in major hydrocarbon exploratory activity in the Beaufort Sea and on Melville Island. Others already have applications before the NEB to transship Arctic natural gas to southern markets either by a gas pipeline from the high Arctic or by LNG tankers through the Northwest Passage. These types of activities are bound to increase in the coming months and years as the industrialized world expands its search for new supplies of energy and raw materials. One area with great potential in this regard is the Canadian Arctic. These developments raise the question whether Canada has sufficient legal capacity in the Arctic to control such expanded activities

2. While Canadian sovereignty over the islands of the Arctic Archipelago is not in question, the same cannot be said for its waters. In Canadian law, the status of these waters is not clear. Although the Canadian Government has claimed that the waters are internal waters of Canada and thus subject to its full sovereignty, this claim is not reflected in Canadian statutory law since baselines have not been drawn. Therefore, no official delineation of internal waters exists in this area even though such a course of action would clarify and reinforce Canada's claims to the waters. This is because drawing baselines might well have the effect of eroding the legal basis of these claims by virtue of the possibility of major international controversy and even litigation. Thus Canada has preferred to develop a functional approach to Arctic waters. This is evidenced by the passage of the Arctic Waters Pollution Prevention Act in 1970 and the negotiations at the U.N. Law of the Sea Conference (UNCLOS) on the ice-covered areas article, the so-called “Arctic Exception provision” which would provide a firm international legal basis for the Act.

3. Three years have passed since the status of the archipelagic waters was last examined by Cabinet. It would now seem to be an opportune time to review the matter with a view to determining whether further action is required.

II. OBJECTIVE

4. The objective of this memorandum is to request guidance from Ministers as to whether the question of the status of the waters of the Canadian Arctic Archipelago should be formally examined by Cabinet. As a basis for making this decision, the memorandum outlines the previous governmental consideration and action in respect of these waters, the present status of the waters in Canadian law, the applicable principles of international law and general relevant international considerations.

III. PREVIOUS GOVERNMENTAL CONSIDERATION AND ACTION

5. In 1960, it was recommended to the Cabinet that in respect of the channels of the Archipelago,

“a decision be reached in principle to lay claim to sovereignty over the waters of these channels. Formal announcement of this claim or public indication of Canada’s intention to make it should be postponed until after the second Conference on the Law of the Sea ... at which Canada will be sponsoring a proposal on the breadth of the territorial sea and exclusive fishing zone (6 – 6). In the meantime, and in light of developments prior to the next conference, the desirability of confidentially disclosing to the United States and to the United Kingdom Canada’s intention to claim the channels of the Arctic Islands should be considered. In any case, since the support of these two countries would seem to be essential, they should be consulted before the claim is formally announced. It is suggested that whenever reference to our claim is made outside government or official circles, care should be taken to indicate that it is not a new one, that it is of long standing.”

6. It is noteworthy that several of the factors included in this recommendation were to be present in successive considerations by Cabinet of this matter, i.e. the implications of a decision for Canadian interests at the LOS Conference, the desirability of informing the USA before any action is taken and the need to ensure that the long-standing nature of the claim is emphasized in any public reference to it. Furthermore, in another recommendation in the memorandum, government departments were cautioned “against taking any action

which might compromise a Canadian claim ... to the waters of the channels ...” This is also repeated in subsequent Cabinet decisions.

7. In 1969 and in 1970 the Government faced the challenge presented by the SS Manhattan’s two voyages through the Northwest Passage. It decided to enact two bills, one amending the 1970 Territorial Sea and Fishing Act, to extend the breadth of the territorial sea from three to twelve miles and the other, the 1970 Arctic Waters Pollution Prevention Act (AWPPA), to enable Canada to control and regulate environmental hazards within the “Arctic waters” as defined by the Act. This definition encompasses all waters seaward “from the nearest Canadian land”. The Act was designed to permit Canada to exercise jurisdiction over these waters, for the functional purpose of pollution control. The Government emphasized that such exercise could not “be construed to be inconsistent with a claim of sovereignty over the waters between the islands or otherwise”. (Mr. Sharp, House of Commons Debates, 16 April 1970 at p. 5949.) With regard to the bill to amend the Territorial Sea and Fishing Zones Act, the Government noted that the amended Act would, *inter alia*, permit Canada to exercise greater control over the movement of foreign ships within that territorial sea. With regard to the Northwest Passage, Canada would have effective control over its by virtue of its sovereignty over the two “choke-points” of the passage, Barrow Strait and Prince of Wales Strait. Thus Canada would be able to enforce regulations to minimize the threat of vessel-source pollution in these waters. The reaction of the major maritime states was swift and vocal with Canada being strongly criticized for taking such unilateral action rather than allowing the matter to be dealt with on a multilateral basis.

8. A significant element in any examination of the position of a state concerning the extent of its territory is the public position taken by its spokesmen. Most of the statements of Canadian spokesmen until the late 1960s were made in the context of Canada’s position regarding the applicability of the sector theory to the lands, ice, water and seabed of the Arctic region. The statements, dating from 1907, are inconsistent as regards the scope of the application of this theory and because the theory has no status within current law of the sea concepts, the statements are not particularly relevant to the objective of the present memorandum. Much more to the point are statements made in 1957, 1970 and 1975. In 1957, Prime Minister St-Laurent referred to the waters as “Canadian territorial waters”, which at that time was synonymous with the term “internal waters” (this was before the advent of the 1958 Geneva Territorial Sea Convention). In 1970 in the House of Commons, the then SSEA Mr. Sharp stated, in answer to a question, that the waters between the islands of the Archipelago are “Canadian internal waters”. However, later in answer

to a second question, he appeared to draw back somewhat from this position. The next day, he made another statement which could be characterized as casting further doubt on a claim by Canada that the waters are “internal” rather than part of the territorial sea. The clearest statement by a Minister of the Crown was made in 1975 by the then SSEA Mr. McEachen before the Standing Committee on External Affairs and National Defence, when he said that “the Arctic waters are considered by Canada as being internal waters”. Since that time Government spokesmen have taken a uniform position along these lines.

9. In 1976 Cabinet twice considered the question of the status of the Canadian archipelagic waters. The first was in connection with the so-called “Arctic-exception article” which was negotiated at the LOS Conference and was the subject of a “package deal” with the USA. (The significance of the article is being examined in the current Cabinet review of the LOS Conference.) At that time, Cabinet decided that

“the Government should reaffirm Canada’s historic claim that the waters within the Arctic Archipelago, including the Northwest Passage, are internal Canadian waters; Ministers should ensure that all Government Departments and Agencies act in a manner consistent with this claim;”

Furthermore Cabinet decided the USA LOS delegation would be informed of the above reaffirmation and that,

“Canada intends at an appropriate time to draw straight baselines, in accordance with generally accepted principles of international law, around the perimeter of the Arctic Archipelago, thereby delimiting the waters regarded by Canada as internal; and

Canada assures the USA that this “reaffirmation and the future delimitation of the Canadian claim to the waters of the Archipelago, are not intended to restrict access to, or transit of these waters by military vessels of the USA operating in pursuance of common defence interests. Accordingly, Canada is prepared to make appropriate arrangements with the USA providing for such access and transit, to become effective concurrently with delimitation of the archipelagic waters. Canada also undertakes to permit the use of these waters, subject to Canadian law, by foreign commercial vessels;”

10. Later that year Cabinet examined the question of the timing for the drawing of straight baselines around the perimeter of the Archipelago. It decided to defer this action until the international

climate and developments at the LOS Conference would be more propitious to such action. The decision was based on the concern that the Arctic exception article and other articles in the LOS Conference negotiating text of special interest to Canada might be placed in jeopardy if Canada were to take action on straight baselines, which in turn would result in the alienation of the support of key delegations at the Conference. Also it was determined that from sovereignty protection and law enforcement viewpoints, the advantages of a clarification of the precise limits of Canadian internal and territorial waters in the Arctic did not outweigh the tactical disadvantages inherent in drawing baselines at that time.

11. In summary, previous Government of Canada have made it a policy, although not always executed with complete consistency, to claim the waters of the Arctic Archipelago as internal waters of Canada. At the same time they were cognisant of the practical dangers which such a claim held for the continuing legitimacy of the claim itself and therefore proceeded to assert and maintain the desired degree of control over the water through functional means. In itself, this method ensured effective control over the area while minimizing the dangers inherent in a formal claim of sovereignty.

IV. PRESENT STATUS OF ARCHIPELAGIC WATERS UNDER CANADIAN LAW

12. The Territorial Sea and Fishing Zones Act defines the territorial sea of Canada as extending twelve mile seaward from the baselines established by the Governor in Council and the internal waters of Canada as being those areas of the sea which are on the landward side of such baselines. Thus in Canadian law the existence of baselines is the sin qua non for the legal determination of whether waters are internal or are part of the territorial sea. Because baselines have never been drawn in the Arctic, there is currently no basis in Canadian law to make this determination. In strict legal terms, the most that can be said is that the territorial sea of Canada extends from the low-water mark surrounding the coast of the Canadian mainland and islands of the Arctic to a breadth of twelve miles.

13. The particular significance of baselines lies in the fact that international law recognizes that the coastal state has certain, although not completely identical, rights over both internal waters and the territorial sea. Internal waters are subject to the sovereignty, in its fullest sense, of the coastal state. Waters in the territorial sea, on the other hand, are subject to the sovereignty of the coastal state in a somewhat more limited manner.

14. One significant limitation on this sovereignty is the right of innocent passage which exists in favour of ships of all states in the territorial sea. Pursuant to this doctrine ships have the right to pass through the territorial sea so long as such passage is not “prejudicial to the peace, good order or security of the coastal state”. Under this doctrine, the coastal state is more limited in the manner in which it can control pollution in the territorial sea than it is in internal waters where no such limitation exists. As it is generally interpreted, the conditions of the right of innocent passage do not apply to control of pollution. (Canada does not accept this view with respect to ice-covered waters). At the LOS Conference, a specific prohibition is contained in the negotiating text (the basis for a future LOS treaty) against the coastal state applying rules in the territorial sea other than those accepted internationally in respect of design, construction, manning and equipment standards for foreign ships. However, the LOS Conference has also recognized, in the so-called “Arctic Exception Article” (Article 234) that coastal states can establish national rules for the control of pollution in ice-covered areas of its exclusive economic zone. This provision will mitigate the effect of the above prohibition. The one draw-back is that Art. 234 is not applicable to warships or other vessels owned and operated by a state and used only on governmental non-commercial service. If the waters are internal, then all ships would be subject to Canadian rules and standards, regardless of ownership or whether the standards were internationally accepted.

15. The foregoing does not mean that no Canadian laws apply to the waters either within or without the archipelago in respect of pollution control. In 1970, the Canadian Government, relying on the fundamental principle that a coastal state can take measures for its self-protection, enacted the Arctic Waters Pollution Prevention Act, which established pollution control jurisdiction over Arctic waters extending one hundred miles from land around and within the islands of the Arctic Archipelago. Fisheries jurisdiction was extended to two hundred miles in the Arctic as of March 1, 1977 under the Territorial Sea and Fishing Zones Act. As well, Part XX of the Canada Shipping Act, which deals with marine pollution from vessels, now applies throughout the two hundred mile fishery zone in the Arctic. (The zone was declared as extending seaward from the baselines from which the territorial sea is measured. Of course these baselines had not been defined. This method, which was also followed in 1970 when the territorial sea was extended to twelve miles, was chosen so that there would be no implicit abandonment of a straight baseline system and so that it would not be inconsistent with the earlier expressed intent of Cabinet to draw straight baselines in the Arctic at an appropriate time.) The various extents of jurisdiction of these Acts do not depend on the establishment of baselines. Nor does, for examples, the Oil and

Gas Production and Conservation Act, which regulates hydrocarbon exploration and production on the continental shelf in the Arctic. Here, the touchstone of jurisdiction is the internationally recognized sovereign right of the coastal state to explore and exploit the natural resources of its shelf.

16. On the other hand, the jurisdiction of certain statutes, like the Canadian Criminal Code, Customs Act, Narcotics Control Act and Food and Drugs Act is tied directly to the territorial sea and internal waters of Canada. The Criminal Code applies to an offence Committed “on the territorial sea of Canada or on internal waters between the territorial sea and the coast of Canada ...” (If new continental shelf legislation is eventually adopted, the Criminal Code as well as the full range of Canadian laws in other areas will be made applicable to all offshore resource activity on Canada’s Arctic continental shelf.) The Customs Act applies to “Canadian waters” which are defined as comprising “the territorial sea and internal waters of Canada”. It thus becomes important to be able to determine where these waters are located. As pointed out above, this is not possible at the present time in the Arctic solely by looking at existing Canadian laws and regulations because baselines have not been drawn. However, this has not prevented these Acts from being applied to all of the waters within the Archipelago in the absence of baselines and regardless of the distance from the nearest land. This is being done pursuant to the 1976 decision of Cabinet that all Departments and Agencies are to act in a manner consistent with the claim that these waters are internal waters of Canada. In other words, it is as if baselines have been drawn around the perimeter of the Archipelago, thereby delimiting all waters within the Archipelago as internal. But because of the absence of baselines, enforcement of these statutes rests on an insecure legal foundation. A Canadian court might very well decline to accept jurisdiction in a case where the violation has taken place beyond 12 miles from the nearest land although within the Archipelago. This ambiguity in the laws also does not provide much support for Canadian claims that the waters are internal. (If they are internal, why are they not so described in Canadian law?) Furthermore, such ambiguity might prejudice our claim internationally since other states could be misled regarding our position in respect of the waters and act on this “misinformation”.

17. A Related matter concerns the Northwest Passage, which forms part of the archipelagic waters. If the Passage is not seen as an international strait, then the above analysis applies fully to it. However, if it is seen as an international strait (which Canada does not accept), then there exists a right of non-suspendable innocent passage in it, or to use the concept which has been developed at the LOS Conference, a right of non-suspendable transit passage (which is an

even more liberal regime of passage with less rights on the part of the coastal state). The “internationality” of a strait is based on usage and while it would be highly unlikely that the Passage could now be characterized as an international strait, increased commercial usage of the Passage by both Canadian and foreign-flag vessels will strengthen arguments that it is an international strait and subject to the right of innocent passage or transit passage. However, even if it were an international strait, the coastal state could rely on the Arctic Exception article (except in respect of warships or state owned ships used for non-commercial purposes) to give it some control over the conditions of vessel passage. If the waters of the Archipelago, including the Northwest Passage, were to be enclosed by straight baselines as historic waters of Canada, this would increase Canadian control over use of the Passage by all ships.

18. In summary, it can be said that Canada currently exercises control over the waters of the Arctic Archipelago with regard to both pollution control, whether from vessels or man-made structure (such as drilling rigs), and the enforcement of Canadian laws. What cannot be said is that the present degree of pollution control is as complete or as independent of uncertain international law rules as it would be if the archipelagic waters and the Northwest Passage were located landward of baselines and considered as internal waters of Canada. Nor can it be said that the enforcement of Canadian laws over archipelagic waters rests on a completely secure foundation in Canadian law. Furthermore, for as long as baselines are not drawn around the perimeter of the archipelago, and the Government continues to claim the waters as internal, a certain legal and potentially political incongruity will exist which in turn might contain the seeds of future problems for Canada.

V. APPLICABLE PRINCIPLES OF INTERNATIONAL LAW

19. Three doctrines or principles of international law have been suggested as possible legal bases for a claim by Canada to sovereignty over the waters of the Canadian Arctic Archipelago. They are the sector theory, historic title and the straight baseline system. All three have been examined recently in a study prepared under the auspices Department of External Affairs. The study’s conclusions are referred to in the following paragraphs.

20. The sector theory has been used by some writers and not a few Canadian Government spokesmen as a legal basis for claiming sovereignty over the area within the so-called Canadian sector, (a triangle having as its base the northern mainland of Canada, its apex the North Pole and its two sides as 141°W and 60°W longitude).

However, the statements made on the subject by Canadian Government spokesmen (14 statements since 1907) have varied greatly as to the scope of application (land, sea-bed, water, ice) of the theory and consistent pattern exists in this regard. Furthermore, Canada has never adopted any law or Order-in-Council claiming sovereignty over the area within the so-called sector. Consequently, Canada's state practice has been indefinite and varying over the years. As a legal basis, the above-mentioned study concluded that the sector theory has no legal validity as a source of title in international law and cannot serve as a legal basis for the acquisition of sovereignty over land and therefore over sea area (water and ice). Thus, it would not appear that the sector theory is very relevant in a consideration of a possible basis for Canadian sovereignty over the archipelagic waters.

21. The most common principle used to justify state sovereignty over bodies of water is historic title. If the waters belong historically to a state then they are considered to be internal waters of that state, over which it can exercise full sovereignty. The basis of a claim to historic title under international law rests on (a) the exercise of authority by a state over a given area; (b) the continuity of such authority over a considerable period of time and (c) the general toleration of other states to such exercise of authority. These legal requirements must be applied to individual cases.

22. As far as the waters of the Arctic Archipelago are concerned the above-mentioned study concluded that it would be most difficult, if at all possible, for Canada to meet the stringent legal requirements for proof of historic waters. One of the most difficult obstacles is the strong rejection by the U.S.A in 1970 of Canada's right to legislate over areas which the U.S.A. regarded as high seas. An additional difficulty is the lack of unequivocal affirmation by Canada over the years that these waters were legally claimed as internal waters. Various Government standards, some of them ambiguous or contradictory, have detracted from the strength of historical evidence of title.

23. In spite of the above, however, the study concluded that Canada might be able to invoke the general legal principle of quista non movere the historical consolidation of title with reasonable chances of success, on the basis of Canada's historic activities in the maritime areas in question. Canada can invoke the fact that it has performed a number of manifestations of sovereignty going back to the beginning of the century, which manifestations have met with the general toleration of foreign states. More specifically, Canada has enforced fisheries and whaling legislation, on a regular basis, at least since 1904. In addition, after World War II, Canada has taken the precaution of exercising the necessary control over the movement of ships in the

water, of the Archipelago, particularly the U.S.A. ships involved in supplying the weather stations in the Queen Elizabeth Islands, as well as over the few ships engaged in exploratory exercises. However, an obstacle to a claim under the principle of historical consolidation of title would be, as in the case of historic title, the U.S.A. protest of 1970, even though this protest was of general application and not directed only or specifically to the archipelagic waters, but applied to all waters above the 60th parallel, up to one hundred miles seaward of the Archipelago. An additional obstacle is the fact that it was not until after its 1970 legislation that Canada made a definite claim that those waters were Canadian "internal" waters, with the clearest statement being made only in 1975. Before that, the term "Canadian" waters had been used. Thus, Canada could not rely exclusively on the historical consolidation of title as a legal basis for claiming the waters of, the Archipelago as internal waters.

24. Nevertheless, Canada could secure valuable support in arguing that they are internal waters if it relied also on the straight baseline system. In addition to utilizing baselines to affirm historic title, international law allows states to use baselines to enclose coastal waters where there is a fringe of islands along the coast of a state or where the coastline is deeply indented or cut into. These rules are an exception to the low-water mark rule and are based upon the 1951 Anglo-Norwegian Fisheries Judgement of the International Court of Justice (ICJ). They have been codified in large part in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. At issue is whether these rules can be used as the basis for drawing baselines around the perimeter of the Arctic Archipelago and for enclosing the special bodies of water.

25. In the 1951 Fisheries Judgement, the ICJ held that Norway had the right to apply the straight baseline system to enclose the "skjaerjaard", the archipelago bordering the western coast of Norway. The study referred to above has concluded that the principles enunciated in the ICJ Judgement with respect to Norway could well have application to the Canadian Arctic Archipelago. In drawing baselines around a coastal archipelago, the Court held that while in general such baselines must not depart from the general direction of the coast, the geography of the region as a whole rather than a particular sector must be considered. Additional criteria enunciated by the Court were that there must be a sufficiently close relationship between the water and land areas to treat the enclosed waters as internal waters (the close link requirement) and that regional economic interests may be taken into account in justifying the drawing of such baselines.

26. The rules and criteria for drawing baselines have been codified in the 1958 Geneva Convention on the Territorial Sea, to which Canada is not a party. However, it would be preferable for Canada to apply the more liberal approach of the ICJ Judgement than to base its action on the narrower rules of the Convention, which in any event, is not binding on Canada. Especially important is the fact that under the 1958 Convention, the waters thus enclosed are subject to the right of innocent passage if they were previously considered either territorial sea or high seas. The ICJ Judgement makes no reference to the right of innocent passage following the drawing of baselines across coastal waters. It was concluded in the study that a reasonably accurate estimate of the chances of success to prove the validity of straight baselines around the Arctic Archipelago should be about 75%. These chances would be appreciably enhanced by relying also on an historical consolidation of title over the enclosed waters.

VI RELEVANT INTERNATIONAL CONSIDERATIONS

27. Several important factors should be considered before any action is taken to enclose the archipelagic waters by straight baselines, thereby delimiting them as internal waters of Canada. These factors include anticipated reactions of other states, the possibility of Canada becoming engaged in international litigation on the issue, the possible effect on the LOS Conference and possible effects on other multilateral or bilateral interests of Canada.

28. At the time of passage of the Arctic Waters Pollution Prevention Act in 1970, following the voyage of the U.S.S. "Manhattan", the U.S.A. and U.K. vigorously protested that action by Parliament in this regard was contrary to international law as infringing upon freedom of the high seas. Other major maritime states also strongly protested Canadian action. It is reasonably certain that these states would hold similar views, and would make those views known, were Canada to enclose the waters of the Arctic Archipelago by baselines thereby demonstrating publicly that these are internal waters of Canada. As part of any Government evaluation of this course of action, consideration should be given to taking measures which might reduce such a reaction to a manageable level or prevent it from occurring. Such measures could include giving clear indications to the international community that international shipping, subject to Canadian laws, would be permitted to use the Northwest Passage; Canada's NATO allies could be advised that Canada would allow the entry of foreign vessels into Canadian Arctic waters pursuant to bilateral or multilateral defence arrangements (as is currently the practice); the U.S.A. could be informed beforehand of any Canadian

action and told, as was done in 1976, that such action is subject, and without prejudice, to future bilateral arrangements.

29. The possibility of litigation before the International Court of Justice in which another state would contest the Canadian action cannot be discounted, (Canada's reservation to the jurisdiction of the Court only exempts disputes over marine pollution and fisheries jurisdiction). The seriousness of such a possibility would have to be carefully examined because it would probably be very difficult politically for Canada to make a further reservation which would also cover the status of its Arctic waters. On the other hand, preventative action of the kind outlined in the preceding paragraph might reduce or eliminate the litigation possibility.

30. The LOS Conference has still not completed its work, although it is scheduled to do so in 1980. There are several provisions in the negotiating text of great importance to Canada, such as the so-called Arctic exception article, which might be put in jeopardy if Canada were to enclose the Archipelago. Such action might appear to the major maritime states as upsetting the delicate compromise packages which have been worked out at the Conference between coastal and maritime states before all of the packages have been finalized in a treaty and thereby the trade-offs contained in them legitimized. It will be recalled that this concern was one of the reasons Cabinet decided in 1976 to postpone the drawing of straight baselines at that time.

31. Finally, various multilateral or bilateral interests or relationships of Canada might be adversely affected. There exists the real possibility of strong diplomatic pressure being brought to bear on Canada by major maritime states, which could put strains on Canada's relations with these states. This is especially true with regard to the U.S.A. where a high degree of interdependence exists and where a high degree of cooperation is required in order to manage our relations. Although nearly a decade has passed since the unilateral action of Canada in 1970, it is not at all certain that the U.S.A. would not be seriously concerned with and react strenuously to the drawing of baselines around the perimeter of the Arctic Archipelago. (Even if they have been reassured concerning their military interests in the Arctic, it is still possible that they might regard this action as unacceptably infringing on their vital national interests.) This in turn, while adversely affecting the general state of Canada-U.S.A. relations, could well exacerbate specific problems, such as maritime boundary negotiations. This, therefore, is a key factor which would have to be carefully evaluated in any examination-of this kind of action.

64. Meeting of the Panel on Arctic Waters, February 18, 1982

LAC, vol. 5, file 8100-15-4-2 (s)

Subject: Meeting of the Panel on Arctic Waters,
Thursday, February 18, 1982

I attended the above meeting to represent Coast Guard's interests and submit the following briefing report of proceedings.

The meeting was opened by T.C. Bacon who asked each Department to give its general views on the draft Memorandum to Cabinet. All Departments agreed that the thrust of the draft document is good and that the paper should not require too much rewriting.

The Chairman then asked each Department to express any specific concerns held. For my part, I made the point that Ministers should be alerted through this paper to an evolving requirement for Government resources downstream, as maritime commerce grows in Arctic waters. This view was supported by Customs and Excise who added that mention of custom services should be made specifically. DND made the point that their Department was by no means fully convinced that the Northwest Passage was not an international waterway. Following some discussion the Chairman concluded that the sovereignty matter was not, in itself, at issue, but rather the definition of the area over which this sovereignty is to be proclaimed and the methods of delineating this area. (It appears that education and dialogue with DND is a requirement).

The point was made that neither the RCMP nor the Department of Communications had been directly involved to date, and since both had a direct interest in the provision of services in the Arctic, they should be.

The Chairman then took the group through the draft Cabinet Document paragraph by paragraph, seeking any suggestions for improving the accuracy, phraseology, etc. In this context Dick Hodgson and Alf Popp both made the point relating to legal interpretation of archipelagic water. The Chairman agreed that this terminology should be used cautiously to avoid legal misinterpretation.

A suggestion was put forth that the baselines at the entrance to Amundson Gulf and McClure Strait need not necessarily be drawn straight, i.e. point-to-point, but could easily accommodate a significant

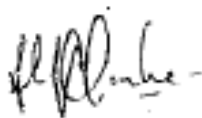
indentation to eastward, in each case, without prejudicing Canadian sovereignty, if this would serve to ameliorate suspected reaction from the United States. After discussion it was agreed that the primary American concern is the issue of an international waterway and that such an indentation would do nothing to soften their views. The straight baseline approach was sustained, although the Chairman indicated that they would certainly look at the proposal for indentation. Concerning the future legal situation in the Arctic (paragraphs 8 to 20 inclusive) this entire section was reviewed, inaccuracies corrected and several changes relating to possible or probable evolution of resource extraction were made. These addressed points of concern. contained in your note on this paper. The various proposals, both Canadian and others were discussed, as well as interests of foreign countries and those of the Inuit community.

The section on Canadian sovereignty and the drawing of straight baselines was reviewed and except as mentioned above was generally accepted. Paragraph 23 will be amended to represent the United States position more accurately and to contain a communication plan with respect to future Canada-U.S. interfaces on this issue. With respect to the recommendations, Recommendation No. 1 was generally accepted; your suggested revision of Recommendation No. 2 was also generally agreed and a copy of your suggested text was left with the Chairman. With respect to Recommendation No. 5 it was concluded that the Arctic Waters Panel, not the Advisory Committee on Northern Development, would be the more appropriate OPI to co-ordinate development of regulations, guidelines and amendments to document for future consideration by Cabinet. This will result in a total rewrite of paragraph No. 30. Concerning Recommendation No. 6 it was generally agreed that Canada should move to ratify both the 69 and 71 conventions without delay and this Recommendation will be sustained.

Other points contained in your note on this paper, were raised and given appropriate consideration.

The next step is a rewrite of the draft Cabinet Document for circulation to Arctic Waters Panel Members and this is timed for mid-March. You may also wish to discuss this matter with Dick Hodgson whose views and perception might differ slightly from my own.

J.Y. Clarke,
Director Fleet Systems,
Canadian Coast Guard.



**65. Memorandum to Cabinet, "Status of Arctic
Archipelagic Waters," June 1, 1982**

LAC, vol. 5, file 8100-15-4-2 (s)

SECRET
SERIAL NO ____
June 1, 1982
le 1 juin, 1982

MEMORANDUM TO CABINET
MEMOIRE AU CABINET

Status of Arctic Archipelagic Waters
Statut des eaux archipelaigues de l'Artique

SECRETARY OF STATE FOR EXTERNAL AFFAIRS
SECRÉTAIRE D'ÉTAT AUX AFFAIRES EXTÉRIEURES

EXECUTIVE SUMMARY

OBJECT

The purpose of this Memorandum is to:

- a) examine the existing legal situation with regard to Canadian sovereignty in the waters of the Arctic Archipelago;
- b) examine the future demands for the commercial use of the Archipelagic waters, particularly the Northwest Passage, and determine whether the existing legal regime can adequately respond to these demands;
- c) recommend a course of action' which will assure full Canadian control over these waters.

DECISION REQUIRED

Decisions are required with regard to:

- a) agreement in principle that an Order-in-Council pursuant to the Territorial Seas and Fishing Zones Act be drafted providing for straight baselines around the perimeter of the Arctic Archipelago on the basis of geographical coordinates provided in Annex I of this Memorandum and as indicated on the chart provided in Annex II;
- b) the timing on when such an Order would be implemented;
- c) discussions with selected states in advance of the enactment of the Order-in-council;
- d) coordination of the development of appropriate legislation and guidelines to ensure that Canada exercises effective control over these Arctic waters once the baselines are drawn;
- e) whether Canada should ratify two marine pollution liability conventions with a reservation to protect our position on Arctic waters.

BACKGROUND AND EXISTING LEGAL SITUATION (paras 3 to 7)

In 1976 Cabinet reaffirmed that the waters of the Arctic Archipelago, including the Northwest Passage, were internal but

decided to defer the drawing of baselines around the perimeter until the “international climate, in particular developments at the Law of the Sea Conference, would be more propitious to such action”. Negotiations at the Conference have now concluded and in view of the increasing number of proposals being put forward on the commercial use of these waters especially a proposal by the United States Coast Guard to make the first winter crossing of the Northwest Passage to test its commercial potential the time has come to consider what further Canadian action might be required.

In the past our approach to the question of sovereignty over these archipelagic waters has been a “functional” one. Our objective has been to build up our claim through a series of statements, and administrative acts while stopping short of legislation which would specifically declare these waters as internal by drawing baselines around them. We have therefore gained a degree of control without provoking sustained international challenge. To support this approach a number of Canadian acts could be amended to make clear they apply in the absence of baselines.

FUTURE LEGAL SITUATION IN THE ARCTIC (paras 8 to 17)

Can the “functional” approach respond to changing future demands on these waters? The most significant factor is that the ‘status’ of the Northwest Passage, which we maintain is not an international strait since it has not been used for international navigation, can change as a result of use. There is increasing interest, not only in Canada but in USA and even Japan, in utilizing the strait to transport hydrocarbons (five Canadian proposals are listed and three U.S.) If Canada does not act to place shipping in the Northwest Passage clearly under Canadian control, commercial use of the Passage by foreign ships will eventually turn the Passage into an international strait. Under the provisions of the new Convention on the Law of the Sea, Canada would then have virtually no control over the ships using the Passage, save for the important “Arctic exception” article in the text which would permit Canada to adopt and enforce its own pollution prevention laws within out 200-mile economic zone in the Arctic. Aircraft and submarines would enjoy the respective rights of overflight and underwater transit. As proposals for foreign use of the Northwest Passage increase, it can be expected that public pressure on the Government, similar to that of the 1969 Manhattan voyage, to exercise control over the waters of the Archipelago will also increase.

OPTIONS FOR CANADA (paras 16 and 17)

Two options present themselves:

- 1) to carry on with the “functional” approach of regulating activity in the Archipelagic waters to the extent possible without actually drawing straight baselines. A number of relevant acts could be amended to enhance this ability and drawing straight baselines could be postponed - perhaps indefinitely;
- 2) to draw straight baselines around the Archipelago to indicate in clear and certain terms that they are internal waters of Canada.

A decision on the future Canadian policy with regard to these waters is important now for the following reasons:

- a) Shipping - While Canada can enforce environmental standards under the Arctic Waters Pollution Prevention Act and exercise routing control through the Canada Shipping Act, we do not have the means to prohibit, delay or regulate the frequency of transit. This ability might be essential in the future and the only way to contend with all eventualities is to deal with these waters as internal, requiring the drawing of baselines.
- b) Security - the lack of complete control over the waters of the Archipelago opens up the possibility of foreign warships or military-related communications vessels entering the waters. The Northwest Passage is in a strategic location and Canada has a vital interest in Arctic security and in ensuring that it controls access to it. Again, only by designating these waters as internal will Canada have the necessary control over military vessels.
- c) Inuit Interests - the Inuit’s historic occupation of the ice between the Arctic islands, as well as the land, is well documented and contributes to Canada’s claim of historic title to the waters of the Archipelago. The Inuit have been encouraging the Government to clearly claim these waters as internal. Drawing baselines neither advances nor hinders land claim negotiations with the Inuit.
- d) Draft Convention on the Law of the Sea - the negotiations on the Convention have not concluded and any move on Canada’s part with regard to these waters will have no effect on them or the Convention. We have not yet issued charts showing the exact location of the territorial sea and fishing zone in the Arctic and if we become a party to the Convention we would be required to clarify the status of these waters. As well, the

Convention contains dispute settlement procedures and the sooner we clarify the status of these waters the better for any Canadian case.

- e) Convention on Civil Liability for Oil Pollution Damage, 1969, and 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage - Cabinet has agreed that Canada should ratify these two conventions subject to guidance on whether an “Arctic reservation” is required. The two Conventions provide a different liability regime for pollution damage than that of the Arctic Waters Pollution Prevention Act (but are in accord with the Canada Shipping Act) and would give Canadians who suffered pollution damage access to a \$67 million international compensation fund. Since the Conventions apply to the territory of a state, and we maintain the waters of the Arctic Archipelago are internal, we would wish to see the Conventions apply to these waters as well. An “Arctic reservation” is therefore not required. Some amendments to the Arctic Waters Pollution Prevention Act will be necessary but the benefits outweigh any possible political question about doing so.

ENSURING CANADIAN SOVEREIGNTY: DRAWING STRAIGHT BASELINES (paras 18 to 20)

The above indicates that only by clearly establishing that the Archipelagic waters are internal will Canada have the degree of control required in the future to effectively regulate the expected use of them. The “functional” approach is not adequate to meet future demands for the use of these waters. The three theories, or principles, upon which Canada can base its claim to sovereignty, in order of importance to our case, are: 1) the sector theory; 2) historic title; and 3) the straight baseline doctrine (i.e. that baselines can be drawn on the basis that the Archipelago constitutes a single unit with the mainland.) An examination of these principles indicates that on balance international law favours the Canadian position and, the drawing of straight baselines. Since Canada has always regarded these waters as internal no right of innocent passage would exist within them; Canada has never said, however, that it would prohibit the passage of foreign commercial vessels as long as that passage were subject to reasonable Canadian laws. The drawing of straight baselines around the Archipelago will lay to rest the sector theory, as far as Canada is concerned, upon which some claims of sovereignty have been made to ice-covered waters outside the Archipelago up to the North Pole. Given our interest in the Arctic “sector” we would wish to

maintain a special role like a "droit de regard" - throughout the sector, even beyond the 200-mile economic zone.

THE POSITION OF FOREIGN STATES ON ARCTIC WATERS (paras 21 to 24)

There has been an evolution in Law of the Sea since Canada first drew its fishing closing lines, claimed a 12-mile territorial sea and initiated pollution control in Arctic waters. All of these acts were protested by maritime powers who, in many cases, feared the establishment of precedents for use by other countries. The Law of the Sea Conference has now resolved many of these questions. The United States has the most direct interest in Canadian Arctic claims since they are looking at the Northwest Passage as a potential shipping route. The United States has a policy of protesting all straight baselines of more than 24 miles in length and we can expect that they will protest the drawing of Arctic baselines. We should, however, stress that commercial shipping subject to reasonable regulation will be permitted through the Passage. The USA is in a somewhat difficult position in questioning the actions of others since it is questioning its own commitment to the multi-lateral treaty approach to Law of the Sea.

Members of the EEC and Japan will likely not protest the Canadian action, at least publicly, and the USSR might even tacitly support us. We should not be deterred by the possibility of international protest, particularly from the USA, since the latter would have protested such a move at any time in the past and can be expected to do so at any time in the future. Postponing action can only lead to the gradual erosion and final abandonment of the Canadian claim to internal waters.

EFFECT ON THE SPECIAL BODIES OF WATER (paras 25 to 27)

Our claims to internal waters in the so-called special bodies of water, the Gulf of St. Lawrence, Bay of Fundy, Queen Charlotte Sound, Hecate Strait and Dixon Entrance, are often considered in the same context as those in the Arctic. There is not the pressing need to act with regard to these waters and action on the special bodies should be taken in the future following action on the Arctic.

TIMING OF CANADIAN ACTION (para 28)

There is no ideal time to draw Arctic baselines; the matter has been under Cabinet consideration for the past 20 years and, as

indicated, it is important to move before Canadian claims are eroded by the advent of commercial shipping. The Law of the Sea Convention will be signed in December and a case can be made that Canada should act before that time or shortly thereafter. The Cabinet could agree in principle that the baselines be drawn within that time frame and the exact date could be left to a recommendation from the Secretary of State for External Affairs in consultation with other interested Ministers.

FEDERAL-PROVINCIAL AND PUBLIC CONSIDERATIONS (paras 32 to 34)

The provinces are not directly involved but would likely support the clarification of Canadian sovereignty. Since Inuit organizations have advocated the move the Territorial Governments would also likely welcome the action. Indicating that the waters are clearly internal should receive wide public endorsement (a Communications Plan is attached). This memorandum has been prepared by External Affairs in consultation with all relevant Government departments.

RECOMMENDATIONS

It is recommended that:

1. the legislative section of the Department of Justice be instructed to draft an Order-in-Council which will promulgate baselines pursuant to the Territorial Seas and Fishing Zones Act around the perimeter of the Arctic Archipelago so as to make the waters therein internal waters of Canada. The baselines should be drawn on the basis of the co-ordinates and chart attached as Annexes I and II hereto (co-ordinates for baselines along the coast in the Beaufort Sea are also included to assist in the delimitation of the territorial sea and fishing zone there);
2. the Order-in-Council be promulgated in 1982 or early 1983 on a date to be recommended by the Secretary of State for External Affairs, on the basis of consultations with other interested Ministers;
3. while activities in these waters will be subject to reasonable Canadian regulation and control, the Government reaffirms its intention to permit passage of foreign commercial shipping;

4. the USA, members of the EEC, Japan, Norway, and the USSR be informed of the Government's decision above before the Order-in-Council is promulgated;
5. departments continue the development of regulations, guidelines and amendments to legislation for future consideration by Cabinet to ensure that Canada maintains effective control over the waters of the Archipelago;
6. the Government reaffirms its intention to provide government services essential to the safe, effective development of year round Arctic exploration and transportation projects, if and when such projects may be approved;
7. Canada ratify 1969 Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, without an Arctic Reservation.

OBJECT

The purpose of this Memorandum is to:

- a) examine the existing legal situation with regard to Canadian sovereignty in the waters of the Arctic Archipelago;
- b) examine the future demands for the commercial use of the Archipelagic waters, particularly the Northwest Passage, and determine whether the existing legal regime can adequately respond to these demands;
- c) recommend a course of action which will assure full Canadian control over these waters.

DECISION REQUIRED

2. Decisions are required with regard to:
 - a) agreement in principle that an Order-in-Council pursuant to the Territorial Seas and Fishing Zones Act be drafted providing for straight baselines around the perimeter of the Arctic Archipelago on the basis of geographical coordinates provided in Annex I of this Memorandum and as indicated on the chart provided in Annex II;

- b) the timing on when such an Order would be implemented;
- c) discussions with selected states in advance of the enactment of the Order-in-Council;
- d) coordination of the development of appropriate legislation and guidelines to ensure that Canada exercises effective control over these Arctic waters once the baselines are drawn;
- e) whether Canada should ratify two marine pollution liability conventions with a reservation to protect our position on Arctic waters.

BACKGROUND

3. The Arctic holds a certain mystique for Canadians. Few have lived in or even visited this vast, inhospitable area or know in detail what life north of '60' is like, and yet there is an attachment to the Arctic felt in every part of the country. Many would see the Arctic as a vast storehouse of wealth on which we can draw in the future. But the bond is more than economic - it borders on emotion. The Arctic is seen as an integral part of our history, our nationhood and the continuing struggle to tame, and adapt to, the northern wilderness. In a sense, the Arctic is our last frontier. For the native people, who have hunted and lived there for centuries, the feeling is more intense - it is simply "home". On the matter of Canadian sovereignty in the Arctic there is perhaps a limited appreciation for the finer questions of law, economics and security. The gut reaction is that "it is ours". And to a large extent it is.

4. The Arctic lands, including the islands of the Archipelago are clearly and undisputably under Canadian sovereignty. The same cannot be said, however, for the waters of the Arctic Archipelago -- waters which we have long claimed as internal but have not established by drawing baselines. In 1976, Cabinet reaffirmed that the waters of the Archipelago were internal and decided to defer the drawing of baselines around the perimeter until the "international climate, in particular developments at the Law of the Sea Conference (including the US view on Arctic pollution prevention measures) would be more propitious to such action by Canada." The Law of the Sea Conference will conclude this year and it is also becoming increasingly apparent that developments in the Arctic are beginning to move at a pace which raises the danger that Canada's policy will be dictated by events. The number of proposals being announced for the use of the Northwest Passage grows yearly: the latest is a United

States Coast Guard proposal to make the first winter crossing of the passage in 1984 in order to test the commercial viability of Alaskan tankers using the route. The time has now come to consider what further Canadian action might be required in light of Cabinet's 1976 decision and developments since then.

EXISTING LEGAL SITUATION IN THE ARCTIC

5. Under international law we have sovereign rights over the resources of the continental shelf under the whole of the Arctic Basin. Our claim to a 12-mile territorial sea in the Arctic, as off our other coasts, is now also supported by customary international law, as is our claim to a 200-mile fisheries zone. The intent of the Arctic Waters Pollution Prevention Act has gained international acceptance through a special provision in the draft Law of the Sea Convention. Our overall approach to sovereignty in the Arctic archipelagic waters, including the Northwest Passage, for the past 20 years has been what might be called a "functional" one. While claiming them as internal, the objective has been to build up the Canadian claim through a series of statements and administrative acts, while stopping short of legislation which would specifically declare these waters as internal. In this way Canada has achieved a degree of control without provoking sustained international challenge, permitting us to gradually build up our claim. Furthermore, Canada has maintained that the Northwest Passage is not an international strait, for reasons which will be outlined, although our position on this question is not necessarily shared by the major maritime states.

6. The current application of Canadian law to the waters of the Archipelago is not dependent on the waters being internal but is determined on the basis of other criteria, as follows:

The Territorial Seas and Fishing Zones Act. Canada has a 12-mile territorial sea and 200-mile fishing zone in the Arctic but in order not to undermine our internal waters claim, we have not issued a chart indicating the location of either. The Territorial Sea and Fishing Zones Act does not provide sufficient clarity on the legal status of the Archipelagic waters. It defines internal waters as including those waters behind straight baselines from which the territorial sea is measured. While there is no court decision interpreting this definition, officials view the use of the word "includes", as permitting historic waters or other waters over which Canada claims sovereignty to be covered by the Act. The definition of internal waters could be improved and doubts about it alleviated if it was amended so as to specifically refer to

historic and other waters over which Canada exercises sovereignty.

The Canada Oil and Gas Act. This Act implements existing Canadian sovereign rights over the mineral resources of the continental shelf which would include the shelf between the Arctic islands. It clarifies Canada's rights to exploit these resources which were previously exercised under two Acts.

The Arctic Waters Pollution Prevention Act (AWPPA). This legislation, which was the subject of some international protest when passed in 1970, has largely now received international acceptance and its validity is recognized by the draft Convention on the Law of the Sea through the so-called "Arctic exception" to the pollution prevention rights of coastal and flag states. The AWPPA bans the discharge of waste into Arctic waters (the Archipelagic waters and 100 miles beyond), requires evidence of financial responsibility and regulates the construction, design and operation of vessels in Arctic waters. The Act and its regulations indicate what type of vessels can navigate during a particular season within 16 shipping safety control zones in Arctic waters. A Lancaster Sound study committee concluded in 1980 that these shipping standards are stringent and technically sound. The Departments of Transport and Northern Affairs intend to soon place proposals before Cabinet to amend the Act to permit the establishment of traffic routes, shipping traffic controls and vessel traffic management systems in Arctic waters. Under such an overall system, vessels would be required to follow defined routes and submit to vessel clearance procedures.

The Canada Shipping Act (CSA). The pollution prevention provisions of the Act (Part XX) do not apply to waters covered by the Arctic Waters Pollution Prevention Act but all other provisions of the CSA related to ship safety do. The Act does apply in our Arctic fishing zone beyond 100 miles. Cabinet has agreed that the Act should be amended so that the Maritime Pollution Claims Fund, which can provide up to \$100 million for pollution claims, will apply north of 60 degrees.

The Criminal Code. A section of the Code purportedly extends its application to the territorial sea and internal waters but the section is ambiguous and the Department of Justice will be proposing to Cabinet that it be amended so as to indicate that the ambit of criminal law extends to all Canadian territory,

including internal waters and the territorial sea as well as to installations on the continental shelf. Such an amendment would also serve to clarify the jurisdiction of courts martial for offences “within Canada” under the National Defence Act. Internal waters will be defined so as to include those waters behind baselines and historic and other waters over which Canada exercises sovereignty. If necessary, the Secretary of State for External Affairs could provide a certificate advising the Court on the location of Canada’s internal and territorial waters. There still could be problems, however, since whether or not an offence occurred outside or inside internal waters, in the absence of baselines defining them, would be determined post facto.

The Customs Act. While the Territorial Sea and Fishing Zones Act provides a definition of the territorial sea and internal waters, the Customs Act has a different definition of internal waters so that straight baselines are required in order to make the Act applicable in internal waters behind baselines. The Customs Act clearly extends to the territorial sea, however. This has created difficulties in applying customs duties to drilling installations in the Archipelagic waters located beyond 12 miles from shore. The Department of Finance has recommended that the Act be amended to apply to all offshore installations located anywhere on Canada’s continental shelf. The Department of Justice will shortly be requesting Cabinet authority to prepare legislation to establish a comprehensive legal regime for the offshore which will ensure that all relevant Canadian laws (i.e. the Customs Act, the Immigration Act, the Labour Code etc.) apply to offshore installations. Such legislation would overcome the difficulties in applying Canadian laws to installations in the Archipelagic waters (as well as in other locations). Canadian law would be applied in these waters not on the basis that these waters are internal but rather that these installations are on the continental shelf. The Customs Act could also be amended to expand its definition of internal waters, perhaps along the lines proposed for the Criminal Code.

7. The above Acts have provided a fairly effective means to date for exercising functional jurisdiction in the Arctic, particularly with regard to pollution prevention and the exploitation of offshore mineral resources. It is apparent, however, that serious gaps exist which could be at least partially rectified through the following actions, which would not entail the drawing of baselines:

- The amendment of the Custom's Act to indicate that it applies to internal waters in the absence of baselines.
- The amendment of the Criminal Code to indicate beyond all doubt that it applies in internal waters over which Canada claims historic or other title.
- The amendment of the Territorial Seas and Fishing Zones Act to make clear that the definition of Canadian internal waters is not dependent on the drawing of straight baselines.
- The amendment of the Arctic Waters Pollution Prevention Act to permit the establishment of ship routing and vessel traffic management schemes in Arctic waters.
- The passage of a comprehensive offshore legislation so that all relevant Canadian laws apply to installations on the continental shelf in the Arctic (as well as off Canada's other coasts).

FUTURE LEGAL SITUATION IN THE ARCTIC

8. The "functional approach" has been the *modus operandi* up to the present when there has been limited commercial activity in Arctic waters; the question is whether this approach can respond to changing future demands. The very nature of this approach means that there is no legislation indicating that these Archipelagic waters are internal. Their status is left unclear until such time as straight baselines are drawn indicating that these waters are internal and under complete Canadian control. Even if the Acts listed above were amended, Canada might increase its control over the waters to some degree but their exact status would remain unclear. As things now stand under Canadian law there is the ever-present fear that a Canadian court might hold that it has no jurisdiction since the waters of the Archipelago are not internal under Canadian law. The uncertain status of these waters and the uneven application of Canadian law to them has contributed to the high degree of confusion among government officials, academics and the public at large as to whether the waters of the Arctic Archipelago are internal waters of Canada or not.

9. Moreover, the advent of commercial shipping in the Arctic will have a profound effect on the status of the Northwest Passage under international law. (The Passage joins Baffin Bay with the Beaufort Sea and is actually any one of four different routes through Archipelagic

waters, as indicated on the chart in Annex II). Some nations might already view the Passage as an international strait and subject to the rules applicable to such straits. Such rules apply to straits which join two parts of the high seas (or economic zone) and are used for international navigation. While the Northwest Passage meets the first part of this criteria, it can by no means be considered as a strait used for international navigation. All of the nineteen crossings of the Passage to date have been experimental in nature; six were by foreign vessels but with Canada's consent or acquiescence. The fact that the Passage is frozen for nine months of the year and can only be navigated with the assistance of ice breakers militates against it being considered as a strait used for international navigation.

10. For this reason Canada has maintained that the Northwest Passage is not an international strait. But while potential use is not a factor in determining whether a strait is subject to international legal rules, actual use is and we now face the situation where the Northwest Passage will soon be used for commercial navigation perhaps on a large scale. With increased attention being paid to Arctic hydrocarbon resources, there is a concomitant interest in the best means of transporting these resources to southern markets. This interest has been demonstrated not only in Canada but in the United States, the EEC and even Japan and has focused on the use of the Northwest Passage. The main proposals for using the Passage are:

Canadian Proposals

Arctic Pilot Project - sponsored by PetroCanada to move gas in LNG carriers from the high Arctic through the eastern portion of the Passage beginning in 1986. Two class 7 icebreakers would be used making up to 60 transits annually with the possibility of 9 ships in use by 1992 making up to 270 transits annually. PetroCanada is looking to regasification in the Eastern Canada.

Trans-Canada Pipeline Proposal - to move gas through the eastern portion of the Passage from King Christian Island after 1986 using 3 LNG carriers.

Dome Petroleum Proposal - now well into the planning stage to move crude oil through the Passage from the Beaufort Sea beginning in the late 1980's in 10 tankers. Dome envisages 10 to 20 ships in service by 2000 making up to 280 transits per year.

Panarctic Oils Proposal - to move oil in one 200,000 ton tanker at some future time from Bathurst Island to eastern markets resulting in 30 transits a year.

Cominco Proposal - to ship lead and zinc from Cornwallis Island to Europe beginning in 1982. There would be eight shiploads a year resulting in 16 transits of the eastern portion of the Passage.

U.S. Proposals

Seatrain Proposal- to move oil through the Passage in three class-8 icebreaking tankers 15 times a year from Alaska's North Slope.

Globtik Tankers Proposal - to carry Alaskan oil to the U.S. east coast through the Passage initially using six tankers (possibly expanding up to 24) each carrying 2.5 million barrels of oil 12 times a year. There is also a proposal from the same company to carry liquefied natural gas along the same route using four class-10 icebreaking LNG carriers. In the case of the oil tankers, the Globtik proposal would result in from 144 to 576 transits of the Passage annually.

General Dynamics Proposal - to ship liquefied natural gas in nuclear powered submarine tankers from Alaska's North Slope under the Northwest Passage to Southern U.S. markets (the company has also proposed supplying the Northern European market utilizing submarines under the Polar ice cap but outside of Canadian jurisdiction).

11. To test the feasibility of U.S. tankers and LNG carriers using the Northwest Passage the United States Coast Guard has informed Canadian officials that they propose to make the first winter transit of the Passage in the Coast Guard vessel Polar Sea in 1984. This voyage would be part of a joint project with 11 U.S. oil companies to test the feasibility of Arctic marine transportation and assess its commercial prospects. The U.S. Coast Guard has not asked permission to make this crossing but has enquired unofficially whether the Department of Transport would be interested in cooperating with them on it. (The Department has already participated in one expedition under this project).

12. While some of the U.S. proposals might never come into effect, it is impossible at this stage to discount the future viability of any of them. A U.S. House of Representatives Committee has already heard

testimony on the Globtik proposal without coming to any conclusions. In the October, 1981 Report of the U.S. National Academy of Science, the Academy has recommended to the U.S. Government: that it financially sponsor the first tanker shipments from the Arctic; that Congress direct federal government agencies to take long-range responsibility for weather and ice prediction services; that further study be made of transport through the Northwest Passage and that there be a continuous exchange of information with other polar nations, especially Canada.

13. There has also been an expression of interest in shipping North Sea oil from the U.K. to Japan through the Passage, although no proposals have been advanced. Japanese businessmen have had consultations with Canadian government and industry representatives on icebreaker construction, the application of Canadian laws in the Passage and ship routes through it. Japan's main interest would appear to be oil and gas tanker shipments from the Beaufort Sea to Japan.

14. Special rules apply to straits when they are used for international navigation. The 1958 Geneva Convention on the Territorial Sea provided that these straits are subject to a regime of non-suspendable innocent passage. When negotiations at the Third UN Law of the Sea Conference began in 1973, flag states argued that a less restrictive rule should apply to international straits - particularly since the new 12-mile territorial sea limit would; make "legal" straits out of some 113 straits which previously had high seas corridors. The regime under the draft Convention is therefore one of "transit passage" through international straits, which is more akin to freedom of navigation on the high seas than innocent passage through the territorial sea and gives the coastal state very little control over shipping. Aircraft and submarines are also given the right of overflight and underwater transit respectively - a right which they have not previously enjoyed. The method of determining whether a particular strait is subject to these rules continues to be a geographic test and a functional one based on use.

15. The status of the Passage can change as a result of use. It is impossible to say at this stage how many crossings a year would be necessary to turn the Northwest Passage into an international strait. There is no doubt that in the absence of action to subject shipping to clear Canadian control, commercial use of the Northwest Passage by foreign ships will eventually turn it into an international strait. Assuming that the draft Law of the Sea Convention will be applicable by then, this would mean that Canada would have virtually no control over the ships using the Passage save for the important "Arctic

exception" article in the text which would permit Canada to adopt and enforce its own pollution prevention laws within the Arctic 200-mile economic zone. Even routing systems would be subject to international approval. Canada's rights under the "Arctic exception" would not extend to warships which would be free to transit the strait unhindered by any Canadian laws. Aircraft and submarines would enjoy the respective rights of overflight and underwater transit; the security implications of having a northern corridor open to the warships, aircraft and submarines of all nations are discussed later in the Memorandum.

16. As proposals for the use of the Northwest Passage, particularly by foreign interests, increase it can be anticipated from past experience that the domestic pressures on the Government to ensure that Canada exercises complete control over the use of the waters of the Archipelago will also increase. The expression of public concern about Canadian Arctic sovereignty when the "Manhattan" transited the Passage in 1969 could be matched by the winter crossing of the U.S. Coast Guard's "Polar Sea" in 1984. In the face of mounting plans for commercial Arctic navigation, two options present themselves.

- 1) To carry on with the "functional" approach of regulating activity in the Archipelagic waters to the extent possible without actually drawing straight baselines. Relevant legislation, such as the Criminal Code, Customs Act and the Territorial Seas and Fishing Zones Act, could be amended to enhance this ability and the drawing of straight baselines could be postponed perhaps indefinitely.
- 2) To draw straight baselines around the Archipelago to indicate in clear and certain terms that they are internal waters of Canada.

17. Option (1) has served us reasonably well over the past 20 years, but it is questionable if it will be sufficient in the face of changing conditions in the Arctic in the future. The closer we come to commercial use of the Passage, the less viable the choice of options becomes since once foreign shipping activities begin in earnest the harder it will be to change or even clarify the rules. A decision on the future course of Canadian policy with regard to these waters is important for the following reasons:

- a) Shipping - We are only now beginning to understand the effects of ship traffic on the Arctic environment, although the Arctic Waters Pollution Prevention Act was an early attempt to minimize its adverse effects. The Lancaster Sound Regional

Study has been important in assessing the long-term detrimental effects of an oil spill on the Arctic environment. But oil spills are only part of the concern since the passage of ships may have other adverse environmental effects, particularly on wildlife and ice conditions.

Under current Canadian law, if a vessel met the standards of the Arctic Waters Pollution Prevention Act and the Canada Shipping Act, we would be obliged to permit its passage through the Archipelagic waters and could not prohibit or delay passage or regulate the frequency of transit. The ability to do so would be important if we wished to delay the passage of vessels pending the completion of an environmental assessment. While a vessel traffic management scheme for Arctic waters as proposed by the Department of Transport would assist in ship routing in the Passage, it is questionable whether ship clearance procedures could be made mandatory if the Northwest Passage were to be regarded as an international strait. Moreover, in such an event Canada would have to submit designated sea lanes or traffic separation schemes to the U.N. maritime organization (IMCO) for approval. In order to contend with all of these and possibly other, as yet unforeseen eventualities involving shipping we will have to deal with these Archipelagic waters as internal, which in turn dictates the drawing of straight baselines.

- b) Security - The opening of the Northwest Passage to commercial navigation has security implications, although many of these implications can only be surmised at this stage. Lack of complete control over shipping opens up the possibility of foreign warships or military-related communications vessels entering the waters of the Archipelago. While this situation has not yet arisen, the case of the Polish yacht Gdynia is perhaps illustrative of non-Western interest in these waters. In that case the yacht sailed as far as Resolute before it responded to a Government request to leave the Archipelago. It is open to question what law the Government could have utilized to enforce its decision had the Gdynia not complied. Moreover, it should be noted that Department of National Defence resources to respond to this or any other kind of security incident are extremely slender. Therefore it would seem prudent and necessary that the defence posture North of 60° be kept under constant review.

This or any other kind of security incident are extremely slender. Therefore it would seem prudent and necessary that the defence posture North of 60° be kept under constant review.

The USSR has, as a policy objective, the enhancement of their naval presence in areas of interest to them around the world. It is impossible to say at this stage what the Soviet interest might be in the Northwest Passage if it were opened to navigation. Again, it must be remembered that if the Passage were to be considered an international strait that it would be open not only for largely unrestricted navigation but to overflight and underwater submarine passage. As of now, it is thought unlikely that the Soviets would utilize the Passage for submarine transit for military purposes due to the inherent risks of under-ice navigation and difficult manoeuvrability. The same argumentation would apply to warships having to navigate through ice. Canada and the U.S.A. maintain a "watching brief" on portions of these waters for security purposes in the event of increased Soviet interest. With the Northwest Passage as a potential link between the Atlantic, Pacific and Arctic oceans, particularly as a route to transport vital energy supplies, and its strategic location at the top of North America, Canada has a vital interest in Arctic security and in ensuring that it controls access to these waters so as to be in the best position to respond to all future circumstances, both foreseeable and unforeseeable. Only by designating these waters as internal will we have the legal basis to ensure that the passage will not be open for use by military or military-related vessels at some time in the future.

The RCMP is responsible for policing the waters of the Archipelago, and in particular providing the policing service necessary to support the Inuit in pursuit of their traditional hunting and living patterns on these frozen waters. The RCMP recognize that they have a potential problem due to gaps in legislation in applying Canadian laws to these waters, particularly over hydro-carbon development activities, and would welcome a clarification of the extent of Canadian jurisdiction.

- c) Inuit Interests - The process of determining the impact of the commercial use of Arctic waters on the native peoples in the North has only recently begun. The Lancaster Sound Regional Study has been useful in this regard particularly in determining how the frequency of ship transits and the

opening of routes through the ice will affect traditional hunting and living patterns on the ice-covered waters. The historic occupation by the Inuit of the ice between the islands, as well as the land, is well documented and contributes to Canada's claim of historic title to the Archipelagic waters. The Inuit Tapirisat is well aware of this contribution and has been encouraging the Government to clearly claim these waters as internal. While the Inuit might see some link between such action and their own land claim negotiations, drawing baselines neither advances nor hinders these negotiations. We have always maintained that these waters are internal and taking effective legal means to indicate this will not affect the Inuit. Canada has a responsibility to the Inuit to ensure that their interests are recognized in any commercial use of Arctic Archipelagic waters and the greatest degree of protection would appear to come from the exercise of complete Canadian sovereignty.

- d) Draft Convention on the Law of the Sea - The draft Convention recognizes the rights of a coastal state to a 12-mile territorial sea, a 200-mile economic zone (EEZ) and sovereign rights over its continental shelf. The Convention was adopted in April and will be open for signature in December. Recommendations to Cabinet on whether or not Canada should sign the Convention are currently being prepared. Under its terms, a coastal state party will be required to provide charts to the UN Secretary General indicating the baselines from which the territorial sea, economic zone and continental shelf are measured. We have not yet issued charts showing the exact location of the Arctic territorial sea and fishing zone and would be required to do so should we become a party to the new Convention. In view of the imminent commencement of commercial navigation in the Archipelagic waters and the need for the users to know exactly what the waters' status is, Canada cannot delay much longer in indicating the location of these various zones of coastal state jurisdiction. The fact that we have not yet done so contributes to some of the confusion and misunderstanding regarding Canada's Arctic claims. If we fail to act to draw baselines, we are increasing the difficulties for ourselves should we become involved in dispute settlement procedures on the status of these waters if we become a party to the Law of the Sea Convention some time in the future. Under its terms, one party can require another party to submit to compulsory dispute settlement or compulsory arbitration if one alleges that another has acted in

contravention of the Convention with regard to inter alia the freedoms and rights of navigation (such as Canadian control of shipping in the Northwest Passage). We would be in a much better position to argue that such procedures do not apply in the case of the Northwest Passage if we had clearly indicated before the commencement of commercial navigation that these waters are internal and therefore not subject to the Convention regime. If we do not act, we increase the chances that many Canadian actions related to shipping and submarine activity in the Archipelagic Waters will be subject to review and challenge through the dispute settlement procedures.

Since the Law of the Sea negotiations have concluded and the Convention will be opened for signature in December. It is unlikely that any move on Canada's part after that time would have any effect on them or upset any of the compromises in the text, including the Arctic exception article which is supported by other Arctic states, especially the USSR.

- e) Convention on Civil Liability for Oil Pollution Damage, 1969 and 1971 Fund Convention - The question of whether or not to draw baselines around the Archipelago has implications for Canadian accession to other international conventions as well. Cabinet agreed on December 16, 1980 that Canada ratify the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage but has requested guidance on whether or not we should make an "Arctic reservation" (ie. indicate that the Conventions will not apply in the Canadian Arctic in the same way that Canada has reserved its position on the Arctic with respect to our accession to the 1973 Marine Pollution Convention). The question of an "Arctic reservation" arises because the 1969 and 1971 Conventions have a different liability regime from that provided in the Arctic Waters Pollution Prevention Act (AWPPA) and if Canada were to become a party to them we would either have to a) indicate that they do not apply in the Arctic or b) amend the AWPPA. In fact, while the AWPPA itself provides for a regime of absolute liability, the de facto regime is one of strict liability (the only regime the underwriters would agree to) which is the same regime as under the two Conventions and the Canada Shipping Act. It would appear reasonable to bring the AWPPA in line with these Conventions and the legislation in effect south of 60 degrees and there would be significant

benefits for Canada in doing so which would outweigh any possible political question about amending the AWPPA. These Conventions would give Canadians who had suffered damage as a result of a maritime oil pollution incident access to a \$67 million international compensation fund. This would supplement the \$21 million maximum liability of the tanker owner and Canada's own \$100 million Maritime Pollution Claims Fund. These two Conventions specifically apply to damage caused in the territory, including the territorial sea, of a contracting party. Since Canada considers that the Archipelagic waters are part of Canadian territory, we would wish to see the Convention apply to these waters as well so that a reservation for the Arctic is not required. A more detailed examination of this question is included in Annex IV.

ENSURING CANADIAN SOVEREIGNTY: DRAWING STRAIGHT BASELINES

18. The above factors demonstrate that only by clearly indicating that the Archipelagic waters are internal will Canada have the degree of control required in the future to effectively regulate the expected use of these waters. The question of whether to take this action has been the subject of Cabinet consideration and public debate for at least the past two decades. A variety of theories and principles of international law have been invoked over the years in support of the Canadian claims that the waters of the Archipelago are internal and that Canada has full sovereignty over them. The three most commonly advanced are:

- a) the sector theory
- b) historic title
- c) the "straight baseline" doctrine (ie. that baselines can be drawn on the basis that the Archipelago constitutes a single unit with the mainland).

These three can be viewed as a spectrum, with the sector theory at one end offering the least amount of support and the "straight baselines" doctrine the most. They are not mutually exclusive and all, or elements of each provide a basis under international law for Canada's claim and ample justification for use to move now to clarify the status of these waters. Details on each of these three approaches are provided in Annex III. An examination of them indicates that Canada has a good basis under the "straight baselines" doctrine enunciated by the International Court of Justice in the Anglo-

Norwegian Fisheries Case and contained in the 1958 Geneva Convention on the Territorial Sea, to draw baselines around the perimeter of the Arctic islands on the rationale that the Archipelago is a northward projection of the mainland and constitutes a single unit with it. By drawing baselines, Canada would also be consolidating its historic title to these waters, making them internal and under complete Canadian control. The application of the "straight baselines" doctrine and historic consolidation of title is not cut and dried and arguments can be made that neither applies in the Canadian Arctic (ie. that the whole of the Archipelago is too distant to constitute a "fringe of islands along the coast" in the same way that the Norwegian archipelago does and that Canada has not expressed its historic claims with sufficient clarity. On the other hand, the year round presence of ice which binds the land to the water, the water to land ratio, which is one of the lowest of any of the world's archipelagos, and the historic record run counter to this argument). On balance, international law favors the Canadian position, and the drawing of straight baselines.

19. The drawing of straight baselines around the Arctic Archipelago would clearly delineate Canadian internal waters and provide certainty, now lacking, as to where Canadian laws and regulations do and do not apply. It would permit Canada to completely regulate ship traffic in these waters and would serve as a clear statement that Canada controls these waters and that the Passage cannot be considered as an international strait. Utilizing the "functional approach" by amending the legislation itemized above can only be regarded as an interim response which would not provide Canada with complete control over the Archipelagic waters and would not respond to the pressing concern that the Passage might be regarded as an international strait. The baselines would be drawn to consolidate Canada's historic claim to the waters and would meet the requirements of international law in following the general direction of the coast and in enclosing waters which are closely linked to the "land domain" Canada's position would be that by consolidating its title and enclosing waters which Canada has always regarded as internal, no right of innocent passage would exist - Canada has never said, however, that it would prohibit the passage of foreign commercial vessels as long as that passage is subject to reasonable Canadian laws. National Defence believes it highly unlikely that foreign warships would wish to transit the Passage. Nevertheless, we would likely wish to apply the same requirements to warships wishing to navigate in these waters as is applicable to all our internal waters: that is, that any such entry would be subject to prior notification and approval, taking into account our existing military agreements.

20. Canada has long claimed these waters as internal, Cabinet has agreed that baselines should be drawn at an appropriate time and such an indication appears to be the only viable means of ensuring that Canada can effectively respond to all expected, and unexpected, future demands. Delay in acting will only work against our claim and make more difficult to implement our policies particularly as the date for the start of commercial navigation approaches and foreign interest mounts. That is why a decision on the waters is important now in advance of the political and economic pressures which are certain to develop rather than response to them. The drawing of baselines will, by implication, lay the sector theory to rest as far as Canada is concerned since the waters outside of the Archipelago will be either territorial seas out to 12 miles or fishing zone from that point on out to 200 miles. Given our interest in the whole of our Arctic "sector", it would seem that Canada would wish to maintain a special role -- something like a *droit de regard* -- throughout the sector, even beyond the 200-mile limit.

THE POSITION OF FOREIGN STATES ON ARCTIC WATERS

21. There have been dramatic developments over the past decade since Canada adopted fishing closing lines of s east and west coasts, a 12-mile territorial sea, and aimed anti-pollution jurisdiction in Arctic waters. At that time maritime powers regarded all of these actions as being unacceptable under international law and our Arctic aims were viewed in the overall context of creeping coastal state jurisdiction in all parts of the world. As a result of nearly 13 years of negotiation surrounding the Third UN Conference on the Law of the Sea these Canadian actions, and those like them of other coastal states, are now accepted and even emulated by the maritime powers themselves. Initial concerns that our actions in the Arctic might be a precedent for archipelagic states (such as the Philippines and Indonesia), to draw baselines around their archipelagos have been largely overcome by provisions in the draft Convention which recognize the right of oceanic archipelagic states to draw baselines, subject to transit passage through established sea lanes.

22. These developments should be taken into account in determining the positions of other states on possible Canadian action on baselines. Further information on the positions of the USA, of the members of the EEC, Japan and the USSR is provided in Annex IV attached. The USA has the most direct interest in Canadian Arctic claims since they are looking to the Northwest Passage as a potential commercial shipping route for Alaskan oil and gas. They also have Arctic security interests and would probably want to ensure unimpeded passage for their warships. (It should be noted that U.S. Coast Guard ships have made

transits of the passage in 1957 and 1969 and U.S. submarines three recorded transits, but no U.S. surface warship has transited the Passage - nor are such transits planned for the near future.)

23. The USA protested the Arctic Waters Pollution Prevention Act in 1970 and said that they could not agree to Arctic claims not supported by international law. As a matter of policy the USA protests nearly all straight baselines of more than 24 miles in length and we can therefore expect that they would protest our move in the Arctic (there is no indication that the USA has departed from its policy of diplomatic protest in favor of military confrontation; the Gulf of Sidra incident involving Libyan claims to internal waters appears to have been directed more against Libya than against straight baselines.) It is difficult to predict the vigor of a possible U.S. protest at this stage since Arctic baselines were first discussed with the USA in 1976 but we can assume a negative reaction. When the matter was last discussed with them, a number of U.S. officials expressed sympathy for Canadian concerns about the possibilities of the Northwest Passage becoming an international strait and open to Soviet ships. We should encourage the USA to continue to take this position and emphasize that Canada would permit the passage of commercial vessels, subject to reasonable Canadian laws, and any passage of U.S. warships and submarines would be on the basis of existing defence arrangements. Paradoxically, it is the United States, which has traditionally encouraged states to adopt the multilateral treaty approach to the Law of the Sea (and specifically did so with Canada in the U.S. Note on the Arctic Waters Pollution Prevention Act) that has been questioning its own commitment to this very approach. The United States, (along with Venezuela, Turkey and Israel) voted against the adoption of the draft Convention on the Law of the Sea in April due to its opposition to a number of provisions on seabed mining. It appears likely that the USA will not sign the Convention and even try to undertake seabed mining outside of the Convention regime. This puts the USA in a difficult position since it approves of the navigational guarantees under the Convention, in particular those granting vessels transit passage rights through international straits. The USA might well find itself embroiled in controversy if it attempts to take the benefits conferred by the Convention on maritime states (ie. transit passage) while ignoring those portions it does not like (ie. seabed mining). The attached Communications Plan indicates how Canada might address the question of Canada's position with regard to Arctic waters publicly in the United States.

24. It now appears possible, as a result of developments since 1970, that the expected reaction of some foreign states might not be as adverse as once might have been anticipated. Members of the EEC and

Japan will likely not protest the Canadian action (at least publicly) and the USSR might even tacitly support us. The U.S. will probably protest, however; we should not be deterred since it is clear that the USA would have protested Canadian action in this regard in 1960, 1970 and likely will at any time in the future. Postponing drawing baselines to a time to meet with U.S. approval can only lead to the gradual erosion and final abandonment of the Canadian claim to internal waters. While acquiescence to the Canadian claim is an element recognized by international law in sustaining a claim to sovereignty over water or land; foreign protest or protests would not necessarily be fatal. Acquiescence might come over time - as in the case of the Arctic Waters Pollution Prevention Act.

EFFECT ON THE SPECIAL BODIES OF WATER

25. The special bodies of water and the waters of the Arctic Archipelago are often considered in the same context and if Canada moves to draw straight baselines in the Arctic, political pressure might be expected for similar action in the "special bodies of water", the Gulf of St. Lawrence, Bay of Fundy, Queen Charlotte Sound, Hecate Strait and Dixon Entrance. Our claim that the waters of the Gulf and the Bay of Fundy are internal is legally the most secure, although all claims are contentious.

26. Many of the same arguments for drawing baselines in the Arctic would also apply to these special bodies of water including the uncertainty about the application of Canadian law and the need to clearly set out our zones of coastal state jurisdiction for international treaty purposes (including Canada's ratification of the 1973 Marine Pollution Convention). The difference is that none of the special bodies of water can be considered as waters which have not been used for international navigation and which face the prospect of having their status changed as a result of changing circumstances. Thus, there is not the same need for immediate action with regard to, the special bodies. Also, federal action with regard to all or some of these bodies would have to take account of the lengthy federal provincial consultations on the offshore. The USA has rejected our assertions of sovereignty over these waters in the past and our drawing baselines to delineate these waters as internal might add an additional complicating factor to our boundary negotiations with them.

27. A good case can be made for proceeding with the Arctic on its own merits rather than in conjunction with claims to other, unrelated bodies of water. Action on Canada's claim to these special bodies of water can be taken in the future following action in the Arctic.

TIMING OF CANADIAN ACTION

28. There is no ideal time for Canada to draw Arctic baselines. Ministers recommended the drawing of baselines in 1960 and the Cabinet again agreed that they should be drawn in 1976 once Law of Sea negotiations had concluded, (which is now the case). Because the Convention is not yet open for signature and foreign governments should be notified of the Canadian move, it is somewhat difficult to recommend an exact date for drawing baselines, but Cabinet could agree in principle that it be done in 1982 or in early 1983. A case can be made that Canada should move during the fall of 1982, before the signing of the Convention so that the Canadian move, resting on an historic claim and existing international law, stands apart from the conclusion of the Law of the Sea Convention in December, 1982. If not, the baselines should be drawn shortly after the Convention's adoption, i.e. in early 1983. The decision on the actual date to implement the Order in Council designating the baselines might best be left to the recommendation of the Secretary of State for External Affairs on the basis of consultations with other interested Ministers.

COMPREHENSIVE GOVERNMENT ACTION AND FINANCIAL IMPLICATIONS

29. Drawing baselines in itself will not assure Canadian control of Arctic waters. Any decision to draw baselines is a first step but it must be augmented by a determination on the part of Canada to provide adequate operational systems such as icebreaking, communications, aids to navigation, surveillance, search and rescue and policing, so that Canada exercises (as well as proclaims) its control over these waters. Canada must also maintain a competitive advantage in Arctic technology to eliminate the need to turn to or rely on foreign interests, particularly in the field of Arctic shipping. Once these waters are clearly internal under Canadian law some amendments to existing legislation and guidelines will be required to deal with such matters as permission to use Arctic waters; frequency of transit; traffic separation schemes; military exemptions; ship design, construction equipment and manning standards, and foreign access to Canadian Arctic technology. On the whole such legislation should be less complicated, and more effective, than amending Canadian laws to expand the use of the "functional approach".

30. Much of the work is already underway through interdepartmental and Cabinet consideration of such things as an Arctic Marine Services Policy, under the direction of the Department of Transport and a northern hydrocarbon policy, under the Department of Indian and Northern Affairs. The Marine Services Policy is geared to respond to

the demand for operational services from industry. Following the recommendation of the Federal Environmental Review Office (FEARO) Transport established a Control Authority for Arctic Shipping as well as an interdepartmental Advisory Committee to provide advice to the Department based on biological / environmental studies. The Canadian Coast Guard has established a Northern Directorate, which will evolve into a year-round Arctic Region Coast Guard command.

31. The drawing of baselines around the Archipelago will complement these and other activities and will not result in any immediate financial expenditures. Such a move by Canada would indicate a clear Canadian resolve to control these waters and would reinforce the Government's stated intention to provide services essential to the safe, effective development of year round Arctic exploration and transportation projects.

FEDERAL-PROVINCIAL RELATIONS

32. While the provinces are not directly involved in the drawing of Arctic baselines, provincial governments would likely welcome the federal governments move to clarify Canadian sovereignty and clearly assert control over an area of importance to all Canadians; Since such a move has been advocated by Inuit organizations and would assist in the application of Canadian laws in the north, the Territorial Governments would also welcome this action. The Territorial Governments should be advised in advance of the promulgation of baselines.

PUBLIC INFORMATION CONSIDERATIONS

33. A Communications Plan identifying interest groups is attached as Annex VI.

INTERDEPARTMENTAL CONSULTATIONS

34. This Memorandum has been prepared by the Department of External Affairs in consultation with the Departments of Transport, Energy Mines and Resources, Indian and Northern Affairs, Justice, Environment, National Revenue and National Defence as well as the Royal Canadian Mounted Police.

CONCLUSIONS

35. While Canada's sovereignty over the Arctic Islands is beyond question, Canada has yet to "perfect" its claim to sovereignty over the waters of the Archipelago. Cabinet decided in principle, in 1976, that

this claim should be precisely and formally asserted by drawing straight baselines around the perimeter of the Archipelago. Such action was to be deferred until the international climate, particularly developments at the Law of the Sea Conference, created a more propitious atmosphere. It is apparent that while the existing legal regime might be sufficient for the limited uses now placed on the Archipelagic waters, that maintaining our policy of applying the "functional approach" (ie. attempting to apply relevant Canadian laws to Arctic Archipelagic waters without drawing baselines to clearly indicate them as internal) will not be sufficient to protect our interests once commercial navigation of the Northwest Passage begins, perhaps in three years time.

36. Drawing baselines to delimit our full sovereignty over the Archipelagic waters is essential to ensure full Canadian control over these waters, particularly in terms of our legal, ecological, security, and Inuit interests. Although the exceptional nature of Arctic waters has now gained international recognition insofar as pollution prevention is concerned, the Canadian, claim to full sovereignty over the waters of the Archipelago, remains a subject of some controversy and drawing straight baselines would no doubt cause a reaction from the USA and perhaps other major maritime powers. Developments at the Law of the Sea Conference have altered the perception of many maritime states of what they once regarded as unacceptable maritime claims and it is possible that our action will not engender the sort of negative reaction once expected. A strong protest still might be expected from the United States. The Law of the Sea. negotiations are now nearly at an end and any Canadian move to draw baselines, upon their completion in 1982 would not upset the consensus at the Conference - including agreement on the "Arctic exception" article which recognizes the validity of the Arctic Waters Pollution Prevention Act.

37. An increasing amount of urgency is attached to the drawing of these baselines because the need to protect the Canadian claim in the face of proposals to begin using the Northwest Passage as a commercial waterway, with the prospect of its becoming an international strait through usage. Under the new draft Law of the Sea Convention, if the Northwest Passage were to become or be considered as an international strait, Canada would have only limited control over foreign ships, and would have to permit the passage of warships, overflight and underwater submarine traffic. It is therefore essential that the waters of the Archipelago be clearly brought under Canadian control through the delimitation of straight baselines around the perimeter of the Arctic Archipelago. Canada would not wish to bar the passage of foreign commercial ships in these waters; we would,

however, wish to regulate their passage. It is important that we have our Arctic regime in place as soon as possible before considering whether to ratify the new Law of the Sea Convention. A decision on whether or not to draw baselines is necessary now before commercial traffic begins and Cabinet could therefore decide in principle that baselines would be drawn in 1982, with the exact date to be recommended by the Secretary of State for External Affairs on the basis of consultations with his colleagues.

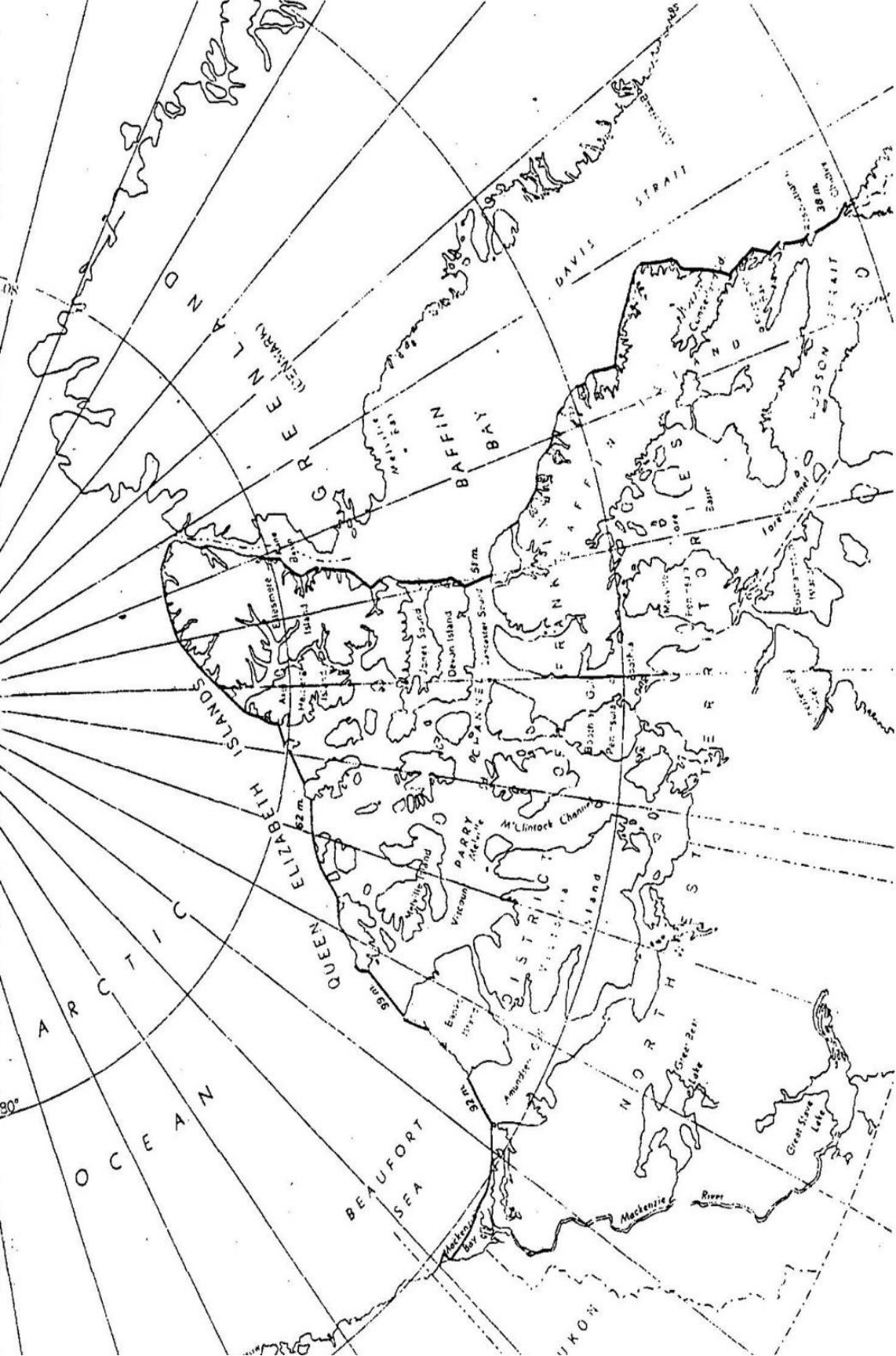
38. To maintain its claim to these waters, Canada must do more than proclaim baselines. We must also have the capacity, and exhibit the capability, to control and regulate the use of these waters and provide the navigational, icebreaking, communications, surveillance search and rescue, customs, hydrographic and policing services which the exercise of full sovereignty would require. There must be a commitment to maintain a technological lead in the provision of these services or Canadian activities could be supplanted by more efficient or advanced foreign capacity (on which we could come to rely) leaving Canada with only a paper claim.

RECOMMENDATIONS

It is recommended that:

1. the legislative section of the Department of Justice be instructed to draft an Order-in-Council which will promulgate baselines pursuant to the Territorial Seas and Fishing Zones Act around the perimeter of the Arctic Archipelago so as to make the waters therein internal waters of Canada. The baselines should be drawn on the basis of the coordinates and chart attached as Annexes I and II hereto;
2. the Order-in-council be promulgated in 1982 or early in 1983 on a date to be recommended by the Secretary of State for External Affairs, on the basis of consultations with other interested Ministers;
3. while activities in these waters will be subject to reasonable Canadian regulation and control, the Government reaffirms its intention to permit passage of foreign commercial shipping;
4. the USA, members of the EEC, Japan, Norway, and the USSR be informed of the Government's decision above before the Order-in-Council is promulgated.

5. departments continue the development of regulations, guidelines and amendments to legislation for future consideration by Cabinet to ensure that Canada maintains effective control over the waters of the Archipelago.
6. the Government reaffirms its intention to provide government services essential to the safe, effective development of year round Arctic exploration and transportation projects, if and when such projects may be approved.



ANNEX III

SECRET

BASIS FOR CANADIAN CLAIM

1. The Sector Theory

Under this theory countries bordering on the Arctic Ocean have a claim to sovereignty over the lands (and waters) included within a pie-shaped area bounded by their northern coasts and lines projected from the extreme eastern and western limits of their coasts to the North Pole. In Canadian terms this would mean that we would claim sovereignty over all lands and waters within a triangle whose base is the northern mainland, the apex is the North Pole and the sides respectively 141 degrees on the west and the 60 degree meridian on the east. The sector theory has been invoked by officials and academics in Canada over the last 80 years mainly as a means of claiming sovereignty over Arctic islands. Some argue that it applies to the waters within the sector as well, although pronouncements in this regard have never been as clear-cut as the claims to land territory. The use of the theory has been inconsistent, having been both affirmed and denied by Ministers and officials. The USSR has used this theory to claim sovereignty over the islands within its sector (and has left claims to the waters unclear). It has also recently argued in delimitation negotiations with Norway that its western sector line forms the boundary for the USSR's continental shelf. Whatever its application for land claims, it is generally agreed that the theory has a weak foundation in international law and Canada's claim has a more solid basis elsewhere.

Nevertheless, insofar as the waters in the sector are concerned, Ministers recommended to Cabinet in 1960 that "the sector theory be held in reserve by Canada and not repudiated". Officials have been guided by this recommendation, although it has become increasingly difficult to avoid giving the impression that the theory has been abandoned. In the Lincoln Sea boundary negotiations between Canada and Denmark, Cabinet agreed in 1976 that Canada should press for a median line delimitation favoring Canada's interests but departing from the 60° "sector" line boundary with Denmark (Greenland). In the Beaufort Sea, Canada continues to claim the 141st meridian as the maritime boundary with the USA, but this on the basis of the 1825 Treaty between Great Britain and Russia rather than on the sector theory. It will, of course, be even more difficult to support the theory if baselines are drawn around the Archipelago so as to make those waters internal. Canada's proclamation of a 100-mile pollution prevention zone in 1970 and a 200-mile fishing zone in 1977 are in

themselves inconsistent with the sector theory and the claim that the waters within the sector are internal. Canada might wish, however, to keep a droit de regard in those parts of the sector not under Canadian jurisdiction. In sum, while the number of assertions of sovereignty over the land and waters of the Archipelago pursuant to the theory give continuity to Canada's claim, we should not rely on the sector theory as the basis for sovereignty over these waters.

2. Historic Title

There are three requirements under international law to establish a claim to historic title over lands or waters:

- (i) the exercise of state authority;
- (ii) the continuity of the exercise of state authority or usage; and
- (iii) the general toleration of states.

The state must first of all manifest its sovereignty. It is difficult to determine what acts are sufficient, but they must go beyond mere legislation or proclamation. A state must exhibit effective control of the lands or waters in question. The degree of control required will depend on a number of factors: the size of the area, its remoteness, the extent of its use and the demand for use on the part of other states. While the passage of time in the exercise of this authority is necessary, international law does not specify how long an historic title will take to materialize. Foreign states also have to tolerate the claim; the absence of protest is sufficient and acquiescence in the form of consent is not necessary. Convincing evidence must be presented to substantiate an historic claim and the burden of proof is on the claimant state. It is questionable whether Canada can say with certainty that we have met all of these standards. Unfortunately, our position with regard to the status of these waters has not been especially clear over time. While we can point to a long history of British and Canadian Arctic exploration, it has only been in recent years that Ministers and officials have clearly stated that we regard these waters as internal - although we have never acted in a manner in any way inconsistent with this.

While we might not be able to point to one or more manifestations of sovereignty which clearly establish Canadian title over these waters, international law recognizes a less onerous route to achieve the same end - historic consolidation of title. The requirements are similar to those outlined above but are more flexible, with the passage of time taking on much more prominence. It is based on the principle of international law that "it is necessary to abstain as much as possible from modifying factual situations which have existed for a long time"

(*quieta non movere*). A state would therefore be able to point to its activities in an area over a period of time (no one act of which would be sufficient in itself to grant immediate sovereignty) and the general toleration of states with regard to them, in order to “consolidate” or “perfect” its sovereignty claim. Canada has demonstrated its sovereignty over these waters since the turn of the century, specifically by enforcing fisheries and whaling legislation and exercising control over the movement of ships in the Archipelago. The Inuit have traditionally made no distinction between the ice-covered waters of the Archipelago and the land territory and their habitations and hunting patterns on the ice are well documented. A number of states protested the adoption of the Arctic Waters Pollution Prevention Act in 1970, but Canada was not claiming sovereignty under this legislation but applying environmental legislation in an area one hundred miles off our coasts. The USA and the UK did leave two Aide Memoires in 1969 which sought clarification of Canadian claims over Arctic waters. The U.S. Aide Memoire said that they would not be able to accept claims “not clearly justified under appropriate principles of international law”. Neither of these could be described as a protest note although as indicated elsewhere a protest from the USA can be expected should we draw baselines.

Canada can make a convincing claim to enclose these waters on the basis of historic consolidation of title. The matter is not totally beyond dispute, however, and we could not expect to succeed on this ground alone and the third line of argument, the “straight baselines” doctrine, must therefore be considered in conjunction with it.

4. The “Straight Baseline” Doctrine

International law recognizes the unique nature of “fringes of islands along the coast” in determining the outward limit of coastal state sovereignty. The International Court of Justice decided in the 1951 Anglo-Norwegian Fisheries case that the straight baselines system constitutes an exception to the normal rule of delineating the territorial sea from the low water mark following the sinuosities of the coast. The Court held, and the ruling was later codified in the 1958 Geneva Convention on the Territorial Sea, that the baseline from which the territorial sea is measured becomes independent of the low water mark where the coast is deeply indented or where there is a fringe of islands in the immediate vicinity of the coast, in the words of the Geneva Convention. In such an event, the baselines may depart from the physical line of the coast as long as (1) they do not depart to any appreciable extent from the general direction of the coast; and (2) the sea areas, within the lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. It would appear

from the judgment that it is these two basic criteria which are important and not the length of a particular baseline. The two longest baselines in the Archipelago would be, 99.5 miles across McLure Strait and 91.9 miles across Amundsen Gulf, both at the western end of the Passage. Sixteen other states including the USSR have drawn longer baselines, largely across coastal gulfs and bays and linking coastal archipelagos and at least 40 states, including France, Norway, U.K., Spain and Iceland, have drawn baselines of more than 24 miles. Not all of these lines are universally accepted and some, such as Libya's of 300 miles are clearly excessive; the questionable legality of baselines such as this should not affect Canada's claim that the waters of the coastal Arctic Archipelago are internal.

In Canada's case the geography of the triangular Arctic Archipelago is a prolongation or projection northward of the mainland and constitutes a single unit with it, in the same way that the fringe of islands along the Norwegian coast was held by the ICJ to constitute a single unit with Norway. Geographic realities would dictate, therefore, that Canada's territorial waters be delimited from baselines surrounding the Archipelago. If the whole Archipelago is viewed as a single unit there is no question that the baselines follow the outer line of the Archipelago, as the chart in Annex II demonstrates. The "close link" between the land and the water once the Archipelago is enclosed by baselines is underscored by the fact that the ratio of sea to land territory would be 0.822 to 1, one of the lowest sea to land ratios of any archipelago in the world (in Norway's case the ratio was 3.5 to 1). Further, the waters are frozen solid for nine months of the year and are treated as being one with the land by the Inuit inhabitants.

Once enclosed by straight baselines, the waters of the Canadian Arctic Archipelago would clearly have the status of internal waters. Under a provision of the 1958 Geneva Convention on the Territorial Sea, a right of innocent passage would apply if these waters were considered to be territorial or high seas before the baselines were drawn. As has been indicated above, Canada maintains that these waters have always been internal and that the baselines serve to consolidate Canada's historic title to them. No right of innocent passage would therefore exist - although Canada has indicated that it would permit such passage, subject to reasonable Canadian laws and regulations.

ANNEX IV

SECRET

CANADA'S RATIFICATION OF THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE AND THE 1971 CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE

Cabinet has agreed that Canada ratify these two Conventions but has requested guidance on whether or not we should make a reservation with regard to the Arctic. The 1969 Civil Liability Convention places a maximum of \$21 million on the liability of a tanker owner for an oil pollution incident under a strict liability regime (i.e. permitting the defences of Acts of God, war, etc.). This is in fact the same regime now employed under the Canada Shipping Act. In addition, the Fund Convention provides supplementary compensation (now up to \$67.5 million) to victims who suffer damage in excess of a shipowner's liability. The Fund is made up from contributions from parties to the Convention on the basis of a formula related to the amount of oil carried by tanker to or from each party (Japan is now the largest contributor although the USA has now indicated its intention of ratifying the Conventions). In order to become a party to the Fund Convention, states must also be parties to the 1969 Convention.

The question of whether or not Canada should reserve its position in the Arctic arises because the liability regime under the Arctic Waters Pollution Prevention Act (absolute liability, with no defences permitted and no maximum on the amount of that liability) and the liability regime under the 1969 Convention (strict liability with a maximum of \$21 million) are different. Becoming a party to the 1969 and 1971 Conventions without an Arctic reservation would therefore require an amendment to the AWPPA. In fact, this does not present much of a problem. When the Arctic legislation was passed it was thought that a more stringent regime should apply so that there was no maximum amount placed on a tanker owner's liability and it was to be absolute. It did not prove possible to obtain the underwriters' agreement for such a regime, however, and in practice the one currently in effect is the same as that of the Canada Shipping Act and the 1969 Convention. It would seem reasonable therefore to amend the AWPPA to bring the liability regime into line with the actual situation, both nationally and internationally. Any political question about amending this legislation would appear to be outweighed by the benefits that acceding to these two conventions without a reservation would bring.

The fund provides compensation for pollution from an oil tanker which causes damage on the territory, including the territorial sea, of a contracting party. The Fund would also compensate for preventive measures taken to ensure that a state's territory is not damaged. Canada would also receive all the benefits from an international fund, to which it was making only a small portion of the contributions. (Canada will continue to maintain its own \$100 million Maritime Pollution Claims Fund as part of the Canada Shipping Act, and these Conventions would provide an additional source of compensation if other sources prove inadequate or unavailable). Since the Fund compensates for damage to the territory of a state, a strong case can be made that the Conventions should apply anywhere in Canada including the Arctic so that victims north of 60 degrees would have the same advantages as those in the south. Not making a reservation for the Arctic would also be an indication that it is as much part of Canadian territory as any other part.

In ratifying the Conventions without an Arctic reservation, it is necessary to weigh the possibility that a Canada claim for compensation for pollution damage in the waters of the Archipelago could be challenged by another party to the Convention on the basis that the damage did not affect Canadian territory or the territorial sea. This would be the case, say, if a tanker caused damage in the middle of the Northwest Passage more than 12 miles from land and Canada sought compensation from the Fund on the basis of damage to Canadian territory (i.e. internal waters). In awarding compensation it has been the practice of the Fund to examine the expenses incurred by a state party on the basis of its national legislation or its state practice. The existence of straight baselines around the Archipelago would be the best indication that these waters are internal and of Canada's responsibilities with regard to them. While there is the possibility of another party which did not recognize these waters as internal challenging a compensation award, the chances of this happening are slight considering that it is unlikely that incident would occur without affecting undisputed Canadian territory; the fact that Canada can claim for measures to prevent damage to its territory and the practice of the Fund to look to national legislation and practice

Considering the benefits which ratification of the two Conventions will bring, the fact that the liability regime under the 1969 Convention is now in place in either a de jure or de facto form and the remote possibility that our position with regard to the Arctic could be compromised, it is recommended that Canada ratify the two Conventions without an Arctic reservation.

ANNEX V

SECRET

POSITIONS OF FOREIGN STATES

THE USA

A number of informal discussions with senior U.S. officials took place in the 1960s about Canadian claims not only to Arctic waters but to the "special bodies of waters" - the Gulf of St. Lawrence, the Bay of Fundy and Queen Charlotte Sound. The U.S. Government in a 1969 Aide Memoire said that it would be "unable to accept claims of internal waters or territorial seas in these (Arctic) areas not clearly justified under applicable principles of inter- national law. The USA protested the Arctic Waters Pollution Prevention Act on the basis that international law did not recognize a pollution prevention zone of one hundred miles on the high seas. At the same time the USA protested Canada's extension of its territorial sea to twelve miles.

As a matter of policy the USA protests all straight baselines of more than the 24 miles specified as the maximum closing lines for bays in the 1968 Geneva Convention and the draft Convention on the Law of the Sea. The USA, as a major maritime power makes few exceptions to this policy in order not to give encouragement to states to draw lengthy straight baselines (from a domestic point of view the USA only claims three historic bays, all under 24 miles across, and has little inducement to draw straight baselines to make other waters internal since they would fall under state, rather than federal control). The USA utilizes diplomatic protests and a recent incident in which the USA militarily challenged Libya's claim to a 300-mile baseline across the Gulf of Sidra (which has no foundation under international law) appears to be related more to bilateral relations with Libya than is the start of a general departure from previous practice.

We can expect that the USA will protest our move to draw baselines in the Arctic. It is worth noting that some US officials have shown some flexibility on how vehemently the USA could do so. The last time this issue was raised with US officials was in 1976 when the "Arctic exception" article in the draft Law of the Sea Convention was being considered. On Cabinet instructions, the USA was advised of Canada's intention to draw Arctic baselines at some appropriate future time. The head of the U.S. delegation said that the USA would reserve its position on this matter and the drawing of baselines would "cause us some problems." Privately, members of the U.S. delegation expressed some sympathy for the Canadian position since they saw this as a means of prohibiting Soviet military vessels from navigating

in the archipelagic waters. On the basis of these consultations, the last with the USA on sovereignty over Arctic waters, the Canadian delegation reported that "the USA itself would not subject its warships and paramilitary vessels to such Canadian authority but might conceivably make only pro forma noises about the Canadian action in drawing straight baselines." We cannot say whether U.S. officials would continue to privately take such a position.

The EEC, Norway and Japan

The UK, France, Belgium and Japan protested the Arctic Waters Pollution Prevention Act, largely on the same basis as the USA - that it was a unilateral declaration of jurisdiction over the high seas and would set a precedent for other states. In a separate confidential Aide Memoire, the UK specifically said that "it would not be acceptable to consider all water lying between the Arctic Islands to be internal waters". They did not wish the document made public. It is likely that the UK's attitude or interest in the subject has modified over the past decade as a result of events, particularly the Law of the Sea Conference. Other EEC countries do not appear to have any direct interest in the matter since we have not learned of any plans that these countries have to use the Northwest Passage for transit purposes. As indicated, there has been a suggestion to ship North Sea oil to Japan via the Northwest Passage but this idea has never been put into concrete form. Moreover, Japan, like West Germany, is interested in obtaining oil and gas exports from the Arctic and would likely take their economic interests into account in considering their reaction. If these states have any concern it would likely relate to possible precedent-setting aspects of the Canadian move and these aspects would appear limited.

Both Denmark or Norway have been "low key" in expressing any concerns about Canada's actions on coastal jurisdiction and it is unlikely that they would react any differently on this occasion while Norway is a major flag state it is also the "author" of the straight baseline doctrine. One purpose of drawing baselines would be to put Canada in a better position to regulate tanker traffic through the Northwest Passage and ensure that ecological and Inuit interests are taken into account. This objective should appeal to Denmark and Greenland. There is the possibility that it might encourage Greenland authorities to try to move to claim its portion of the Davis Strait as internal but there is no legal foundation for such a claim. Denmark (Greenland) might be able to apply its own non-discriminatory pollution prevention regulations under the "Arctic exception" to Canadian and other tankers using its side of Davis Strait, but any attempt to completely bar ship traffic would be going beyond its provisions.

The USSR

The Soviet Union would probably remain neutral on any move by Canada to draw straight baselines around the Archipelago although they would likely support us privately. Soviet claims to its own Arctic waters are unclear. In a 1926 decree, the USSR claimed all the lands and islands located north of the Soviet mainland within its sector (with the exception of the Spitzbergen Archipelago) and while the decree does not refer to waters, some Soviet jurists have interpreted it to so apply. The Soviet Government appears to regard the Northeast Passage as being internal waters but again their practice has not been wholly consistent and no law has proclaimed it as such (although a 1960 statute defined internal waters as including the waters of bays, seas and straits "historically belonging to the USSR").

ANNEX VI

SECRET

COMMUNICATIONS PLAN

Objective

To inform Canadians and select audiences in the United States and a number of European countries of the reasons why Canada has drawn straight baselines around the perimeter of the Arctic Archipelago.

Target Populations

Within Canada there are two audiences: the general public, which is concerned about Canadian sovereignty in the Arctic, and those who have a particular interest in Arctic affairs, such as residents of the Northwest Territories (in particular the Inuit), academics (in particular international lawyers); those in the business community with Arctic interests (particularly in the petroleum and transportation sectors).

Within the United States, outside of Government, the audience would be a specialized one, mainly in the media, the academic community and among those in the business community with interests in Arctic petroleum and transportation. The same audiences would exist in European countries with an interest in the Arctic and/or maritime affairs (the UK, FRG, Norway, Denmark and Japan).

Theme of the Announcement

The basic theme of the announcement is that Canada has drawn straight baselines around the Arctic Archipelago in order to clarify its longstanding claim that these waters are internal waters of Canada. Since Canada has always believed these waters to be internal, the announcement should be relatively low-key, in a sense routine, so as not to make it appear that Canada is laying claim to new territory (and to avoid heightening any foreign (especially U.S.) concerns). Nevertheless since the question of Canadian sovereignty in the Arctic, in particular as it relates to the Northwest Passage, has been the subject of public interest in the past, it can be expected that the announcement will arouse interest within Canada and media coverage will be significant. A fairly detailed press release setting out why baselines are being drawn and their effect should therefore be prepared. While Canada has waited until the conclusion of the Law of the Sea negotiations before acting, the announcement should not be linked to developments at the Conference since the Draft Convention

does not deal explicitly with Canada's claim, nor does it prohibit such Canadian action. Our move stands on its own, separate from developments at the Conference. The reason for acting at this particular time can be given as the need to clarify the legal situation in these waters in view of the increasing activity, and plans for such activity, within them

The press release should contain the following information: the nature of Canada's historic claim to these waters the recognition under international law of a coastal state's right to draw straight baselines around coastal archipelagos; the legal effect of such an action, especially on the Northwest Passage; the commitment of Canada to permit foreign commercial traffic through the passage subject to reasonable regulation.

Outside of Canada, the fact that Canada will permit foreign traffic and is acting under established principles of international law should be stressed.

Timing of Announcement

Since the drawing of straight baselines relates to Canadian sovereignty in the Arctic and requires an Order-in-Council, the most appropriate place would be the House of Commons. A press release could be issued simultaneously and the Secretary of State for External Affairs could respond to questions in a press conference the same day. Our Embassies in the relevant countries could send out press releases to their target audiences and be briefed to respond to any questions.

Follow-up Activities

In an attempt to keep the announcement relatively low key, limited follow-up public relations activity is contemplated. The Secretary might wish to speak on the question of Arctic sovereignty in some suitable forum shortly after the announcement. The Department of External Affairs could arrange for "seminar-type" briefing for Canadian academics and Canadian businessmen with Arctic interests. In addition, members of the Legal Bureau of the Department of External Affairs address academic audiences on a fairly regular basis and could include the subject of baselines in speeches on Arctic sovereignty. The Bureau would be prepared to respond to foreign requests for speakers on the subject at significant symposiums such as the American Society of International Law and the Law of the Sea Institute. Our Ambassador in Washington and our Consul General in New York might also wish to address interested groups on the subject and similar "seminar" briefings could be held in both locations for

academics and businessmen. While contingency planning for the USA is important, the extent of our public relations activities there should await a determination on interest in the subject among target audiences in the USA.

Budget

It is expected that the above communications plan can be met out of existing departmental budgets.

**66. Memorandum for the Deputy Minister and
Secretary of State for External Affairs, "Canada-
United States Consultations on the Law of the Sea
and Arctic Baselines," November 3, 1983**

LAC, RG 25, vol. 4, file 8100-14-4-2

Bureau of Legal Affairs
T.C. Bacon/2-2728
Legal Advisor
L.H. Legault/3-4324

SECRET WITH ATTACHMENTS/
CONFIDENTIAL

November 3, 1983
JCD-0128

Memorandum for the Deputy Minister and Secretary of State for
External Affairs

c.c. Minister of State (External Minister)
c.c. Minister of State (International Trade)

Subject: Canada-United States Consultations on the Law of the Sea and
Arctic Baselines

Purpose

To inform you of the results of recent Canada-United States consultations on Law of the Sea matters, including the question of Arctic baselines and to recommend a possible course of action on this question.

Summary Report on Conversations

There have been two rounds of consultations with the United States on Law of the Sea matters following the adoption of the new Convention: the first on February 4, 1983 (our memorandum LAP-008 of February 14, 1983) and the second on October 11, 1983. On both occasions the consultations took place at the request of the United States.

At the February session, the Americans' main concern was the question of the right of transit passage through international straits overlapped by the 12-mile territorial sea. The United States considers that this right is assured under customary international law and is not contingent on signature of the Law of the Sea Convention. The two sides agreed on a modus vivendi with regard to their different views on the issue.

At the October session, the United States informed us of the results of its bilateral consultations with other countries on the question of transit passage, and of its future intention in this respect. The Americans also provided an update on their proposed legislation to establish a National Oceans Policy Commission and to implement President Reagan's proclamation on the establishment of a United States exclusive economic zone. The main United States interest, however, was to determine Canada's intentions with regard to drawing baselines around the Arctic archipelago to give explicit legislative expression to the long-standing claim that the waters of the archipelago are internal waters of Canada. This matter had been raised by the Canadian side in February, when it was indicated that the establishment of baselines (which Cabinet had approved in principle in 1976) was again under active consideration following the conclusion of the Law of the Sea Conference. At that time, the United States had reserved its position and expressed the hope that we would consult further before proceeding. The United States had also made it clear that, although it regards the provisions of the Law of the Sea Convention on environmental protection in ice-covered waters (the so-called "Arctic exception") as being customary international law, it does not consider that these provisions give international recognition to Canada's Arctic Waters Pollution Prevention Act.

At the latest consultations, the United States reiterated its position on the "Arctic exception" and its serious concern with respect to any possible Canadian move to draw baselines in the Arctic. The Americans are particularly concerned that such action would establish an undesirable precedent, which might be followed by Indonesia in particular. They have not yet been able to advance their negotiations with the Indonesians on the question of sealane passage, and it seems unlikely that they will be able to do so for some time. It was explained to the United States

- i) that any Canadian baselines in the Arctic would not be based on the new "archipelagic state" provisions of the new Law of the Sea Convention (upon which Indonesia relies) but rather on traditional provisions retained from the 1958 Territorial

Sea Convention (originally derived from the 1951 Anglo-Norwegian Fisheries case);

- ii) that, unlike the waters separating the islands of Indonesia, Canada's Arctic waters are unique because of their ice cover, their use by the Inuit virtually as land territory, and the absence of commercial navigation in this area; and
- iii) that, unlike the Northwest Passage, the waters of the Indonesian archipelago have customarily been used for international navigation, so that, even if Indonesia were to draw baselines connecting all its islands, it would not be able to deny customary rights of passage.

United States officials acknowledged that the two situations were not parallel but argued that this would probably have little effect on the Indonesian attitude.

It was further explained to the United States that, in light of the public reaction to the experimental transit of the Northwest Passage by the "SS Manhattan" in 1969, political pressure in Canada to consolidate Canada's Arctic waters claims could be expected to mount if plans for intensified navigation in Canadian Arctic waters should materialize, as expected, in the near future. In this context, we asked if the United States Coast Guard would be proceeding with its plans to send two icebreakers to transit the Northwest Passage in January and February of 1984. We were informed that this program has been postponed and that no decision on its reactivation in 1985 has yet been taken. The last round of discussions concluded with an undertaking to consult further on the question of baselines, in general, and the United States ice-breaker program, in particular.

Memorandum to Cabinet on Arctic Baselines

In keeping with the Canadian position on the internal status of the waters of the Arctic archipelago, including the Northwest Passage, Cabinet decided in principle, in 1976, that this claim should be more precisely defined and more formally asserted by drawing straight baselines around the perimeter of the archipelago (the waters landward thereof being internal). Cabinet also decided, however, to defer such action until the international climate and developments at the Law of the Sea Conference were more propitious. In 1982, the attached memorandum to Cabinet was approved by the Mirror Committee and by Cabinet Committee which agreed inter alia:

- i) to draw baselines in late 1982 or early 1983;
- ii) to hold consultations on this decision with the United States and other countries; and
- iii) to delay the decision on the precise date for the promulgation of baselines until Ministers were advised of the results of these consultations.

It was agreed interdepartmentally that it was timely to proceed with such a submission because the Law of the Sea Conference was scheduled to end in December 1982, and because a number of projects, both Canadian and foreign, were being actively considered that would involve the use of the Northwest Passage for commercial navigation. In the circumstances, it was considered that Canada should proceed to draw baselines in order to achieve the following objectives:

- to ensure that the Northwest Passage would not acquire, through commercial usage, the status of an international strait;
- to ensure that access to the Passage for any navigation, commercial or military, would be subject to Canadian approval, control and regulation;
- to place Canada in a position to charge "user states" for services, such as ice-breaker, navigational and other aids, search and rescue, etc., which Canada would be required to establish and maintain in its Arctic waters;
- to avoid the implications of Article 43 of the Law of the sea Convention under which coastal states bordering on international straits are required to cooperate with other states navigating such straits in the establishment and maintenance of navigation facilities (thus making these facilities a matter for international rather than national decision); and finally,
- to protect Inuit interests.

In the event, the decision of the Cabinet Committee did not go to full Cabinet because Ambassador Beesley expressed concern over the proposed timing as being too close to the December 1982 signing of the Law of the Sea Convention and advocated continuation of the "functional" approach (by which Canada gradually applies its laws to Arctic waters but stops short of drawing baselines) to maintain Canadian claims. Ambassador Gotlieb also expressed concern

regarding the anticipated adverse reaction of the United States, and also regarding the legal merits of the Canadian case.

Ambassador Beesley's concern in respect of the timing has now been overtaken by events. As to whether Canada's claim could be fully protected through the functional approach, this appears doubtful in the light of the United States position that the Arctic Waters Pollution Prevention Act does not accord with the provisions of the Law of the Sea Convention. In any case, the functional approach has been continued, and the process of extending Canada's criminal, customs and civil jurisdiction to the offshore is nearing completion. As to Ambassador Gotlieb's view of the legal merits of the Canadian case, this has been carefully studied by three outside legal experts, who generally agree that Canada could successfully defend the legal validity of its actions in drawing straight baselines and that, in any event, it is questionable whether Canada could be taken to the International Court of Justice on this issue.

At the same time, it remains abundantly clear that drawing baselines would create a very serious irritant - possibly a major confrontation - in Canada/United States relations (for the United States baselines are a matter of global strategic concern). It has also become clear that although there is considerable Arctic navigation activity in the offing, none of it - including the United States Coast Guard ice-breaker program - is now imminent. In the circumstances, there is not the same pressure to act immediately as there appeared to be in 1982, and accordingly there is time to consider possible alternatives to baselines (whether as an interim or long-term measure). It has also become necessary to "re-visit" the attached Memorandum to Cabinet in the light of recent developments such as the extension of customs, commercial and civil jurisdiction to the offshore, and the further understanding we have acquired concerning the United States position on the Law of the Sea Convention.

If the Northwest Passage is opened up to foreign commercial navigation by the facilities of the United States or any other country, Canada's claim to sovereignty over these waters would be seriously eroded. If Canada's claim is to be substantiated, it is essential that Canada should provide all the necessary navigational service for foreign shipping. It might be possible to recapture some of the high costs involved, both in establishing and maintaining these navigational and other aids, by entering into the agreements with potential user states for the payment of charges of the use of these facilities. Such an approach would not prejudice Canada's claim so long as Canadian facilities were being used. It is therefore proposed if you agree, to explore this possibility with other departments and, if this kind of


arrangement appears possible, to make a further recommendation to you regarding consultations on this matter with the United States and other countries.

Recommendations

It is recommended that:

- i) for the time being, we do not refer the attached memorandum of July 7, 1982 to the full Cabinet and that we review it in light of recent developments;
- ii) we explore possible alternatives to baselines interdepartmentally, in particular the user fee idea;
- iii) if alternatives are agreed at the official level, and approved by you, we test their viability in further consultations with the United States.
- iv) We keep in close contact with the United States on its plans for a Coast Guard ice-breaker program; and finally
- v) We report further to you in light of this exploratory work and other developments.

Do you agree?



Michael Shenstone

L.H. Legault for de Montigny Marchand
Legal Advisor

67. House of Commons *Briefing Book*, Briefing Note, September 4, 1985

Subject

Voyage of USA icebreaker POLAR SEA reference to the International Court on the question of the statue of the Arctic waters.

Assessment

Questions have been raised in the press and elsewhere as to whether Canada should take the initiative to refer the mutation of the statue of the waters of the Northwest Passage to the International Court of Justice.

Suggested Reply

- We are confident in the strength of our case and would be prepared to adjudicate the issue in the world Court if that were the only recourse to defend our sovereignty.
- Such action, however, would only be in response to a challenge. It would hardly be appropriate for us to call our own sovereignty into question or to sue ourselves, so to speak.
- If asked. Because the voyage of the POLAR SEA was without prejudice to either side, it could not be raised by either Canada or the United States in support of their respective positions in any action before the world Court.

**68. Statement in the House of Commons by the
Secretary of State for External Affairs, the Right
Honourable Joe Clark, on Canadian Sovereignty
September 10, 1985**

Mr. Speaker,

Sovereignty can arouse deep emotion in this country. That is to be expected, for sovereignty speaks to the very identity and character of a people. We Canadians want to be ourselves. We want to control our own affairs and take charge of our own destiny. At the same time, we want to look beyond ourselves and to play a constructive part in a world community that grows more interdependent every year. We have something to offer, and something to gain in so doing.

The sovereignty question has concerned this government since we were first sworn in. We have built national unity, we have strengthened the national economy, because unity and strength are hallmarks of sovereignty, as they are hallmarks of this government's policy and achievements.

In unity and strength, we have taken action to increase Canadian ownership of the Canadian petroleum industry. We have declared a Canadian ownership policy in respect of foreign investment in the publishing industry. We have made our own Canadian decisions on controversial issues of foreign policy - such as Nicaragua and South Africa. We have passed the Foreign Extraterritorial Measures Act to block unacceptable claims of jurisdiction by foreign governments or courts seeking to extend their writ to Canada. We have arrested foreign trawlers poaching in our fishing zones. We have taken important steps to improve Canada's defences, notably in bolstering Canadian forces in Europe and in putting into place a new North Warning System to protect Canadian sovereignty over our northern airspace. And we have reconstructed relations with traditional friends and allies, who have welcomed our renewed unity and strength and the confidence they generate.

In domestic policy, in foreign policy, and in defence policy, this government has given Canadian sovereignty a new impetus within a new maturity. But much remains to be done. The voyage of the Polar Sea demonstrated that Canada, in the past, had not developed the means to ensure our sovereignty over time. During that voyage, Canada's legal claim was fully protected, but when we looked for tangible ways to exercise our sovereignty, we found that our cupboard was nearly bare. We obtained from the United States a formal and

explicit assurance that the voyage of the Polar Sea was without prejudice to Canada's legal position. That was an assurance which the government of the day, in 1969, did not receive for the voyage of the Manhattan and of the two United States Coast Guard icebreakers. For the future, non-prejudicial arrangements will not be enough.

The voyage of the Polar Sea has left no trace on Canada's Arctic waters and no mark on Canada's Arctic sovereignty. It is behind us, and our concern must be what lies ahead.

Many countries, including the United States and the Federal Republic of Germany, are actively preparing for commercial navigation in Arctic waters. Developments are accelerating in ice science, ice technology, and tanker design. Several major Japanese firms are moving to capture the market for icebreaking tankers once polar oil and gas come on stream. Soviet submarines are being deployed under the Arctic ice pack, and the United States Navy in turn has identified a need to gain Arctic operational experience to counter new Soviet deployments.

Mr. Speaker,

The implications for Canada are clear. As the Western country with by far the greatest frontage on the Arctic, we must come up to speed in a range of marine operations that bear on our capacity to exercise effective control over the Northwest Passage and our other Arctic waters.

To this end, I wish to declare to the House the policy of this government in respect of Canadian sovereignty in Arctic waters, and to make a number of announcements as to how we propose to give expression to that policy.

Canada is an Arctic nation. The international community has long recognized that the Arctic mainland and islands are a part of Canada like any other. But the Arctic is not only a part of Canada. It is part of Canada's greatness.

The policy of this government is to preserve that greatness undiminished. Canada's sovereignty in the Arctic is indivisible. It embraces land, sea, and ice. It extends without interruption to the seaward-facing coasts of the Arctic islands. These islands are joined and not divided by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land.

The policy of this government is to maintain the natural unity of the Canadian Arctic archipelago, and to preserve Canada's sovereignty over land, sea, and ice undiminished and undivided.

That sovereignty has long been upheld by Canada. No previous government, however, has defined its precise limits or delineated Canada's internal waters and territorial sea in the Arctic. This government proposes to do so. An order in council establishing straight baselines around the outer perimeter of the Canadian Arctic archipelago has been signed today, and will come into effect on January 1, 1986. These baselines define the outer limit of Canada's historic internal waters. Canada's territorial waters extend 12 miles seaward of the baselines. While the Territorial Sea and Fishing Zones Act requires 60 days notice only for the establishment of fisheries limits, we consider that prior notice should also be given for this important step of establishing straight baselines.

Canada enjoys the same undisputed jurisdiction over its continental margin and 200-mile fishing zone in the Arctic as elsewhere. To protect the unique ecological balance of the region, Canada also exercises jurisdiction over a 100-mile pollution prevention zone in the Arctic waters. This too has been recognized by the international community through a special provision in the United Nations Convention on the Law of the Sea.

No previous government, however, has extended the application of Canadian civil and criminal law to offshore areas, in the Arctic and elsewhere. This government will do so. To this end, we shall give priority to the early adoption of a Canadian Laws Offshore Application Act.

The exercise of functional jurisdiction in Arctic waters is essential to Canadian interests. But it can never serve as a substitute for the exercise of Canada's full sovereignty over the waters of the Arctic archipelago. Only full sovereignty protects the full range of Canada's interests. This full sovereignty is vital to Canada's security. It is vital to Canada's Inuit people. And it is vital even to Canada's nationhood.

The policy of this government is to exercise Canada's full sovereignty in and over the waters of the Arctic archipelago. We will accept no substitutes.

The policy of this government is also to encourage the development of navigation in Canada's Arctic waters. Our goal is to make the Northwest Passage a reality for Canadian and foreign shipping, as a Canadian waterway. Navigation, however, will be subject to the controls and other measures required for Canada's

security, for the preservation of the environment, and for the welfare of the Inuit and other inhabitants of the Canadian Arctic.

In due course the government will announce the further steps it is taking to implement these policies, and especially to provide more extensive marine support services, to strengthen regulatory structures, and to reinforce the necessary means of control. I am announcing today that the government has decided to construct a Polar Class 8 icebreaker. The Ministers of National Defence and Transport will shortly bring to Cabinet recommendations with regard to design and construction plans. The costs are very high, in the order of half a billion dollars. But this government is not about to conclude that Canada cannot afford the Arctic. Meanwhile, we are taking immediate steps to increase surveillance overflights of our Arctic waters by Canadian Forces aircraft. In addition, we are now making plans for naval activity in eastern Arctic waters in 1986.

Canada is a strong and responsible member of the international community. Our strength and our responsibility make us all the more aware of the need for cooperation with other countries, and especially with our friends and allies. Cooperation is necessary not only in defence of our own interests but in defence of the common interests of the international community. Cooperation adds to our strength and in no way diminishes our sovereignty.

The policy of this government is to offer its cooperation to its friends and allies, and to seek their cooperation in return.

We are prepared to explore with the United States all means of cooperation that might promote the respective interests of both countries, as Arctic friends, neighbours, and allies, in the Arctic waters of Canada and Alaska. The United States has been made aware that Canada wishes to open talks on this matter in the near future. Any cooperation with the United States, or with other Arctic nations, shall only be on the basis of full respect for Canada's sovereignty. That too has been made clear.

In 1970, the government of the day barred the International Court of Justice from hearing disputes that might arise concerning the jurisdiction exercised by Canada for the prevention of pollution in Arctic waters. This government will remove that bar. Indeed, we have today notified the Secretary General of the United Nations that Canada is withdrawing the 1970 reservation to its acceptance of the compulsory jurisdiction of the world Court.

The Arctic is a heritage for the people of Canada. They are determined to keep their heritage entire. The policy of this government is to give full expression to that determination.

We challenge no established rights, for none have been established except by Canada. We set no precedent for other areas, for no other area compares with the Canadian Arctic archipelago. We are confident in our position. We believe in the rule of law in international relations. We shall act in accordance with our confidence and belief, as we are doing today in withdrawing the 1970 reservation to Canada's acceptance of the compulsory jurisdiction of the World Court. We are prepared to uphold our position in that Court, if necessary, and to have it freely and fully judged there.

In summary, Mr. Speaker, these are the measures we are announcing today;

- 1) immediate adoption of an order in council establishing straight baselines around the Arctic archipelago, to be effective January 1, 1986;
- 2) immediate adoption of a Canadian Laws Offshore Application Act;
- 3) immediate talks with the United States on cooperation in Arctic waters, on the basis of full respect for Canadian sovereignty;
- 4) an immediate increase of surveillance overflights of our Arctic waters by aircraft of the Canadian Forces, and immediate planning for Canadian naval activity in the Eastern Arctic in 1986;
- 5) the immediate withdrawal of the 1970 reservation to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice; and
- 6) construction of a Polar Class 8 icebreaker and urgent consideration of other means of exercising more effective control over our Arctic waters.

These are the measures we can take immediately. We know, however, that a long-term commitment is required. We are making that commitment today.

69. Memorandum to the Secretary of State for External Affairs Concerning Arctic Sovereignty Discussions with the U.S.A., January 30, 1986

LAC, vol. 5, file 8100-15-4-2 (s)

-- The U.S. Government has been struggling with this Arctic issue over the past few months

-- In all of our considerations we have had at the forefront of our thinking cooperation with Canada, in general, and in the Arctic, specifically.

-- We have a legal difference, but we have wanted to avoid a confrontation about that difference and instead to use the present focus on the Arctic to build a stronger cooperative relationship with Canada in the Arctic. Thus, we have sought a solution that is without prejudice to either side's legal position, and one that looks at our practical interests in the area and that builds cooperative arrangements for the future.

-- We are still of this view, and that is the spirit in which we approach our talk today.

-- At the last informal meeting, we spoke of a future arrangement that would be without prejudice to our different legal viewpoints. You would be able to describe it as consistent with your position. We would be able to say we had not recognized your position.

-- We also indicated that we would need to put on the record at some point our legal position, since Canada has done so emphatically in Foreign Minister Clark's September 10 Statement, his letter to the Secretary, and in the straight baseline Order in Council itself.

-- We have not yet made a legal reservation to your baselines announcement, but we need to do so at some point if we are to maintain our position over time that we have not recognized your claim.

-- We have been surprised by the Canadian reaction to what we regard as a routine reservation of legal position, which we had proposed to get out of the way at an early stage; nevertheless, we deferred the sending of the note until we could have another informal talk.

-- If a diplomatic note creates political difficulties for Canada which will inhibit negotiation of an overall solution, we are prepared to use a different vehicle.

-- The alternative we intend to pursue is to send a reply to Mr. Clark's September 10 letter. That letter clearly stated Canada's legal point of view, but it also proposed cooperative arrangements regarding Arctic waters, particularly with respect to continental security.

-- At that time Canada clarified to us, including in a telephone conversation between Mr. Clark and the Secretary, that references in the September 10 letter and statement that these arrangements would have to be "on the basis of full respect for Canadian sovereignty" did not set out a precondition for negotiations.

-- We welcomed Mr. Clark's proposal with that clarification.

-- Accordingly, we have envisioned a framework for U.S./Canada cooperation in the Arctic that would be based upon our mutual overarching interests in continental security and in environmental protection.

--Within this framework we could address:

- maritime defense
- commercial navigation
- icebreaker operations
- environmental protection

-- For instance, the Permanent Joint Board on Defense could serve as a forum for discussion of some of the military defense and navigation issues.

-- Thus, in our letter we would outline these interests and make some specific proposals for cooperation.

-- At the same time, the letter would also state clearly our reservation to your straight baseline and maritime sovereignty claim in the Arctic.

-- Nonetheless, the letter would make clear that the purpose of our proposals was not simply to establish a framework within which we could finesse our legal difference, but a framework in which we could establish cooperative programs of mutual benefit consistent with the interests of our two countries.

-- We believe that such an approach, outlined in our letter, which clearly indicates our interest in overcoming our legal difference, and sets forth the prospects for cooperation that we see, would perhaps be the best way to move us forward.

-- Our real interest is in cooperation with Canada, particularly on mutually shared strategic objectives. The intent of this letter is to open a dialogue while making clear that the dialogue will have to be without prejudice to U.S. or Canadian positions on legal rights in Arctic waters.

-- These are our remarks at this stage. We would be interested in your reaction to them, and in anything else you might wish to say on this matter.

Wang BHL I.D. #47

70. Talking Points, “Canadian Arctic Sovereignty,” May 29, 1986¹⁰⁸

CANADIAN ARCTIC SOVEREIGNTY

ISSUE:

On September 10, 1985, the Secretary of State for External Affairs made a statement in the House of Commons on Canadian sovereignty. Among the measures announced by Mr. Clark were an order in council establishing straight baselines around the outer perimeter of Canada’s Arctic archipelago and the construction of a Polar Class 8 icebreaker.

BACKGROUND:

There is a long-standing difference of view between Canada and the USA with respect to rights of passage through the waters of the Arctic archipelago. In Canada’s view, the territorial sea in the Arctic is measured from straight baselines encircling the outer perimeter of the archipelago. The waters within this perimeter are internal by virtue of historic title and neither the right of innocent passage nor the right of transit passage applies. Canada has made it clear, however, that it will allow passage of foreign vessels, subject to controls and safeguards.

In the view of the USA, Canada’s sovereignty over these waters is limited to a 12-mile belt of territorial sea around each Arctic island. The USA is also of the view that Canada’s sovereignty is subject to a right of transit passage.

¹⁰⁸ Document provided by Canadian government officials to Dr. Rob Huebert.

TALKING POINTS

- Canada is determined to exercise full sovereignty over the historic internal waters of the Arctic archipelago and is prepared to uphold its position before the International Court of Justice if necessary.
- These Canadian internal waters have now been delineated by straight baselines that became effective on January 1, 1986. The Government is also moving forward with plans for the construction of a Class 8 icebreaker and other measures to ensure effective control of Canadian Arctic waters
- Canada's claim is well-founded in law and fact. It establishes no precedent that might be cited to justify interference with international navigation in other parts of the world because it is based on unique circumstances:
 - the Canadian Arctic archipelago is unlike any other archipelago in the world in geographical terms:
 - these waters are covered with ice for all or most of the year;
 - they have been used and occupied like the land itself by Canadian Inuit people from time immemorial;
 - they have not been customarily used for international navigation and the Northwest Passage does not constitute an international strait.
 - they are, moreover, subject to the environmental jurisdiction of Canada in any event pursuant to the so-called "Arctic exception" under the 1982 Law of the Sea Convention.
 - Canada will encourage the development of international navigation in Canadian Arctic waters, but only subject to the controls and other measures required for Canada's security, for the preservation of the environment, and for the welfare of the Inuit.

[page redacted under Access to Information Act, section 15(1)]

TALKING POINTS

(Responsive)

- The legal foundation for the baselines is Canada's historic title and relevant principles of international law. The baselines simply delineate the outer limit of that title.
- Successive Canadian governments have declared their intention to open Canada's Arctic waters to safe navigation for the shipping of all nations, subject to the conditions required for Canada's security, for the preservation of the environment, and for the welfare of the Inuit and other local inhabitants.
- Canada could not accept that Soviet warships have a right to free transit in the Arctic archipelago waters.
- The Canadian claim establishes no precedent that might be cited to justify interference with international navigation in other parts of the world because it is based on unique circumstances.
- Canadian and American officials have held a number of preliminary and informal discussions on cooperative arrangements in the Arctic. These exploratory consultations are continuing.

71. Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation, Signed January 11, 1988 in Ottawa

1. The Government of the United States of America and the Government of Canada recognize the particular interests and responsibilities of their two countries as neighbouring states in the Arctic.
2. The Government of Canada and the Government of the United States also recognize that it is desirable to cooperate in order to advance their shared interests in Arctic development and security. They affirm that navigation and resource development in the Arctic must not adversely affect the unique environment of the region and the well-being of its inhabitants.
3. In recognition of the close and friendly relations between their two countries, the uniqueness of ice-covered maritime areas, the opportunity to increase their knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts:
 - The Government of the United States and the Government of Canada undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose;
 - The Government of Canada and the Government of the United States agree to take advantage of their icebreaker navigation to develop and share research information, in accordance with generally accepted principles of international law, in order to advance their understanding of the marine environment of the area;
 - The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.
4. Nothing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the

United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.

5. This Agreement shall enter into force upon signature. It may be terminated at any time by three months' written notice given by one Government to the other.

IN WITNESS WHEREOF, the undersigned, duly authorized to that effect, have signed this Agreement.

DONE in duplicate, at Ottawa, this 11th day of January, 1988, in the English and French languages, each version being equally authentic.

JOE CLARK

For the Government of Canada

GEORGE P. SCHULTZ

For the Government of the United States of America

**72. House of Commons, *Debates*, 2nd Session, 33rd
Parliament, January 18, 1988**

ORAL QUESTION PERIOD

[English]

SOVEREIGNTY

**CANADIAN ARCTIC - SIGNING OF CANADA-UNITED STATES
AGREEMENT**

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, my question is for the Prime Minister and it concerns misleading statements made by two of his Ministers on defence matters.

First, I would like to deal with statements made by the Secretary of State for External Affairs who stated in the House of Commons on September 10, 1985, in response to opposition prodding, that there is - and I use the Secretary of State's own words - "no substitute for Canada's full sovereignty over the waters of the Arctic ... Full sovereignty is vital to Canada's security - it is vital to Canada's identity ... We will accept no substitute ... Any co-operation with the United States shall only be on the basis of full respect for Canada's sovereignty." Those were the words of the right hon. gentleman.

In view of the fact that last week the Secretary of State for External Affairs negotiated and signed an agreement with the United States which fails to recognize Canadian sovereignty over the Arctic, which makes no mention of American submarines patrolling our waters, and which in effect clearly weakens Canada's legal claim to the Arctic, why would the Prime Minister tolerate a senior Minister and colleague negotiating and signing an agreement with the United States which clearly violates a declaration and undertaking that he gave to the House of Commons?

Right Hon. Joe Clark (Secretary of State for External Affairs): Mr. Speaker, before that agreement was signed the United States did not acknowledge its need to seek Canada's consent before the transit through our Northwest Passage of U.S. government owned or operated ice-breakers.

As a result of that agreement, the United States now acknowledges and has a legal obligation to seek Canada's permission before there is a

transit through our Northwest Passage of government owned or operated ice-breakers. That is a small but significant step forward in emphasizing Canada's control over our North. As the Leader of the Opposition will understand, one of the ways to establish sovereignty is not to talk about it in empty phrases, as the Liberal Party did for so many years, but actually to go out and assert control. That is what we are doing.

Mr. Prud'homme: Bring back Flora.

[Translation]

REQUEST FOR CLARIFICATION OF ALLEGED CONTRADICTION
RELATING TO AGREEMENT SIGNED WITH UNITED STATES

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, by his actions, by signing the contract with the United States, the Minister contradicted the clear statement he made in the House. I repeat, he said: "We will accept no substitute. Any co-operation with the United States shall only be on the basis of full respect for Canada's sovereignty". That was quite clear. There was no misunderstanding.

I repeat: Why did the Secretary of State for External Affairs mislead this Parliament during the debate? Why did he negotiate and sign an agreement with the United States that clearly contradicts what he said before the Parliament of Canada?

Right Hon. Joe Clark (Secretary of State for External Affairs): Mr. Speaker, the Leader of the Opposition is repeating in French the question he just put in English. Maybe he never heard of simultaneous translation. It's a fact of life in Canada, and it is also a fact there has been no change in the Canadian position on our sovereignty and our control over the North. The change is that before the agreement was signed with the United States, the U.S. did not recognize it was necessary to seek and obtain Canada's consent before they could go through with icebreakers controlled or directed by the U.S. Government. It was not necessary before, but now it is. That is a step forward, a very concrete step, and concrete steps help demonstrate our sovereignty.

Mr. Turner (Vancouver Quadra): Mr. Speaker, the Minister is as vague in French as he is in English, and as contradictory in either language. He is to be commended for his bilingualism.

**73. Department of External Affairs, "News Release:
U.S. Icebreaker Polar Star Enters Canadian Waters
Under Canada-U.S. Arctic Cooperation Agreement,"
October 6, 1988**

No. 219

October 6, 1988

U.S. Icebreaker Polar Star Enters Canadian Waters Under Canada-U.S.
Arctic Cooperation Agreement

The Secretary of State for External Affairs, the Right Honourable Joe Clark, announced today that the Canadian Government granted its consent, under the Canada-United States Arctic Cooperation Agreement, to a United States request to have the U.S. Coast Guard icebreaker Polar Star enter Canadian waters to refuel and effect repairs to one of its turbines. The Canadian Coast Guard has offered to have its icebreaker, the John A. MacDonald, proceed to American waters to assist the American vessel.

The Polar Star sustained damage while assisting, in U.S. waters, the Canadian Coast Guard icebreakers Martha L. Black and Pierre Radisson. Unable to continue on its westward journey from its location off the Alaskan coast due to extremely heavy ice conditions, the Polar Star turned eastward and, with the consent of the Government of Canada, may enter Canadian waters this weekend.

If ice conditions continue to be impassable in the western Arctic, American authorities will request Canadian consent to have the Polar Star transit through the Northwest Passage on its way out of the Arctic. The Canadian Government's response would take into consideration the requirements as set out under the Canada-USA Arctic Cooperation Agreement signed on January 11, 1988.

The USA authorities have undertaken to ensure that the Polar Star will operate in conformity with the pollution control standards and other standards under the Arctic Waters Pollution Prevention Act. In addition, the United States has provided an undertaking to be responsible for any costs incurred in the unlikely event of any pollution caused by the Polar Star.

The Canadian Government is grateful for the assistance provided by the Polar Star to Canadian icebreakers and is pleased to help facilitate the return of the Polar Star from the Arctic.

74. Text of U.S. Note No. 425, October 10, 1988

TEXT OF U.S. NOTE NO. 425 [October 10, 1988]

The Embassy of the United States of America presents its compliments to the Department of External Affairs and refers to the Agreement between the Government of the United States of America and the Government of Canada on Arctic Cooperation, signed by Secretary of State Shultz and Secretary of State for External Affairs Clark in Ottawa on January 11, 1988.

As provided by the terms of that Agreement, the government of the United States hereby requests the consent of the Government of Canada for the United States Coast Guard Cutter "Polar Star," a polar class icebreaker, to navigate within waters covered by the Agreement, and to conduct marine scientific research during such navigation. Any information developed would be shared with the Government of Canada, as envisioned by the Agreement on Arctic Cooperation.

On September 28, while immediately north of Point Barrow, the "Polar Star" responded to a call from the master of the Canadian Coast Guard icebreaker "Martha L. Black," to assist the Canadian icebreaker "Pierre Radisson" and "Martha L. Black," in accord with the policy of cooperation embodied in the Agreement on Arctic Cooperation. The "Polar Star," which was then enroute from Point Barrow, Alaska, to Seattle, Washington, rendezvoused with the nearby Canadian icebreakers to assist them in their transit to Victoria, British Columbia. Unusually heavy ice caused the "Pierre Radisson" and the "Martha L. Black" to abandon their operational plan and to proceed east toward Saint John's, Newfoundland, via the Northwest Passage.

After having rendered assistance to the Canadian icebreakers through October 1, which required it to change its own operational plans, the "Polar Star" now finds itself compelled by heavy ice conditions, adverse winds and engineering casualties to proceed east through the waters of the Northwest Passage in order to exit the Arctic, as did the Canadian icebreakers.

The Government of the United States would welcome the presence of a Canadian scientist and an officer of the Canadian Coast Guard on board the "Polar Star" and would also be pleased if a Canadian Coast Guard vessel were to choose to accompany the "Polar Star" during its navigation and conduct of marine scientific research in the Northwest Passage.

“Polar Star” will operate in a manner consistent with the pollution control standards and other standards of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations. Costs incurred as a result of a discharge from the vessel, including containment, cleanup and disposal costs incurred by the United States or Canada and any damage that is an actual result, will be the responsibility of the United States Government, in accordance with international law.

In view of the necessity for prompt action by the “Polar Star” due to deteriorating weather conditions, the Government of the United States requests a prompt reply to its request for the consent of the Government of Canada to the “Polar Star’s” navigation of waters covered by the Agreement on Arctic Cooperation.

The Embassy of the United States avails itself of this opportunity to renew to the Department of External Affairs the assurance of its highest consideration.

Embassy of the United States of America
Ottawa, October 10, 1988

TEXT OF CANADIAN RESPONSE TO U.S. NOTE NO. 425
[October 10, 1988]

The Department of External Affairs presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note No. 425 of October 10, 1988, in which, pursuant to the terms of the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, signed on January 11, 1988, the Government of the United States requests the consent of the Government of Canada for the United States Coast Guard cutter "Polar Star", a polar class icebreaker, to navigate within waters covered by the Agreement, and to conduct marine scientific research during such navigation.

The Department notes the assurance provided by the Embassy that the "Polar Star" will operate in a manner consistent with the pollution control standards and other provisions of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations and that costs incurred as a result of a discharge from the vessel, including containment, cleanup and disposal costs incurred by the United States or Canada and any damage that is an actual result will be the responsibility of the United States Government in accordance with international law.

The Department has the honour to inform the Embassy that the Government of Canada consents to the "Polar Star's" navigation within waters covered by the Agreement.

The Department has the further honour to inform the Embassy that the Government of Canada also consents to the conduct of marine scientific research during such navigation. The Department notes that the information obtained in such research will be shared as envisioned in the Arctic Cooperation Agreement.

The Department is pleased to inform the Embassy that the Canadian Government has scheduled the Canadian Coast Guard icebreaker "John A. MacDonald" to accompany the "Polar Star" during its navigation in the Northwest Passage. Canadian authorities will also be pleased to make available an officer of the Canadian Coast Guard to be on board the "Polar Star" during this journey.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

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Adam Lajeunesse, Editor

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