The Law of the Sea in the "Canadian" Arctic: The Pattern of Controversy (Part II)†

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D. *Canada's Claim to an Arctic Contiguous Anti-Pollution Zone*

Under the *Arctic Waters Pollution Prevention Act* of 1970, Canada claimed competence to regulate all shipping in zones up to one hundred nautical miles north of its Arctic coasts.[131] The regulatory rights claimed are designed to prevent pollution of the region's coastal and marine resources.[132] Canada moved concurrently to preclude international adjudication of disputes arising out of this legislation by submitting to the United Nations a declaration amending Canada's acceptance of the compulsory jurisdiction of the International Court of Justice over such disputes.[133]

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† Part Two is the concluding section of the present article. Part One appears in Volume 19, number 3 of the *McGill Law Journal*, at pp. 322 *et seq.*

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[131] See *supra*, n. 6.

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

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

Now therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

[133] *Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, April 7, 1970*, U.N. Communication C.N. 53, 1970, Treaties — 3 of April 21, 1970.

Under the *Pollution Prevention Act*, Canada claims the right, *inter alia*, to:

(1) prohibit and punish deposit of "waste" in the Arctic waters or on the islands or mainland so as to enter Arctic waters; require that any deposit of such waste or danger of pollution be reported;[134]

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[134] (4) (h) "waste" means

(i) any substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and

(ii) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man,

and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act*, is deemed to be waste.

4. (1) Except as authorized by regulations made under this section, no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the maiuland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters.

(2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the *Canada Water Act* if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph (a) of subsection (2) of section 16 of that Act with respect to that water quality management area.

5. (1) Any person who

(a) has deposited waste in violation of subsection (1) of section 4, or

(b) carries on any undertaking on the mainland or islands of the Canadian arctic waters that, by reason of any accident or other occurrence, is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section,

shall forthwith report the deposit of waste or the accident or other occurrence to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

(2) The master of any ship that has deposited waste in violation of subsection (1) of section 4, or that is in distress and for that reason is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section, shall forthwith report the deposit of waste or the condition of distress to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

(2) destroy or remove ships in distress which are a source or threat of waste deposits;[135]

(3) prescribe as a "shipping safety control zone" any area of the Arctic waters;[136] within such zones regulate navigation,[137]

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[135] 13. (1) Where the Governor in Council has reasonable cause to believe that a ship that is within the arctic waters and is in distress, stranded, wrecked, sunk or abandoned, is depositing waste or is likely to deposit waste in the arctic waters, he may cause the ship or any cargo or other material on board the ship to be destroyed, if necessary, or to be removed if possible to such place and sold in such manner as he may direct.

[136] 11. (1) Subject to subsection (2), the Governor in Council may, by order, prescribe as a shipping safety control zone any area of the arctic waters specified in the order, and may, as he deems necessary, amend any such area.

[137] 12. (1) The Governor in Council may make regulations applicable to ships of any class or classes specified therein, prohibiting any ship of that class or of any of those classes from navigating within any shipping safety control zone specified therein

(a) unless the ship complies with standards prescribed by the regulations relating to

(i) hull and fuel tank construction, including the strength of materials used therein, the use of double hulls and the subdivision thereof into watertight compartments,

(ii) the construction of machinery and equipment and the electronic and other navigational aids and equipment and telecommunications equipment to be carried and the manner and frequency of maintenance thereof,

(iii) the nature and construction of propelling power and appliances and fittings for steering and stabilizing,

(iv) the manning of the ship, including the number of navigating and look-out personnel to be carried who are qualified in a manner prescribed by the regulations,

(v) with respect to any type of cargo to be carried, the maximum quantity thereof that may be carried, the method of stowage thereof and the nature or type and quantity of supplies and equipment to be carried for use in repairing or remedying any condition that may result from the deposit of any such cargo in the arctic waters,

(vi) the freeboard to be allowed and the marking of load lines,

(vii) quantities of fuel, water and other supplies to be carried, and

(viii) the maps, charts, tide tables and any other documents or publications relating to navigation in the arctic waters to be carried;

(b) without the aid of a pilot, or of an ice navigator who is qualified in a manner prescribed by the regulations, at any time or during any period or periods of the year, if any, specified in the regulations,

prohibit access to ships not meeting prescribed regulations;[138] preclude access entirely at certain times of year or when certain ice conditions prevail;[139]

(4) exempt ships owned or operated by foreign sovereigns if substantial compliance with shipping safety control zone regulations is indicated;[140]

(5) implement the anti-pollution regime through the activities of pollution prevention officers with broad powers including boarding and inspection of ships entering the zone;[141]

(6) sanction the regime through fines, seizure and forfeiture of ships and cargos, civil liability for costs and expenses of the Canadian Government and for actual loss or damage resulting in the deposit of waste.[142]

It is important to take note of the characterization of this anti-pollution contiguous zone by Canadian authoritative decision-makers. In his press conference of April 8, 1970, following the

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or without icebreaker assistance of a kind prescribed by the regulations; and

(c) during any period or periods of the year, if any, specified in the regulations or when ice conditions of a kind specified in the regulations exist in that zone.

(2) The Governor in Council may by order exempt from the application of any regulations made under subsection (1) any ship or class of ship that is owned or operated by a sovereign power other than Canada where the Governor in Council is satisfied that appropriate measures have been taken by or under the authority of that sovereign power to ensure the compliance of such ship with, or with standards substantially equivalent to, standards prescribed by regulations made under paragraph (a) of subsection (1) that would otherwise be applicable to it within any shipping safety control zone, and that in all other respects all reasonable precautions have been or will be taken to reduce the danger of any deposit of waste resulting from the navigation of such ship within that shipping safety control zone.

(3) The Governor in Council may make regulations providing for the issue to the owner or master of any ship that proposes to navigate within any shipping safety control zone specified therein, of a certificate evidencing, in the absence of any evidence to the contrary, the compliance of such ship with standards prescribed by regulations made under paragraph (a) of subsection (1) that are or would be applicable to it within that shipping safety control zone, and governing the use that may be made of any such certificate and the effect that may be given thereto for the purposes of any provision of this Act.

[138] Art. 15(3)(b).
[139] Art. 15(3)(b)(iii) and (c).
[140] Art. 12(2).
[141] Arts. 14, 15, 16, and 17.
[142] Arts. 18, 19, 23-24.

introduction of the *Pollution Prevention Act* in the House of Commons, Prime Minister Trudeau said:

> ... it is not an assertion of sovereignty, it is an exercise of our desire to keep the Arctic free of pollution and by defining one hundred miles as the zone within which we are determined to act, we are indicating that our assertion there is not one aimed towards sovereignty but aimed towards one of the very important aspects of our action in the Arctic.[143]

When asked, "Would not the prosecution of any violation of the pollution regulations in the Arctic be an exercise of a sovereignty claim?", Trudeau replied:

> They would be an exercise of authority given by Parliament to the Executive Branch to apply a certain statute. Now, this doesn't necessarily mean that you're asserting sovereignty over those seas any more than the Continental Shelf Doctrine, for instance, entails sovereignty with it... Therefore, the distinction between the absolute claim of sovereignty which means that you own everything, the land, the water, the resources in the water and so on, which is the case for the international waters of any nation — this is the sovereignty aspect of it — against the other aspect which is not an assertion of sovereignty, but an assertion of determination to control certain aspects of what is happening there. In the same way as you have this happening in the airways. The United States and Canada exercise some form of control over airships approaching Canada for hundreds of miles out over the Atlantic Ocean. This doesn't mean we are asserting sovereignty over that.[144]

Later in the conference, Prime Minister Trudeau again disavowed any claim to sovereignty in the contignous zone, this time in the context of a discussion of nationalist pressures that "have been extremely critical in the past because we haven't gone ahead and sort of grabbed the whole Arctic..." [145]

In Canada's April 16, 1970 note in reply to U.S. objections to the *Arctic Waters Pollution Prevention Act*, having stated that, "Canada reserves to itself the same rights as the United States has asserted to determine for itself how best to protect its vital interests, including in particular its national security", and that "a danger to the environment of a state constitutes a threat to its security",[146] the Secretary of State for External Affairs asserted:

> Thus the proposed Canadian Arctic Waters Pollution Prevention Legislation constitutes a lawful extension of a limited form of jurisdiction to meet

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[143] Trudeau Press Conference, *supra*, n. 110, at p. 2.

[144] *Ibid.*, at pp. 2-3.

[145] *Ibid.*, at p. 3.

[146] Summary of Canadian Note, April 16, 1970, Tabled by the Secretary of State for External Affairs in the House of Commons, April 17, 1970, Canadian Embassy, Washington, D.C., at p. 608 (Hereinafter cited as "Canadian Note, April 16, 1970").

> particular dangers, and is of a different order from unilateral interferences with the freedom of the seas such as, for example, the atomic tests carried out by the United States and other states which, however necessary they may be, have appropriated to their own use vast areas of the high seas and constitute grave perils to those who would wish to utilize such areas during the period of the test blast... [e.g. the October 1969 Amchitka Island test]. The proposed anti-pollution legislation, proposed fisheries protection legislation, and the proposed twelve-mile territorial sea constitute a threat to no state and a peril to no one.[147]

In its April 15, 1970 statement, the U.S. Department of State made, *inter alia*, the following points in objecting to Canada's claims:

> The enactment and implementation of these measures would affect the exercise by the United States and other countries of the right to freedom of the seas in large areas of the high seas and would adversely affect our efforts to reach international agreement on the use of the seas.
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> ...
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> International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction.
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> We are concerned that this action by Canada if not opposed by us, would be taken as precedent in other parts of the world for other unilateral infringements on the freedom of the seas. If Canada has the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. Merchant shipping would be severely restricted, and naval mobility would be seriously jeopardized. The potential for serious international dispute and conflict is obvious.[148]

These claims and counterclaims may be analyzed in terms of the following three issues:

(1) Is a state justified in controlling access to a contiguous pollution control zone such as that claimed by Canada?

(2) Is a state justified in prescribing authority with respect to mandatory anti-pollution control measures in such a zone?

(3) What, if any, measures may a state employ to apply its authority in such a zone?

The Canadian claims also raise the issue of the effect of anti-pollution regulation on appropriation of the resources in the region. Despite the absence of Canadian claims to exclusive rights to appropriate these mineral and living resources of the sea, it is clear that implementation of the anti-pollution measures might have that effect. Further, Canada claims broad rights of self-

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[147] *Ibid.*

[148] U.S. Statement, April 15, 1970, at pp. 610-11.

defense against environmental threats to its most vital interests. Finally, as previously observed, the issues dealt with in this section relate integrally with the issue of access to alleged international straits, to be discussed last.

(i) *Basic Community Policies*

Clearly, the basic community policy regarding contiguous zones requires that maximum free access to and use of the high seas and their resources be maintained. But the understanding of that broad policy is changing and controverted. Traditionally it meant maximization of *use* of the high seas. There is an accelerating awareness of threats to the ocean environment arising out of a man's use of it. This awareness has produced pressures to temper maximization of use with adequate measures to protect this environment. This new conservationist emphasis in basic community policy confronts state practice which was already in disarray over the meaning of the goal of "fullest production of values compatible with their equitable distribution".[149]

Thus, the broad preference for inclusive over exclusive control and use of the oceans is tempered by the realization that exclusive claims to regulatory control in the interests of conservation may have to be accorded greater weight than in the past. In the light of this emerging realization, the community must face the further perennial issue of unilateral, exclusive, legitimate claims of a coastal state which may simply outweigh the broad inclusive claims of other states and of the international community because of the values at stake for the coastal state.

McDougal and Burke sum up the question as follows:

> The historic function of the contiguous zone concept has thus been that of authorizing coastal states unilaterally to secure a reasonable protection of their limited exclusive interest, without permitting the more drastic expansion of their continuing, comprehensive competence associated with internal waters and the territorial sea. The major significance of this function has been in its explicit recognition that an optimal shaping and sharing of all values requires honoring this extension of *exclusive authority for special, limited purposes only*, and, consequently, some modification of inclusive use and authority on the high seas. Community policy has, therefore, been expressed in complementary principles promoting, on the one hand, inclusive use and authority and, on the other, important exclusive interests.[150]

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[149] M. McDougal and W. Burke, *supra*, n. 8; See generally, Friedheim, *Understanding the Debate on Ocean Resources*, (Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 1, February, 1969).

[150] M. McDougal and W. Burke, *supra*, n. 8, at pp. 578-79. Emphasis added.

Given the growing concern for conservation of the ocean environment, we must emphasize that McDougal and Burke's "special, limited purposes only" qualification refers to community interests protected, as well as the interests of the coastal state. This, of course, is a major point in Canada's claim.

From the standpoint of the international community, the problem in judging claims to contiguous zones is that of evaluating their reasonableness in terms of the balancing of exclusive coastal and inclusive community interests. Put negatively, exclusive claims must not be arbitrary in substance and form. This criterion of reasonableness involves multifactoral analysis. McDougal and Burke outline such an analysis which is readily applicable to the Canadian Arctic claims. It involves an examination of interests to be protected, the status of ocean areas affected, and the "modality and degree of interference involved in the claim to authority".[151]

Applied to the Canadian claim, these factors include, first, the following issues with respect to interests:

(1) The interests of the coastal state;

(2) The scope of the authority asserted;

(3) The relationship between claimed authority and the interest at stake, and the nature and significance of the inclusive uses affected.

Canada's interests in protecting its coastal and maritime environment and resources seem relatively clear and vital.[152] The scope of the authority asserted is less clear. It is not exclusive in the sense of sovereigu authority, but it may be sufficiently exclusive so as to amount to practical, exclusive control of the region. What is even less clear is the relation between the claimed authority and the interests at stake, on the one hand, and the nature and significance of the inclusive uses affected on the other. Given the developing character of activities such as shipping, fishing, and appropriation of mineral resources in the Canadian Arctic, it is very difficult to know what the stakes now are, or will be in the future, for Canada and, in particular, for other states and for the international community.[153]

Finally, it is necessary to judge whether the authority claimed "is reasonably calculated to secure the professed objective or whether some other, perhaps concealed, goal is in view".[154] Certainly

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[151] *Ibid.*, at pp. 579-81.
[152] *Supra*, at pp. 355-56.
[153] *Supra*, at pp. 340-42.
[154] M. McDougal and W. Burke, *supra*, n. 8, at p. 580.

it appears that the authority claimed by Canada is appropriate to the professed objectives. Whether Canada also has some other objectives, such as claiming sovereignty over the entire region as the last step in a series of claims, is a matter for speculation. Here it may be useful to recall the requirement of "Right Intention" in traditional "Just War Theory". In addition to limiting means to those appropriate to legitimate ends, a party must be faithful to those ends and not use them as a cover for the accomplishment of other less defensible objectives.

A second broad category of variables concerns inclusive uses of the ocean areas affected by the Canadian claims. The physical characteristics, history and legal status of the Arctic waters north of Canada clearly differentiate them from most ocean areas. They also link the Canadian Arctic waters with other Arctic and perhaps Antarctic regions. It is important, then, to probe the issue of the *unique* character of the Canadian Arctic waters. This is necessary in the first place in order to judge the reasonableness of the Canadian claims viewed as legitimate self-protection. But the alleged uniqueness of these waters also enters into the evaluation of Canada's claim that her initiative is in the interest of the general law of the sea. Viewed from this standpoint it is important to determine what elements in this ocean area are common to all ocean areas.

In the last category of variables suggested by McDougal and Burke, attention is turned to the modality and degree of interference involved in the claim to authority. What is the effect on specific inclusive uses? Here again the developing character of the region forces projections of what may occur as a substitute for analyses of practice. It appears that there has been little activity for Canada to interfere with. Moreover, the effective date of the Canadian law was August 2, 1972. Unlike other controversies, such as those involving claims in the CEP states in Latin America and Iceland, we lack practice, precedents and *causes célèbres*.[155]

Once these factors have been analyzed and weighed, basic community policy requires that they be evaluated in terms of a presumption for inclusive uses, and against exclusive claims, to the oceans. The importance of the factors favoring exclusive claims by the coastal state must override the factors favoring maintenance of the balance in favor of inclusive interests.[156] It bears repeating that this calculation is complicated by the contention of Canada that its claims have a two-fold character: protection of Canada's

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[155] See *supra*, n. 120.

[156] M. McDougal and W. Burke, *supra*, n. 8, at p. 581.

interests and protection of the interests of other states and of the international community.[157]

Opinions as to these difficult questions will be offered in the section of Appraisal and Recommendation. Meanwhile, they form the background for examination of the component parts of the Canadian claim to a contiguous zone in the Arctic:

(1) competence to control access;
(2) competence to prescribe authority;
(3) competence to apply authority.

E. *Canada's Claim to Control Access to Canadian Arctic Waters*

(i) *Clarification of Policy*

It has been recalled that international law raises a presumption against exclusive claims to competence in the oceans beyond the territorial seas. This presumption has sometimes been overcome when exclusive claims of coastal states were not comprehensive, but rather occasional and limited to specific functions. Such restrictions upon the principle of freedom of the seas have sometimes been accepted as reasonable where a high degree of recognition and protection was accorded by the coastal state to the preservation of effective inclusive use.

This traditional way of viewing claims for contiguous zones must be reviewed in the light of the growing challenge to freedom of the seas as the overriding expression of international community policy. Canada has been a leading exponent of a shift in emphasis from freedom of the seas to protection and conservation of the seas and of coastal states. The problem is further complicated by the nature of the Arctic Seas. Are they, in principle, "free"? Are they "free" in the same way that other seas are free? In view of possible changes in basic community policies and the particularistic character of the Arctic waters, does Canada have as much of a presumption to overcome in order to justify its claims as, for example, Ecuador?

On the other hand, in the calculation of reasonableness, is it accurate to characterize the measures whereby Canada will implement its claims as "limited", "occasional", or strictly "functional"? A review of roughly comparable claims may furnish a better basis for answering these questions. Certainly it is contended by Canada

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[157] *Supra,* at p. 355.

that her claims are reasonable by the criteria that have been applied to other claims to competence to control access to the ocean.

One point is particularly important in the review and appraisal of past precedents. That is the changing character of the ocean environment and the consequent changing requirements for the law regulating that environment. As Canada has frequently complained, anti-pollution law for the oceans is a very new and unsatisfactory expression of state practice. There are few direct precedents. Analogies from other parts of the law of the sea may be helpful, but inquiry into the Canadian position profits from the perceptive call by McDougal and Burke for flexibility:

> The relatively recent efforts to devote more systematic and comprehensive attention to investigation of oceanic phenomena are likely to lead to developments that increase and intensify impact on unique coastal interests. These impacts may well require extension of occasional exclusive competence by the affected states in relation to events that we cannot now anticipate in helpful detail. Until more effective general community institutions of world public order are created, there appears no reasonable alternative to a recommendation that the contiguous zone concept be maintained as a highly flexible device, capable of adaptation to secure the reasonable protection of any exclusive interest shared by states.[158]

(ii) *Trends in Decision*

The practice of states generally reflects a fair degree of tolerance for claims to control access to the high seas for limited purposes within contiguous zones. In surveying trends in this practice it is important to bear in mind that the claims in question had two basic characteristics:

(1) They extended beyond the territorial sea, were of a limited, not sovereigu nature, and were treated by all concerned as extraordinary;

(2) These contiguous zones were judged in terms of their reasonableness in relation to their purpose rather than on the basis of their width or their assimilability into preordained categories such as those set forth in Article 24 of the 1958 Geneva *Convention on the Territorial Sea and Contiguous Zone.*

Thus, as observed earlier, Article 24 of the Geneva *Convention on the Territorial Sea and Contiguous Zone* does not reflect either the full range of types, or of the widths, of the contiguous zones that have been accepted by state practice. The following categories of contiguous zones are to be found in state practice:

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[158] M. McDougal and W. Burke, *supra,* n. 8, at p. 583.

(1) customs, fiscal, immigration, sanitation;
(2) liquor;
(3) fishing;
(4) continental and national defense;
(5) naval manoeuvers;
(6) nuclear tests;
(7) anti-pollution; and
(8) continental shelf.

While Article 24 now appears to have limited customs, fiscal, immigration, and sanitation regulatory zones to twelve miles, it will be recalled that customs enforcement historically has been tolerated beyond that distance in important precedents. The U.S. attempts to enforce prohibition required broad claims for jurisdiction, some beyond twelve miles. These precedents are now invoked by states such as Canada.[159]

Regulation of fishing has been a perennial source of dispute over the location and width of territorial waters and now appears to be accepted within twelve miles. Control of fisheries is the core issue in most contemporary cases of claims to sovereign or near-sovereign exclusive jurisdiction beyond twelve miles. Claims to control fisheries have reached the point where disavowal of the intention to exercise full sovereign rights beyond twelve miles is taken as a welcome sign of moderation.[160]

It is significant that Canada invokes rights of self-defense in the rationales of her Canadian Arctic claims. Canada apparently believes that the United States and other great powers have provided precedents for claims to control access to the high seas that sustain her anti-pollution measures. Prominent in discussions of contiguous security zones is that claimed by the American Republics in the Declaration of Panama. This claim was based on the contention that this measure of continental self-protection reflected an "inherent right" to those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, "free from the commission of any hostile act by any non-American belligerent nation . . .".[161]

It is noted by commentators that the Declaration of Panama has been widely accepted and applauded by governmental decision-

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[159] *Ibid.*, at pp. 585-89.

[160] See *supra*, n. 120. See also: M. McDougal and W. Burke, *supra*, n. 8, at pp. 642-663; M. Whiteman, (1965) 4 *Digest of International Law*, at pp. 932-1240; D. Johnston, *The International Law of Fisheries, supra*, n. 8.

[161] "International Conferences of American States, 1933-40", (1st Supp., 1940), at p. 334; reprinted in (1940) 34 A.J.I.L. Supp. 17.

makers and publicists.[162] However, its relevance to contemporary contiguous zones may be doubted. The Declaration was an invocation of neutral rights in time of overt war. Granted, a number of situations engendering conflict over claims to access to the seas are coloured by unresolved questions of past wars and the realities of present, undeclared hostilities approximating major armed coercion. But the pattern of claims with respect to contiguous zones is concerned mainly with the law of peace, not war. It might be added that the sweeping claims of the American Republics were iguored by the belligerents when it became necessary, and rendered ludicrous by Nazi submarines well before Pearl Harbor.[163]

More relevant are contemporary national claims to control access to adjacent waters for reasons of national security. Among these claims, the most noteworthy in all respects are those of the United States. Since 1950, the U.S. has maintained Air Defense Identification Zones (ADIZ) extending several hundred miles out into the Atlantic and Pacific. Within these zones, all foreign aircraft bound for the United States are required to make position reports to a U.S. aeronautical facility when they are "not less than an hour and not more than two hours average cruising distance *via* the most direct route from the United States".[164] Interestingly, Canada

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[162] M. McDougal and W. Burke, *supra*, n. 8, at pp. 590-91.

[163] S.E. Morrison, *The Two-Ocean War*, (1963), at pp. 21-31. D.P. O'Connell observes:

> It has been pointed out that the zone at one point extended 1,200 miles from the coast of Florida. Great Britain disputed the pretension, and it does not seem to have translated itself into decisive action: (1965) 2 Int'l. Law 704.

[164] W. Bishop, Int'l. Law 631, states:

> Pursuant to an Act of Congress, since 1950 the President through appropriate officials has issued regulations establishing domestic and coastal air identification zones within which aircraft (with certain specified exception) must identify themselves. These zones extend several hundred miles into the Atlantic and Pacific. Canada provides for similar zones (CADIZ). The United States regulations specify that "The pilot in command of a foreign aircraft shall not operate an aircraft into the United States without: (1) Making position reports as prescribed for United States aircraft..., or (2) Reporting to an appropriate aeronautical facility when the aircraft is not less than one hour and not more than two hours average cruising distance via the most direct route, from the United States. Thereafter, reports shall be made as instructed by the facility receiving the original report." By a letter of December 31, 1954, the Department of Commerce interpreted this as follows: "Foreign aircraft operating in a coastal ADIZ are required to comply with the regulation only if they are entering the United States, i.e., a foreign aircraft en route from Havana to Halifax might conceivably fly through the Atlantic ADIZ without being subject to any... [such] restriction. It should be noted that

maintains a similar system, CADIZ, which is more restrictive than that of the U.S. because it applies to all aircraft traversing the zone, whether bound for Canada or not.[165] It will be recalled that Prime Minister Trudeau invoked the ADIZ and CADIZ precedents in his press conference of April 8, 1970.[166]

The United States also has long controlled access to sea lanes adjacent to its coast for limited periods of exclusive U.S. military use. This falls into the broader pattern of claims to temporary exclusive use of high seas areas for naval and military exercises and other security purposes.[167]

Nuclear testing has required temporary interference with access to ocean areas and produced precedents now invoked by Canada.[168] It is particularly relevant that U.S. tests were justified on the two-fold basis that they were vital to the security of the United States and to the maintenance of a world security balance.[169] In

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the departure point has no bearing on the applicability of the regulation. Bishop cites: U.S. Naval War College, (1957) 51 International Law Situation and Documents, 1956, at pp. 578-600; Note, *Air Defense Identification Zones*, (1958) 4 N.Y.L.F. 365; Martial, *State Control of the Air Space over the Territorial Sea and the Contiguous Zone*, (1952) 30 Can. Bar Rev. 245; Murchison, *The Contiguous Air Space Zone in International Law*, (1956); Head, *ADIZ, International Law and Contiguous Airspace*, (1960) 2 Harv. Int'l. L. Club Bull. 28, reprinted in (1964) 3 Alta. L. Rev. 182; Brock, *Legality of Warning Areas as Used by the United States*, (1966-67) 21 JAG J. 69; M. McDougal and W. Burke, *supra*, n. 8, at p. 593.

[165] McDougal and Burke state:

> In the United States law, the planes obliged to report must be destined for the United States. Canadian regulations are more extensive in this respect, requiring position reports whether or not the plane is bound for Canada: *Supra*, n. 8, at p. 593.

McDougal and Burke cite: "Security Control of Air Traffic Order", Air Navigation Order, Series V, No. 14, in *Air Laws and Treaties of the World*, 87th Cong., 1st Sess., (1961), at pp. 323, 324.

[166] Trudeau Press Conference, *supra*, n. 110, at p. 23.

[167] M. McDougal and W. Burke, *supra*, n. 8, at p. 592.

[168] McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security", in *Studies in World Public Order*, (M. McDougal and Associates, eds., 1960), at p. 763.

[169] "As expectations of imminent violence in the world arena have become ever more realistic and intense, many of the nations of the free world have organized themselves, under proper provisions of the U.N. Charter, into regional groupings for their more effective self-defense. The United States has undertaken its program of atomic and thermonuclear weapons development to ensure that these coalitions of free nations are not lacking in the retaliatory power which may deter aggression, or in the weapons of self-defense if deterrence fails": *Ibid.*, at pp. 812-813. See: D.P. O'Connell, (1965) 2 Int'l. Law 710.

this respect, they parallel Canada's Arctic claims. However, given the grudging acquiescence of the international community to the U.S. tests and the dangers they created for the environment, Canada has an advantage in that its arguments paralleling those justifying the U.S. nuclear tests are made in the cause of protecting rather than endangering the environment.

Canada makes this point most explicitly in its Note of April 16, 1970, wherein special attention is called to the Amchitka Island test of October 1969 during which the United States warned away shipping within a fifty-mile radius.[170] To be sure, the actual period of exclusion from test areas has been limited, although possible danger may remain within such areas. But the rationales for nuclear testing supply precedents which Canada can invoke.

Finally, there is the question of precedents for anti-pollution measures such as those now established by Canada. It is instructive to review the treatment of this subject by McDougal and Burke in 1962.

> ... If it were practicable for the coastal state to enact and enforce prohibitory regulations applicable in adjacent seas, there would seem to be sufficient justification for considering this permissible under general community policy. To the extent, therefore, that a coastal state could exercise sufficient effective control it would be appropriate to permit it to prohibit the discharge of oil that would, or could reasonably be thought to, damage marine life and property in the vicinity. Reasonable enforcement would include apprehension of vessels infringing the prohibition and imposition of a penalty on such vessels.[171]

McDougal and Burke continue — eight years before the Canadian *Arctic Waters Pollution Prevention Act*:

> If such unilateral prescription is not practicable, and it does appear to be too formidable and costly an operation for general adoption as an effective measure, methods of ensuring discharge in areas not likely to threaten harm to coastal interests would appear to be in the common interest. It would be acceptable also to seek to require that ships install any available and effective equipment for reducing or eliminating the deleterious effects of the substance discharged.[172]

It remains to be seen whether Canada's unilateral anti-pollution measures will be "practicable". Meanwhile, it appears that the focus of states concerned with maritime pollution has been largely on international regulation through voluntary compliance with international conventions. The 1954 London *Convention for the Prevention*

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[170] See *supra*, n. 146.
[171] M. McDougal and W. Burke, *supra*, n. 8.
[172] *Ibid.*

of Pollution of the Sea by Oil, signed by forty-two states, provides standards for acceptable levels of oil and oily-mixture discharge and prohibits specific types of oil discharge. A fifty-mile control zone for the prevention of oil pollution is authorized.[173] Responsibility for coordinating implementation by parties to the 1954 London Convention was given to the Intergovernmental Maritime Consultative Organization (IMCO). IMCO became operative in 1957.[174] IMCO assemblies have met a number of times since 1959 and have produced rules purporting to strengthen the regulation of maritime oil pollution. The 1962 London Conference increased restrictions of spillage and oil discharge. Relevant to Canada's present claims was an extension of the prohibited zone from fifty to one hundred miles for nations adhering to the convention.[175]

In 1969, two IMCO-sponsored conventions were proposed. The *International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties* begins to attack the problem engendered by the fact that previous conventions left enforcement with the flag state.[176] The 1969 Convention on intervention permits limited intervention at sea by a coastal state to "prevent, mitigate, or eliminate grave and imminent danger... following upon a maritime casualty".[177] But the right of intervention is hedged with requirements for notifications and consultations. Primary responsibility remains with the flag state.[178] The second convention, the *International Convention on Civil Liability for Oil Pollution Damage,* extends the amount of financial liability for damage from oil spills, without proof of fault. Mandatory insurance is set for ships carrying over 2,000 tons of oil, but liability for any one incident is limited.[179] The United States signed these 1969 IMCO conventions. Canada, as well as such maritime states as Australia, Japan, the

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[173] 12 U.S.T. 2989; T.I.A.S. 4900; 327 U.N.T.S. 3.

[174] M. Whiteman, 4 *Digest of International Law,* at pp. 706-708; Legault, *supra,* n. 6, at pp. 212-13; Bilder, *supra,* n. 6, at pp. 15-16; Milsten, *supra,* n. 6, at pp. 1186-87; Sutton, *supra,* n. 6, at pp. 54-55.

[175] Legault, *supra,* n. 6, at pp. 212-13; Bilder, *supra,* n. 6, at pp. 15-16; Wilkes, *supra,* n. 6, at pp. 504-505; Milsten, *supra,* n. 6, at pp. 1186-87; Green, *supra,* n. 6, at p. 468; Sutton, *supra,* n. 6, at p. 55.

[176] (1970) 9 I.L.M. 25; Legault, *supra,* n. 6, at pp. 213-14; Green, *supra,* n. 6, at pp. 470-73; Neuman, *supra,* n. 6, at pp. 353-54; Milsten, *supra,* n. 6, at p. 1187; Sutton, *supra,* n. 6, at p. 56.

[177] (1970) 9 I.L.M. 25.

[178] Legault, *supra,* n. 6, at p. 213; Neuman, *supra,* n. 6, at p. 353; Milsten, *supra,* n. 6, at p. 1187; Green, *supra,* n. 6, at p. 471; Sutton, *supra,* n. 6, at p. 56.

[179] (1970) 9 I.L.M. 45.

Netherlands, Liberia, Greece and the Scandinavian states, did not sign them.[180]

The 1954 London Convention and the 1962 and 1969 IMCO conventions do not authorize the anti-pollution program instituted by Canada. At present, international practice would appear to accept such anti-pollution measures only within the twelve miles of the 1958 Geneva contiguous zone. The U.S. based its 1970 pollution control measures on the Article 24 zone, apparently assimilating such measures into "sanitary" regulations.[181] Thus Wulf asserts that, "Quite clearly, the exercise of pollution competence over foreign vessels on the high seas at a distance in excess of twelve miles is contrary to established norms of international law." [182] Moreover, Wulf contends, even within the twelve-mile limit anti-pollution measures must meet the requirements of reasonableness, i.e., there is no right of sovereign, exclusive anti-pollution control.[183] It further appears from Wulf's recent article that Canada's lead has not been followed thus far by other states claiming anti-pollution contiguous zones beyond twelve miles.[184]

The foregoing impressions merely underscore Canada's explicit acknowledgement that its claim to an anti-pollution contiguous zone was not in conformity with the "old" law of the shipping interests, but rather was an attempt to establish new law to protect the interests of coastal states. This attitude is reflected in withdrawal of this issue from the jurisdiction of the International Court of Justice. It is also reflected repeatedly in connection with Canada's refusal to sign the IMCO conventions.[185]

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[180] Milsten, *supra*, n. 6, at p. 1187; Green, *supra*, n. 6, at pp. 473-76; Sutton, n. 6, at pp. 56-61.

[181] Wulf, *supra*, n. 6, at pp. 537-38.

[182] *Ibid.*, at p. 538.

[183] *Ibid.*, at pp. 538-39.

[184] *Ibid.*, at pp. 538-39. Wulf says:

> To establish a zone of fixed breadth would be unwise and probably unnecessary... With all the variables which determine the impact of a spill on a coastal state, an inflexible standard would not meet the interests of a coastal state. Further, a right to intervene should not be dependent upon a claim to a specified zone but rather upon the realistically perceived dangers of pollution a maritime casualty presents to the coastal state no matter when the casualty occurs: *Ibid.*, at p. 545.

[185] On Canada's objections to the IMCO conventions, see: Department of Transport, *Statement by the Canadian Minister of Transport to the Brussels Conference on Pollution of the Sea by Oil, November 10, 1969;* Green, *supra*, n. 6; Beesley, *supra*, n. 6, at p. 8.

Legault concludes:

> Even as amended, however, the London Convention for the Prevention

Examination of the relevance of claims, trends in decision, and modes of authoritative decision relative to the Continental Shelf have a special place in analyses of Canada's anti-pollution regime. Despite Canada's invocation of the 1945 *Truman Declaration on the Continental Shelf*[186] as a precedent for its claim, the extent to which this precedent is relevant and supporting is far from clear. Two issues arise. First, how relevant is the subject matter of control of the resources of the continental shelf to claims to control of access, and competence to prescribe and apply authority primarily on the surface of contiguous zone waters? Second, what does the history of the law-making process for the continental shelf demonstrate that would support Canada's approach to the process of developing international anti-pollution law?

As regards the first issue, the claims are of quite a different nature. As application of the McDougal-Burke categories has revealed in the preceding analysis, the thrust of the Canadian claims to a contiguous zone does not appear to reach directly the claim to exclusive appropriation of resources in adjacent submarine areas. This latter category would be appropriate to continental shelf claims. Canada already has complete jurisdiction and control over its continental shelf as a matter of application of

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of Pollution of the Sea by Oil has serious defects (quite apart from the fact that it applies, of course, only to contracting parties). The central defect relates to enforcement and involves problems of both detection and jurisdiction. Detection of the source of a particular discharge of oil presents great difficulties which can be only partially overcome by visual surveillance in view of the vast areas to be policed and the rapidity with which oil slicks break up into similar particles. Various suggestions have been made for 'labelling' or 'tagging' tanker cargoes but such solutions to the identification problem have not yet been adopted. A further problem would in any event remain with regard to establishing whether or not a particular discharge exceeded the limits permitted under the 1954 convention. These difficulties are compounded by the fact that prosecution for offences beyond the territorial sea is at the exclusive discretion of the flag state, which may or may not deem sufficient such evidence as can be supplied by the coastal state. Finally, another major weakness of the convention is that it does not make compulsory the adoption of techniques (such as the 'load-on-top' system) and the use of equipment (such as shipboard separators and oil reception facilities at ports) which could help considerably to eliminate the deliberate discharge of oil and oily mixtures into the sea: Legault, *supra*, n. 6, at p. 213.

See also: Morin, *Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Arctique*, (1970) 8 Can. Yb. Int'l. L. 158 (hereinafter cited as "Morin").

[186] M. Whiteman, (1965) 4 *Digest of International Law*, at pp. 752-64.

the 1958 Convention on that subject and of customary international law.[187]

To be sure, the Canadian anti-pollution regime reinforces Canada's control over appropriation of resources on the continental shelf. Control of traffic within the zone obviously could affect appropriation operations on the shelf, if permitted by Canada. But this aspect of the anti-pollution controls appears somewhat superfluous. The true relevance of continental shelf law appears to be in the nature of the competences claimed and in lessons it has recorded with respect to unilateral claims to contiguous zones.

As to the nature of the competences claimed by the United States with regard to the continental shelf, President Truman's Proclamation asserted that, "The United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas, but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control".[188] A White House press release of September 28, 1945 commented:

> While asserting jurisdiction and control of the United States over the mineral resources of the continental shelf, the proclamation in no wise abridges the right of free and unimpeded navigation of waters of the character of high seas above the shelf, nor does it extend the present limits of the territorial waters of the United States.[189]

The Truman claim was exclusive, comprehensive, and continuous with respect to everything necessary for jurisdiction and control over the continental shelf. The U.S. specifically disavowed any claim to control access to, or prescribe with respect to, any portions of the high seas.[190]

The comparability of the Truman and Canadian claims as, in effect, enlightened unilateral initiatives to develop customary international law, is a complex matter. The U.S. initiative profits by comparison, in that it was made in a legal vacuum. The empirical problems were novel and the legal situation was very close to that of a *tabula rasa*.[191] The Canadian claims, on the other hand,

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[187] *Ibid.*, at pp. 920-31. The Convention on the Continental Shelf entered into force June 10, 1964: U.S.T.I.A.S. 5578; 15 U.S.T. 471.

[188] Proclamation No. 2667, "Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", Sept. 28, 1945, 10 Fed. Reg. 12303; 3 C.F.R. 1943-1948 Comp., at p. 67; (1954) 13 Dep't. State Bull. 485, quoted from M. Whiteman, (1965) 4 *Digest of International Law*, at p. 757.

[189] *Ibid.*

[190] M. McDougal and W. Burke, *supra*, n. 8, at pp. 638, 652.

[191] M. Whiteman, (1965) 4 *Digest of International Law*, at pp. 740-52.

do confront existing international law. The 1954 London and 1962 and 1969 Brussels Conventions do provide a body of anti-pollution law, no matter how inadequate Canada may consider it. In his April 8, 1970, press conference, Prime Minister Trudeau stated that, "where no law exists, or where law is clearly insufficient, there is no international common law applying to the Arctic seas; we're saying somebody has to preserve this area for mankind until the international law develops".[192] While one may agree as to the insufficiency of the international law of pollution, it cannot be said that "no law exists".

There remains the question of unilateral versus international initiatives to develop law for the oceans. The treatment of this subject in the literature on the Canadian claims shows a tendency to regret the Truman Continental Shelf initiative. Contemporary publicists seem to feel that the U.S. claims were not productive of good precedents or of a healthy climate in which to develop an adequate law of the oceans.[193]

In retrospect, it is abundantly clear that many, if not most, of the problems triggered by the Truman Proclamation derived from over-enthusiastic acceptance of the U.S. claims. Increasingly, states responded to the Truman initiative by claiming sovereignty over continental shelves, superadjacent waters and fisheries — drastic extensions of the Truman claims both with respect to exclusivity and subject matter embraced.[194] Serious and compar-

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[192] *Supra,* at p. 355.

[193] See "Oral Proceedings" section of (1971) 50 Ore. L.R. 4, at pp. 4-62, following L.C. Green's article, *supra,* n. 6: at pp. 492 (J.L. Jacobson), 495 (L.C. Green), 497 (J. Carter), 498 (L.C. Green).

[194] Bishop provides the following summary:

> Mexico, the first to follow, with a Presidential Declaration of October 29, 1945, referred to the need to protect mineral and fisheries resources of the continental shelf and waters off Mexico, and stated: "the Government of the Republic recovers all the continental shelf or platform adjacent to its coastline and each and every natural resource, known or unknown, found therein, and is moving towards that vigilance, use and control in the zones of fisheries protection necessary for the conservation of such a source of well-being." It added that this action, "does not imply that the Government of Mexico intends to fail to recognize legitimate rights of third parties on a basis of reciprocity or that the Government of Mexico intends to affect legitimate rights of free navigation on the high seas, since the only thing it seeks is the conservation of these resources for the national, the continental, and the world well-being." Implementing Mexican decrees and legislation appear to be confined to the resources of the subsoil.
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> Continental shelf claims limited to sea bed and subsoil were soon made by Australia, Bahrein, Brazil, Dominican Republic, Guatemala, Iran, Israel,

atively successful codification efforts at Geneva in 1958 proved inadequate in the face of the variety and persistence of claims related, to varying degrees, with the original Truman continental shelf initiative. In the light of this record, some contemporary publicists apparently believe that the Truman Continental Shelf precedent was unfortunate.

In mitigation of this judgment it should be pointed out that the United States has consistently opposed claims to exclusive sovereign powers beyond territorial seas, denied their justification in the Truman precedent, and worked for resolution of outstanding issues through international conventions.[195] Indeed, it may be argued that the more recent difficulties encountered by the U.S. in championing the convention approach to the law of the oceans may provide reason to reconsider the advantages of the unilateral Truman approach, which at least obtained the U.S. objectives without interfering with freedom of the seas. This, of course, is what Canada claims to be doing.[196]

(iii) *Appraisal and Recommendation*

In summary, trends in decision with respect to claims to control access to the high seas reveal strengths and weaknesses in Canada's rationale for her 1970 claims. Favouring Canada is the fact that such claims have received historic and contemporary acceptance to a point that far exceeds the limited definition of contiguous zones in Article 24 of the 1958 Geneva *Territorial Sea and Contiguous Zone Convention.* Of further importance for Canada's position is the fact that such claims have been judged to be reasonable in terms of vital interests of the claimant state and, to varying degrees, of all or part of the international community.

Kuwait, Nicaragua, Pakistan, Philippines, Saudi Arabia, Trucial Sheikdoms, Venezuela, and the United Kingdom (for Bahamas, British Honduras, Falkland Islands, and Jamaica but not for the homeland), and other states. Continental shelf claims including claims to sovereignty over waters above the continental shelf, or fisheries therein, have been made by Argentina, Chile, Costa Rica, Honduras, and Peru. Ecuador, Panama, and Salvador claim 200 miles of waters off their shores for fisheries purposes, while Chile and Peru also adopt this figure. Iceland claims fisheries rights over specified areas extending out to about 12 miles from shore. Korea and U.S.S.R. have closed large areas of adjacent sea to foreign fishing (except under special permissions): Bishop, *supra,* n. 124, at p. 640.

[195] M. Whiteman, (1965) 4 *Digest of International Law,* at pp. 763-64, 842-71, 920-31.

[196] See: Trudeau Press Conference, *supra,* n. 110; Canadian Note, April 16, 1970, *supra,* n. 146.

However, two aspects of the relevant precedents tend to distinguish them from Canada's claim and thereby weaken their supportive character. First, the general trend has been towards tolerance of contiguous zones of limited duration, e.g., naval maneuvers, nuclear tests; or of permanent zones wherein limited functions were carried out, e.g., liquor control. A permanent contiguous zone, wherein fairly comprehensive measures are undertaken affecting virtually all traffic and activity, goes beyond the precedents except for ADIZ and CADIZ.[197] If this is a fair reading of contemporary trends in international law, it may be necessary to go to the lengths that Canada has indeed gone in equating anti-pollution measures with self-defense measures under the law of war. This extreme formulation will be considered after completion of the analysis in terms of the norms more usually applied to claims to territorial waters and contiguous zones.

Second, most claims to contiguous zones have not been made with respect to subjects that were under, as it were, competitive, regulatory efforts by international conventions. Claims to control access to the high seas encountered generalized opposition and scrutiny as challenges to the presumptive rights of freedom of the seas. But, in the case of Canada's claims, the opposition is not only generalized, it focuses on the specific objection that what Canada seeks to achieve is already being sought by an international regime that will be progressively more effective if, *inter alia*, unilateral initiatives such as Canada's do not undermine it.

These two points of difference between precedents invoked by Canada and Canada's actual claim result in Canada being depicted as a state that seeks to establish a permanent, contiguous zone dealing quite comprehensively with activities therein, contrary to international law and inclusive international efforts to improve that law. This characterization will be hard for Canada to overcome. But, given the rapidly changing situation, both of the problems and the law of the sea, a negative verdict on Canada's claims may not stand up for long. On the one hand, Canada's implementation of her claims may strike other interested states as reasonable and worthy of acceptance. On the other hand, hopes for resolution of the problems of pollution control on the seas by international conference may prove unfounded. Enlightened unilateralism may turn out to be the only sensible strategy for coastal states. A further look at the implications of Canada's implementation of its Arctic regime is in order.

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[197] *Supra*, at pp. 488-90.

F. *Canada's Claims to Prescribe and Apply Authority for Canadian Arctic Waters*

(i) *Clarification of Policy*

It is important to observe the distinction between claims to competence to prescribe authority for contiguous zones and the closely related claim to competence to apply authority therein. Increased transnational interdependence requires states to prescribe with respect to activities occurring completely outside of their territorial jurisdiction but having significant and sometimes deleterious effect within their jurisdiction. In such cases, competence to prescribe is not accompanied by competence to apply authority in enforcement of such prescriptions at the place where they are violated. Moreover, the history of the law of the sea is marked by the problem of ships or persons which allegedly violated a coastal state's prescriptions within its jurisdiction, but profited by the modest dimensions of territorial seas and limited contiguous zones to escape enforcement measures.

Additionally, it must be observed that the accelerating trend towards far-reaching claims to contiguous or even exclusive sovereign zones in the high seas by states possessed of insufficient powers to enforce them underscores the distinction between competence to prescribe and competence to apply authority.[198] Finally, the forms of enforcement actually employed by a state claiming competence to apply authority in a contignous zone will obviously be evaluated in the process of determining the overall reasonableness of this intervention into the interactions of the maritime environment.

The distinction between competence to prescribe and competence to apply authority is made by McDougal and Burke. Their discussion reveals that the distinction is either rejected, misunderstood, or not perceived by many practitioners and publicists.[199] With respect to competence to prescribe, they state that, "the honoring and protecting of claims by states to control access to [contiguous] waters, for all the various purposes discussed . . . does in fact confer upon particular states a competence to prescribe certain particular policies with which vessels *must* comply while in such waters".[200] They add that "the prescription by coastal states relates to the

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[198] For example, the claims of Costa Rica, El Salvador, Panama, Ghana, and Guinea as described in M. Whiteman, (1965) 4 *Digest of International Law*, at pp. 20-35.

[199] M. McDougal and W. Burke, *supra*, n. 8, at pp. 576-77, 608-12, 621-23.

[200] *Ibid.* Emphasis added.

events occurring in the contiguous areas and not merely to those within the waters, or upon the land, subject to its more comprehensive authority".

The McDougal and Burke position is at odds with the view that an area of the globe is either subject to the sovereign competence of a state or not. Therefore, claims to jurisdiction in areas not purportedly within a state's sovereign domain, as in contiguous zones, "are in fact not so much rights, as powers — which the coastal state may lawfully exercise if it can, but which foreign vessels are not fundamentally obliged to submit to, except in so far as they must".[201] This formulation by Sir Gerald Fitzmaurice concludes:

> International practice allows, or — more probably — tolerates that the coastal State should exercise certain limited powers of control in the contiguous zone in order to enable it to prevent *eventual* infringement *within its territory or territorial waters* of certain of its laws.[202]

Two aspects of this debate emerge as important issues in the developing law of the sea. First, must jurisdiction be either territorial, or at least, assimilable into territorial jurisdiction on some theory of "eventual" effect of extra-territorial acts? Or, may jurisdiction range over a spectrum from exclusive comprehensive competence (territory, including territorial waters), through partial exclusive competence (contiguous zones), to the inclusive regime of the high seas? Applied to Canada's claims, are they tolerable only to the extent that they are related to "eventual" violation of Canada's laws in territory that is clearly Canadian? Or, as Canada obviously intends, does Canada have the competence to prescribe *for* contiguous zones beyond her territorial waters, with the result that prohibited acts are illegal where they are committed, irrespective of their eventual effect on Canada?

Second — and this leads to the second category of competences distinguished — is respect for jurisdiction in contiguous zones simply a function of the capability to enforce prescriptions? The issue is presented starkly by Fitzmaurice:

> But the foreign vessels are not obliged, fundamentally and as a matter of law, to submit to this control if it can avoid or evade it — whereas in the territorial sea, and subject to the right of innocent passage and certain other limitations, the foreign vessels must, and are legally obliged, to submit to the legitimate and reasonable controls of the coastal State. In

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[201] Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law — I*, 31 Brit. Yb. Int'l. L. 371, at p. 378; quoted in M. McDougal and W. Burke, *supra*, n. 8, at p. 608.

[202] Fitzmaurice, *supra*, n. 201, at p. 379; quoted in M. McDougal and W. Burke, *supra*, n. 8, at p. 609. Original emphasis.

short, in the territorial sea, the foreign is found *voluntarily* to submit, whereas in the contiguous zone he is found to do so only if compelled.[203]

Applied to Canada's claims in Arctic waters, this raises the question whether Canada must contemplate enforcement against resisting parties who assume that "as a matter of law" Canada's prescriptions are nullities, of importance only in circumstances where involuntary compliance can be "compelled".

(ii) *Trends in Decision*

The evidence of state practice in support of claims to control access to contiguous zones tends to support claims to prescribe and to apply authority. This practice is most clear with respect to customs and revenue zones wherein certain acts are made unlawful under coastal state law, as recognized by Article 24 of the 1958 Geneva *Territorial Sea and Contiguous Zone Convention.*[204] Further support is found in the precedents for security zones previously mentioned.[205] However, it must be admitted that prescriptions which are largely confined to occasional and limited exclusion from access to security or manoeuver areas do not appear to furnish much support for the claim to prescribe authority in contiguous zones. Thus, claims to prescribe fishing regulations beyond twelve miles have met with much resistance and would not appear to be accepted in state practice.[206]

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[203] Fitzmaurice, *supra,* n. 201, at p. 379; quoted in M. McDougal and W. Burke, *supra,* n. 8, at p. 622.

[204] *Supra,* at pp. 363-64.

[205] *Supra,* at pp. 488-90.

[206] M. Whiteman, (1965) 4 *Digest of International Law,* at pp. 1184-88 (re controversies over claims by the Republic of Korea); 1198-1209 (Chile, Ecuador and Peru).

Iceland and the United Kingdom clashed over Iceland's claims to a 12-mile limit, 1958-61. See: M. Whiteman, (1965) 4 *Digest of International Law,* at pp. 1154-74. A 1961 settlement was terminated by Iceland in 1972 and a fifty-mile fisheries limit was put into effect on September 7, 1972. On April 14, 1972, the United Kingdom took her objections to Iceland's fifty-mile claims to the International Court of Justice. The Federal Republic of Germany joined in the suit. On August 18, 1972 the I.C.J. ruled that the British and West German trawlers can continue fishing within the area of Iceland's fifty-mile limit on a provisional basis. In its ruling, the court called on Iceland to refrain from taking any measures against British and West German vessels fishing outside the present 12-mile limits. At the same time, the court said Britain should limit its annual catch in Icelandic waters to 170,000 tons, and West Germany to 119,000 tons. The international tribunal said its ruling could be reviewed at any time before August 15, 1973. Iceland rejects the jurisdiction and ruling of the I.C.J. in this matter, claiming its obligation to adjudicate it ceased

It is possible to demonstrate that there is wide acceptance by publicists of coastal state competence to prescribe in contiguous zones.[207] However, if one eliminates from the consensus of the experts statements relating to a limited, twelve-mile contiguous zone, statements relating to narrow functions such as customs control, and statements relating to somewhat vague security zones, there appears only modest support for the right of coastal states to prescribe authority for the contiguous zone on a continuing basis and with the degree of comprehensiveness envisaged in the Canadian initiatives.

As to enforcement of prescriptions made for contiguous zones, McDougal and Burke contend that "state practice exhibits a high consensus that states do have a competence to apply authority in contiguous zones which is fully adequate to secure their established competence to prescribe".[208] They find that:

> With some exceptions, the same legislative or administrative enactments, honored in reciprocal claim and mutual tolerance, which prescribe the policies for interactions in contiguous areas also contain provision both for enforcement, as by seizure and arrest, and for punishment of violation, as by fine or by the more severe penalty of confiscation.[209]

The McDougal and Burke view is, once again, supported by the record of state practice recalled in considering claims to control access to contiguous zones. As they recognize, this view is not supported by the modest provisions of the 1958 Geneva *Convention on the Territorial Sea and Contiguous Zone*, which "limits coastal competence principally to such minor measures as surveillance, inquiry and search".[210]

The record of state practice seems to reveal two attitudes towards jurisdiction over contiguous zones, much as it shows two positions over the maximum extent of the contiguous zone.

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when it gave notice that it considered the 1961 agreement had been terminated. See: "Court Voids New Iceland Fishing Ban", *Washington Post*, August 18, 1972, § A, at p. 18, col. 1; and "Iceland Extends Limits, 'Cod War' Threatened", *Washington Star News*, September 1, 1972, § A, at p. 5, cols. 1-2.

See generally: Iceland, Ministry for Foreign Affairs, *Fisheries Jurisdiction in Iceland*, (Reykjavik, February 1972); Permanent Mission of Iceland to the United Nations, *Statement by His Excellency Einar Agustsson, Minister for Foreign Affairs of Iceland, in the General Debate of the Twenty-Seventh Session of the General Assembly of the United Nations, Friday, 29 September 1972.*

[207] M. McDougal and W. Burke, *supra*, n. 8, at pp. 613-14, and authorities cited therein.

[208] *Ibid.*

[209] *Ibid.*

[210] *Ibid.*

The narrow view, that of the 1958 Geneva Convention, would restrict contiguous zones to twelve miles, would restrict the functions therein controlled, and would limit competence to apply authority in enforcement. The liberal view, emphasizing state practice rather than the results of the 1958 Geneva Conference, would accept any limits reasonably related to the purposes of a contiguous zone, would accept security and perhaps other functions not included in Article 24 as proper subjects for prescription, and would expect that enforcement would take such familiar forms as seizure, arrest, fine and confiscation.

There remains another category of enforcement which has apparently not been widely discussed in the literature. In remote and hazardous regions, a coastal state may support its prescriptions in a contiguous zone by denying vital assistance to violators. In the case of the Canadian Arctic, denial of assistance from ice breakers may prove a decisive deterrent against and punishment for violations of Canadian law. This possibility will be discussed in connection with the analysis of the Northwest Passage. Another sanction has been suggested by recent Icelandic practice. This is to warn possible violators of a contiguous zone regime that they will be prosecuted if they are obliged by *force majeure* to put into ports of the coastal state.[211]

All in all, trends in decision are not conclusive regarding coastal state competence to prescribe and apply authority in contiguous zones. The limited 1958 Geneva Convention view is clearly inadequate. It is highly pertinent to the Canadian claims to recall McDougal and Burke's prediction eleven years ago:

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[211] An Icelandic source states:

> If no interim agreement is reached between the U.K. and Iceland, and Iceland is denied what she claims as her inalienable right to administer and manage her 50 miles limit, how can she enforce it? Iceland is a peaceful nation. She has no army or navy and therefore has no means of "enforcing" the management of the 50 mile limit other than with 5 small coastguard patrol vessels and a few aircraft. With these limited resources she would merely keep a record of any foreign fishing vessels poaching in her waters and should any vessel, having contravened her fishing regulations, have to put into port because of mechanical breakdown, or lack of supplies, the captain of the vessel may be prosecuted and fined according to Icelandic law. But Iceland will not deny aid to the sick or supplies to any such vessel. The waters around Iceland are treacherous and no foreign fishing vessel can operate in these waters for any length of time without seeking aid or shelter.

Iceland's New Fishing Limits, (Whittaker Hunt Public Relations Ltd., 2 Old Burlington Street, London W1X 2LH, on behalf of the Icelandic Foreign Ministry, 1972), at p. 6.

> The most likely outcome in future practice would appear to be that states will continue active enforcement of their coastal laws in contiguous zones for securing reasonable protection of important, particular interests. It does not seem probable that states will suddenly convince themselves that a suspected vessel's crossing of an imaginary line in the ocean delimiting the territorial sea is necessary before an exercise of protective authority can be considered reasonable. From the perspectives of general community policy, there would appear to be nothing inimical in states continuing to act, as in the past, to secure their legitimate interests by exercise of a reasonable authority to apply policy in contiguous areas.[212]

(iii) *Appraisal and Recommendation*

As previously noted, Canada's claims to a contiguous zone are advanced as a self-defense measure. This justification complicates the case, raising novel issues of transference of the concepts of the law of war to the law of peace. Accordingly, it seems best to evaluate Canada's claims for a contiguous anti-pollution zone on the basis of trends in decision in the law of peace. The validity and implications of the invocation of the right of self-defense will be dealt with separately.

In terms of the present law of peace, it seems clear that characterization of Canada's claim to an anti-pollution contiguous zone as either "legal" or "illegal" is unwarranted and premature. This is the case because both the state of the law and the character and implications of Canada's claims are uncertain and in flux. Advocates' cases have been made for and against the Canadian claims. But clarification of issues in a controversy which may have major implications for the emerging law of the sea is presently more important than scoring legal points.

Moreover, as is the case with respect to the claim to a twelve-mile territorial sea, the ultimate issues are two: (1) the substantive merit of the claims; (2) the effects of the claims on the process of authoritative decision.

On the merits, it is possible to come to many evaluations, depending on the content and combination of the variables discussed. Several models of possible analysis may demonstrate the complexity of the issues.

Model A might be a conservative analysis. This ultimate guiding principle remains the freedom of the seas. Conservation and anti-pollution continue to be important but subordinate values. But the presumption in favor of maximization of inclusive use of the high seas remains at the heart of the analysis. Canada's claim is not au-

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[212] M. McDougal and W. Burke, *supra*, n. 8, at p. 630.

thorized by the conventional law of the sea. However inadequate that law may be thought to be, it stands until there is clear evidence that it has been overridden by custom — not demonstrable regarding contiguous zones — or convention, which must await developments at the coming Law of the Sea Conference.

As to the reasonableness of the claims, analysis of Model A would hold that the very substantial interests of Canada justify protection, but *not* through unilateral control of access, prescription, and application of authority. The presumption in favor of inclusive access to and enjoyment of the high seas is not overcome by Canada's interests unilaterally defended by a permanent, highly comprehensive regulation of virtually all significant activities in the Canadian Arctic.

In conservative analysis, Model A, it will be maintained that despite the descriptive adjective "Canadian" attached to the waters of the region in question, they have been and remain high seas, not "Canadian" in the sense of territorial waters, or in any other legal sense distinguishable from other portions of the high seas adjacent to Canada's shores.

Finally, conservative analysis, Model A, will object to the modality and degree of interference contemplated in the Canadian claims. The modality may be likened to wartime inspections and seizures of neutral vessels: resisted in war, intolerable in peace. The degree of interference may likewise be compared to wartime naval restraints. The area covered by the Canadian legislation is like a war zone. Every ship of consequence, every activity occurring in the ocean environment therein, is subject to comprehensive regulation, including exclusion, seizure and punishment by Canada. Such a regime is unreasonable and arbitrary.

To these arguments on the merits, conservative analysis, Model A, will add that the effects of the Canadian claims to a contiguous zone will be destructive to the law-making process. Particularly in view of Canada's reputation as a responsible, internationalist state, this initiative will undercut efforts to resolve maritime environmental problems by international conventions and more effective international organization. It will encourage less responsible states to make reckless claims, also based on environmental arguments, to exclude and regulate shipping and other activities in the previously free high seas.

However, a liberal analysis, more favorable to Canada, is possible. In such an analysis, Model B, the presumption against infringement on the basic principle of freedom of the seas will be relaxed

significantly and balanced with a new principle requiring reasonable protection of the ocean environment. So viewed, the problem is not one of justifying an exception to an overriding principle, but of balancing one important principle, freedom of the seas, with another, environmental protection. Although Canada's claims are not authorized by existing conventional law, that law is notoriously biased towards freedom of the seas. Indeed, the new, equal principle of environmental protection is not seriously reflected in the conventional law. The practice of states is seeking to rectify this state of affairs but lags behind the ever-more-threatening situation. This is particularly true in the Arctic.

Model B, the liberal analysis, would hold that Canada does face a clear and present danger to her environment and her vital social and economic interests. In these circumstances, it might be more proper to place the presumption against continued claims to unregulated enjoyment of waters adjacent to Canada, rather than against claims to protect those waters from irremedial damage — to the detriment of inclusive world interests as well as exclusive Canadian interests. If Canadian claims to control access, prescribe and apply authority are appropriate and proportionate to the legitimate ends sought, they should be viewed as precursors of a new, more balanced, law of the sea — the beginning of customary international law.

At this point in the construction of a liberal analysis, Model B, one hesitates. The next item in the calculation of reasonableness concerns the status and character of the ocean areas affected. Should the liberal analysis argue on the basis of the unique character of the Canadian Arctic Waters? Exclusively or in part? If the main concern is protection of this particular ocean area by building the strongest case for the Canadian protective regime, it would seem best to emphasize the unique character. The threat is perceived as particularly great because of unique features of the area. Perhaps the legal claim should follow closely the empirical facts and stick to uniqueness as a central justification for the measures undertaken.

Let us, then, assume that liberal analysis, Model B, claims that the measures are appropriate for and proportionate to the threat to the unique Canadian Arctic Waters. At this point, a further choice has to be made. Must we attribute a legal significance to the adjective "Canadian" when we speak of these waters? If so, what significance? If Canada claims a near-exclusive, near-comprehensive, competence in dealing with the Arctic waters adjacent to her shores, acceptance of such a claim will grant a very special status to the area of the anti-pollution regime. It will not be part

of the sovereign territory and territorial waters of Canada, but it will not be like any ordinary contiguous zone. Thus, both the physical character and legal status of these waters may be unique. Whether this uniqueness will be recognized and accepted by other states is the question.[213]

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[213] The following statements may both inform and confuse those desirous of understanding the legal status of the Canadian Archipelago:

> To speak of Arctic sovereignty in a generic sense, with reference to everything north of the Arctic Circle, is to suggest, contrary to all geographic, climatic, legal and political realities, that there exists a single Arctic region and that the sovereignty of that region remains somehow unsettled. In fact, of course, the Arctic comprises many distinct and widely varying continental, insular and marine regions. So far as the land regions are concerned, there are few if any questions of Arctic sovereignty which remain unsettled. While I cannot speak for other Arctic states, I must say that Canada is aware of no challenge to its sovereignty over the mainland and islands of the Canadian Arctic. Canada's sovereignty over these territories has been established beyond dispute under every test of law and fact since Canada fell heir to the rights of Great Britain in the 1860's and progressively extended its administration to comprise the vast and complex system which today covers every sphere of activity throughout the whole of the Canadian Arctic. Similarly there is no question as to Canada's exclusive sovereign rights to explore and exploit the resources of its Arctic continental shelf. These rights, in the Arctic as elsewhere, are firmly established under both customary and conventional international law and flow from Canada's sovereignty over the lands adjacent to the shelf areas concerned.
>
> If all these special characteristics are such that the Arctic waters and ice do not constitute high seas to which the traditional freedoms apply, what then is the status of these areas and what regime should govern their use? So far as Canada is concerned, the special characteristics of the Arctic waters and ice combine to give them a special status — however defined — which implies special rights and responsibilities for the Arctic coastal states. Accordingly, for many years Canada has exercised effective control over the uses of the waters of the Canadian Arctic archipelago and over a wide range of activities carried out on their ice-cover. Indeed, as was most recently reaffirmed by the Secretary of State for External Affairs in April, 1970, "Canada has always regarded the waters ... of the Arctic archipelago as being Canadian waters ... The present Government maintains that position".

Debates of the Canadian House of Commons, *Hansard,* April 16, 1970, at p. 5948; Beesley, *supra,* n. 6, at pp. 1-2, 5.

> Although Canada has always regarded the waters of the Arctic archipelago as Canadian waters, it should be emphasized that the Arctic waters pollution legislation is in no way based on and in no way represents an assertion of sovereignty over the waters concerned. It represents rather a functional exercise of jurisdiction in response to an objective concrete need, and it is based on scientific and ecological considerations rather than terri-

Assuming, then, that from the standpoint of a liberal analysis, Model B, unilateral action by Canada is broadly justified by the unique threat to environmental values and the unique physical and legal character of the ocean areas in question, what of the mode and degree of interference with inclusive interests in the area? It may be assumed that the answer will be that the regulatory measures are all objectively related to the practical requirements for dealing with the environmental threat. If they prove successful, they will be justified and beneficial to all concerned. If they shock those who have become habituated to the freedom and irresponsibility of the freedom of the seas era, this is not surprising. One eminently useful purpose of the new Canadian regime is to cut through indifference and half-measures and produce an efficacious regime to protect the ocean environment.

Accordingly, the effect of Canada's initiative can only be good, according to liberal analysis, Model B. It will be justified on the merits for the Canadian Arctic situation, will serve as a good example for other states with similar problems, and will put the international community on notice that further delays and half-measures at conferences on the subject will increasingly result in conventional law being ignored while customary law does the job.

It is possible for a reasonable observer to find either of these models of analysis as plausible. Moreover, by shuffling some of the judgments with respect to the variables other models may be

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torial imperatives. Thus the issues raised by this legislation concern not sovereignty but the right of the coastal state action to protect itself against a grave threat to its environment.

Legault, *supra*, n. 6, at p. 219.

It now seems safe to say that the nations of the world have acquiesced in Canadian claims to sovereignty over these islands and over an undetermined number of other Arctic islands that have not witnessed the performance of symbolic administrative acts by Canadian governments. In consequence, it is now common for international lawyers outside as well as inside Canada to refer to the "Canadian Arctic archipelago", and what is now in question is the precise extent of Canadian sovereignty in the *waters* of the archipelago.

Other countries possessing an archipelago, such as Indonesia, the Philippines, and some Caribbean states, have claimed the right to close off all archipelagic waters as internal waters and to deny foreign vessels the right of innocent passage. This kind of sovereignty claim has never been made by Canada, and, when made elsewhere, it has been rejected by many states as a violation of the freedom of the high seas.

Johnson, *supra*, n. 6, at p. 3.

On the ambiguity of Canada's claims to "archipelago waters", see: Bilder, *supra*, n. 6, at pp. 6-7, 19-20.

produced. But it appears that the persuasiveness of any analysis of the Canadian claim for an anti-pollution contiguous zone will rest primarily on their reasonableness in the specific context of the Canadian Arctic and on the estimate of their impact on the law-making process. It appears that existing international law prescriptions will play only a secondary role in shaping analyses of these claims.

If this evaluation is correct, the verdict on Canada's establishment of an anti-pollution contiguous zone must await answers to at least the following questions:

(1) As activity in the Canadian Arctic increases significantly, how does the balance sheet read between Canadian interests, U.S. and other foreign interests, and broad community interests? It is submitted that an adequate answer to that question at this time is probably not possible.

(2) How will Canada treat the area of the new anti-pollution regime? Will it be treated as a virtual extension of Canada or will it be treated as a contiguous zone subject to limited, functional regulations?

(3) How will Canada implement her Arctic waters regulations? What modes and degrees of interference will actually occur — and with what effects — with respect to international shipping, fishing, exploration, and exploitation of mineral resources, scientific investigations, military and naval deployment and other important functions and activities?

(4) What changed conditions will alter everyone's perspectives on these issues? Will political, economic, military, technological and other developments so "overtake" the present issues in the Canadian Arctic that emerging issues become settled and new issues take priority?

(5) How successful will initiatives be of the United States and others to resolve law of the sea issues through global, regional and functional conventions and, perhaps, new attempts to develop effective international organizations?

(6) What reception will the Canadian claims to an Arctic contiguous zone receive:

(a) from the principal Arctic powers;
(b) from the principal maritime powers; and
(c) from coastal powers?

Canada refers frequently to the precedent of the Truman Continental Shelf initiative of 1945. Will reception of Canada's claim, in like manner, bring an embarrassment of acceptance couched in

terms and applied in circumstances not intended or welcomed by Canada?

Implicit in these questions is a recommendation to maintain an open mind on the Canadian initiative and to observe and evaluate carefully the unfolding answers to these questions. Equally implicit is the recommendation to forego last-ditch defense of existing international law prescriptions which are manifestly inadequate to the exigencies of the law of the sea in the age of environmental crisis. Rather than continue such rearguard tactics, the responsible commentator and decision-maker should be improving his analyses of the complex factors involved in these issues so as to be able to play whatever role falls to him in the process of authoritative decision.

Finally, we recommend that official spokesmen and decision-makers eschew exaggerated use of legal claims in political-diplomatic exchanges and that publicists strive to separate the real legal claims from the legal trappings of political-diplomatic arguments. It strikes us that the Canadian position would be strengthened by more restraint in the use of analogies and the invocation of precedents.[214] The U.S. position would be strengthened by avoiding apodictic characterizations of actions as illegal, and by a somewhat more modest tone regarding the prospects for resolving complex problems by international conferences and international organizations.[215] In any event, it is with this problem in view that we turn to consideration of the Canadian claim that its overall policy with respect to pollution control in the Arctic is an exercise of the right of self-defense.

IV Canada's Claim to Self-Defense Measures

In the Summary of the Canadian Note of April 16, 1970, answering the U.S. objections to Canada's Arctic claims, it is asserted that:

> Canada reserves to itself the same rights as the United States has asserted to determine for itself how best to protect its vital interests, including in particular its national security.[216]

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[214] See *supra,* n. 146. Invocation of U.S. precedents such as nuclear tests are of questionable relevance and, *inter alia,* hardly persuasive *vis-à-vis* the many third parties who may have opposed or regretted the U.S. tests.

[215] See: U.S. Statement, April 15, 1970, *supra,* n. 111. As this study shows, the issues comprising the Canadian - U.S. Arctic controversy involve rapidly changing material and legal developments. It would be a brave publicist who would lay down "the law" in these conditions.

[216] Canadian Note, April 16, 1970, *supra,* n. 146, at pp. 1-2.

The Canadian Note goes on to state at a later point:

> The Canadian Government has long been concerned about the inadequacies of international law in failing to give the necessary protection to the maritime environment and to ensure the conservation of fisheries resources. The proposed anti-pollution legislation is based on the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment.[217]

(i) *Basic Community Policy*

Basic community policy on the right of self-defense is directed mainly to the threat or use of military coercion. A general presumption against major military coercion is laid down by Article 2(4) of the United Nations Charter. But Article 51 of the Charter reiterates the "inherent" right of self-defense. Theoretically, self-defense was to be superseded in most cases by the operation of collective security measures under the Charter. Since such collective security measures have proved to be impracticable because of political and ideological rifts in the international community, there have been many occasions for states to assert their right of self-defense against the threat or use of major armed coercion against their "territorial integrity or political independence".[218]

Restrictive interpretations of Article 51 have sought to limit its legitimate application to cases wherein "an armed attack occurs".[219] Such interpretations are so restrictive as to make the right of self-defense virtually meaningless in the face of threats ranging from nuclear attack to indirect aggression. Accordingly, major publicists with whom we concur concede the legitimacy of anticipatory self-defense where the threat is clear and present and the response proportionate.[220]

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[217] *Ibid.*

[218] M. McDougal and F. Feliciano, *supra,* n. 8, (1961), Ch. 3, at pp. 120-260; D. Bowett, *Self-Defense in International Law,* (1958); J. Stone, *Aggression and World Order,* (1958); J. Brownlie, *International Law and the Use of Force by States,* (1963); H. Kelsen, *Principles of International Law,* (Rev. ed., R.W. Tucker, ed.), at pp. 16-173; J. Moore, *Law and the Indo-China War,* (1972), at pp. 8-46; W. O'Brien, *War and/or Survival,* (1969), at pp. 71-91; O'Brien, *International Law and the Outbreak of War in the Middle East, 1967,* (1967) 11 Orbis 692.

[219] For example: Wright, *Intervention, 1956,* (1957) 51 Am. Jl. Int'l. L. 257; and Wright, "The Cuban Quarantine", *Proceedings, 57th Annual Meeting,* (1963) Am. Soc. Int'l. L., at pp. 9-10.

[220] M. McDougal and F. Feliciano, *supra,* n. 8, (1961), at pp. 229-241; J. Moore, *Law and the Indo-China War,* (1972), at pp. 367-68, 373; J. Stone, *Aggression and World Order,* (1958), Ch. 5; A. Goodheart, "Some Legal Aspects of the Suez Situation", in *Tensions in the Middle East,* (P. Thayer ed., 1958), at

Throughout the period wherein the *jus ad bellum* regulating the legal status of recourse to major armed coercion has been developing, authoritative decision-makers and publicists have been keenly aware that the military instrument is neither the sole source of, nor response to, threats to the vital interests of states. Indeed, it is questionable whether the usual characterization of a threat, based on Article 2(4) of the Charter, in terms of "territorial integrity or political independence" is an adequate indication of the extent of the right of self-defense. It is clear that threats may be carried out by non-military or by covert means, including psychological, political and economic.[221] Economic sanctions, in particular, have been attempted by international organizations as well as by individual states and their allies. It is equally clear that assaults on economic, social or other base values — not clearly embraced in "territorial integrity or political independence" — can threaten a state's existence.[222] Finally, environmental threats to "territorial integrity" may be likened to the consequences of armed coercion.[223]

From the standpoint of basic community policy, the inherent right of self-defense may be anticipatory, it may be addressed to non-military threats to territorial integrity, political independence — and, perhaps, to other vital interests — and it may be exercised by means other than recourse to military defensive measures.

A. The Anti-Pollution Regime As Self-Defense

By invoking the right of self-defense, Canada deliberately elevates its anti-pollution measures to the highest, most controversial level of self-help measures. Canada thereby emphasizes its conviction that ordinary institutions, norms, and processes of international law have failed, and that she is obliged to fall back upon the most fundamental and extreme basis for protection of her interests. This is not to say that invocation of self-defense in this case is a short-term, emergency measure. On the contrary, the character of

pp. 243, 244, 246-47, 249-51; Green, *supra*, n. 6, at pp. 476-82; O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, (1967) 11 Orbis 692, at pp. 716-723.

221 M. McDougal and F. Feliciano, *supra*, n. 8 (1961), at pp. 227-28, 238, 240-241.

222 See: D. Bowett, *Self-Defense in International Law*, (1958), at p. 111; Green, *supra*, n. 6, at pp. 482-84 (surveys some contemporary practice on economic coercion and reactions thereto). The Arab oil boycott is by now the cause of serious examination of this subject.

223 See: Canadian Note, April 16, 1970, *supra*, n. 146. The argument is developed by Green, *supra*, n. 6, at pp. 484-90.

the Canadian claims is long-term — pending adequate development and enforcement of international law. At least such an interpretation is in order if Canada's invocation of self-defense is to be taken at face value.

There remains an element of doubt about the significance of the self-defense claim. It clearly serves the function of throwing up to the United States its own extensive invocations of self-defense and of inviting comparison with what are held out to be more modest Canadian claims. This is fair and normal in international diplomacy. But the observer concerned with assessing the validity of the claim of self-defense as a basis for establishing a new type of contiguous zone is left with a numer of questions. Not the least of these is whether it is necessary to invoke the right of self-defense in order to sustain the kind of claims to establish a contiguous zone that Canada has made. What would be the force of identical claims based on major vital interests but not on the right of self-defense?

(i) *Clarification of Policy*

In order to justify an anti-pollution contiguous zone by a claim of self-defense, a state will have to submit the same kind of argument of reasonableness in the specific context of the case as in any claim for a contiguous zone. But, additionally, it would seem that to qualify as a self-defense measure, the demonstration of reasonableness should prove that a highly vital interest, comparable to the interests that are defended with respect to territorial integrity and political independence, is at stake. Naturally, the criteria for legitimate recourse to self-defense measures involving armed coercion, and the kinds of threats to territorial integrity and political independence usually associated with armed, self-defense measures has, it would seem, obligated Canada to make a very persuasive case of reasonableness in terms of proportionality of ends and means and responsibility for placing exclusive above inclusive interests.[224]

It should be emphasized that these strictures ought not be interpreted as denial of the possibility that the defense of a state's environment may be comparable to defense of its territorial integrity and political independence against armed coercion. But it is important to recognize that this is a new form of self-defense claim. Environmental protection is important but so is the special character of the concept of self-defense. It would be doubly unfortunate if

[224] See: M. McDougal and F. Feliciano, *supra*, n. 8, at pp. 241-44, 521-30; W. O'Brien, "The Meaning of 'Military Necessity' in International Law", (1957) *World-Polity*, at pp. 138-50.

Canada's invocation of self-defense in an anti-pollution initiative were to lead to a dilution of the concept of self-defense and a proliferation of invocations of self-defense as justification for anti-pollution measures which might not warrant the respectful consideration to which Canada's claims are entitled.

(ii) *Trends in Decision*

Reference has been made to security measures, naval manoeuvers, and nuclear testing. Precedents and objections registered with respect to these functions clearly are relevant to the right of self-defense. As previously pointed out, they have usually involved serious but temporary interference with freedom of the seas. The most relevant precedent appears to be the U.S. ADIZ and the Canadian CADIZ.[225] Whereas naval manoeuvers and nuclear tests generally have the character of measures necessary to build and maintain deterrent and defense capabilities, ADIZ and CADIZ are permanent systems of anticipatory self-defense. Aerial incidents over the years since 1945 would indicate that many states, notably the Communist states, maintain their own version of ADIZ.[226] The question is, does tolerance of air defense systems designed to protect a state from surprise aerial attack in the nuclear age, produce a precedent for maintaining permanent anti-pollution zones in a form of anticipatory self-defense?

In the Canadian debates on the *Pollution Prevention Act*, reference was made to the maritime quarantine imposed by the United States during the 1962 Cuban Missile Crisis.[227] It should be recalled that the U.S. justified the Cuban Quarantine as an enforcement action on behalf of the Organization of American States, a most dubious rationale.[228] The true character of the Cuban Quarantine was an act of individual and collective self-defense against a nuclear threat that was perceived to be of the highest magnitude. The implementa-

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[225] *Supra*, at pp. 488-90.

[226] See: Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, (1953) 47 A.J.I.L. 559; De La Pradelle, *Les Frontières de l'air*, (Academy of International Law, Hague), (1954-II) 86 Recueil des Cours 117.

[227] See the remarks made by Mr. Eric Nielsen, Debates of the Canadian House of Commons, *Hansard*, 114 H.C. Deb. 6003 (April 17, 1970); and the comments of Mr. Baldwin, *Ibid.*, at p. 7897 (June 9, 1970), cited in Bilder, *supra*, n. 6, at p. 27.

[228] Meeker, *Defensive Quarantine and the Law*, (1963) 57 Am. Jl. Int'l. L. 525; Chayes, *The Legal Case for U.S. Action on Cuba*, (1962) 47 Dep't. State Bull. 763; Chayes, *Law and the Quarantine of Cuba*, (1963) 41 Foreign Affairs 522.

tion of the quarantine, on the other hand, was widely accepted as reasonable. Aside from Cuba, the states most concerned appear to have considered the measures limited and appropriate in view of the magnitude and credibility of the threat to the U.S., and the nations of the Western Hemisphere.[229]

It might be possible to make an interesting, detailed comparison of the U.S. measures in the Cuban Quarantine and the Canadian measures provided for in the new Arctic anti-pollution regime. But the comparison would suffer severely from the basically different context. The Cuban Quarantine was a temporary act of war directed against the most extreme kind of nuclear threat. The Canadian anti-pollution program is a long-range regulatory system established in time of peace to meet an environmental threat. Once again, the comparison makes a plausible debating point but it is difficult to apply in substantiation of Canada's claim.

The most relevant case of anticipatory self-defense would appear to be Israel's launching of the Six-Day War in 1967. Its relevance derives from the nature of the threat perceived by Israel. Egypt had closed the Straits of Tiran, cutting off the vital Israeli port of Elath in the Gulf of Aqaba. Additionally, military force was massed on Israel's borders, the United Nations peace-keeping personnel were peremptorily expelled from the Straits of Tiran and Sinai, and a general escalation of psychological warfare unleashed, seemingly heralding a final solution to the problem Israel presents to the Arab world. Particularly in view of the vulnerability of Israel both to blockade and direct attack, conditions justifying measures of anticipatory self-defense existed.[230] Again it may be asked whether Canada is seriously contending that the environmental threat to the Arctic regions is comparable to the threat to Israel's national existence at the time of the outbreak of the 1967 war in the Middle East.

The most serious attempt to pursue the issue of Canada's right of self-defense appears to be that of L.C. Green. In a section of his article headed "National Preventative Self-Defense Against the Threat of Pollution", Professor Green recalls the *Trail Smelter Arbitration*, stating:

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[229] M. McDougal, *Soviet - Cuban Quarantine and Self-Defense*, (1963) 57 Am. Jl. Int'l. L. 597; MacChesney, *Some Comments on the "Quarantine" of Cuba*, (1963) 57 Am. Jl. Int'l. L. 592; Christol and Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material, 1962*, (1963) 57 Am. Jl. Int'l. L. 525, 533-36, 543. See generally: R. Kennedy, *Thirteen Days*, (1969); E. Abel, *The Missile Crisis*, (1966).

[230] O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, (1967) 11 Orbis 692.

> In so far as preventive measures are concerned, the Tribunal found no difficulty in instructing the smelter to refrain from actions which might cause further damage and it laid down regulations for the future operation of the smelter. In this way it clearly recognized that under customary international law an arbitral tribunal was able to call for the adoption of true preventive measures — in the same way as the World Court is authorized to order interim measures of protection, although in this case some clear injury must have been caused, sufficient to ground a claim...[231]

Green then argues that this reasoning may properly be applied to oil pollution from ships on the high seas, justifying the right of a coastal state "to enact preventive or protective measures against ships using the high seas sufficiently adjacent to its shores as to threaten damage to those shores in the event of an oil spillage".

After an examination of instances in which an "economic application" to the right of self-defense has been suggested, Green concludes:

> Accepting these views as to the nature of economic independence and its significance as regards independence as such, leading to the conclusion that a threat to the one is a threat to the other, it becomes easy to argue that if a state is permitted to take preventive, anticipatory measures of self-defense to preserve its political or territorial independence, it is equally able to take similar measures with regard to potential threats to its economic independence, and, since economic survival depends upon economic well-being against any action which constitutes a threat of a substantial character of its economic welfare...[232]

Green contends that this "right under customary law" still exists despite the limitations of the Brussels treaties which have received either opposition or abstention from Canada. Thus, Professor Green finds that there is "inescapable logic" in the remark of the Secretary of State for External Affairs:

> I find it anomalous that certain countries can accept the right of a coastal state to sink a foreign ship on the high seas when a marine accident threatens pollution but at the same time assert that coastal states do not have the right to prevent such an accident by turning away such a ship from areas off their coasts, or by imposing safety standards or preconditions for entry into these areas.[233]

However, it may be asked again whether Canada really strengthens her claims to the right to take preventative action against pollution by justifying them as an exercise of the right of self-defense.

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[231] Green, *supra*, n. 6, at p. 477, citing the *Trail Smelter Arbitration, (United States* v. *Canada)*, (1941) 3 U.N.R.I.A.A. 1905.

[232] Green, *supra*, n. 6, at pp. 483-84.

[233] *Ibid.*, at p. 484, citing *Hansard*, 114 H.C. Deb. No. 103, at p. 5951 (April 16, 1970).

(iii) *Appraisal and Recommendation*

Reaction to the Canadian claims as self-defense depends on one's answer to the question: Is it necessary and right to add another chapter to the law of self-defense measures in order to deal justly and wisely with claims to protect states and areas from serious environmental threats? The precedents for transferring the concept of self-defense against armed threats to territorial integrity and political independence are so few and inconclusive that a decision to press in this direction is a major one for authoritative decision-makers. If the necessary actions for environmental protection can be justified and taken without recourse to the right of self-defense, it would seem preferable not to add a non-military dimension to the exceptions presently related to self-defense.

V. Canada's Claims With Respect to the Northwest Passage

The Northwest Passage, sought vainly for centuries, is a reality of the highest importance in the Canadian Arctic today. There are several possible routes. The best and most promising for international navigation is the following from east to west: Davis Strait, west through Lancaster Sound, through Barrow Strait and Viscount Melville Sound, southwest through Prince of Wales Strait between Banks and Victoria Islands, then west along the north coast of the mainland into Prudhoe Bay in the Beaufort Sea, toward Bering Strait. An alternate route continues from Melville Sound west through McClure Strait. But ice obstructs McClure Strait to the point that it is presently much less feasible than the Prince of Wales Strait southerly route.[234]

As long as Canada's territorial seas were limited to three miles, it was possible to traverse the Northwest Passage without entering them. However, the extension of territorial waters to twelve miles means that Canada claims exclusive jurisdiction at narrow points in Barrow Strait and Prince of Wales Strait.[235] Accordingly, the new Canadian territorial sea claim, otherwise tolerable to the United States, confronts a U.S. claim to treat the Northwest Passage as an international strait. In this respect it also brings Canada into the whole debate about the effect of extensions of territorial seas on

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[234] See: Pharand, *Innocent Passage in the Arctic*, 6 Can. Yb. Int'l. L. 3, at pp. 48-51 (Hereinafter cited as "Pharand"); Cohen, *supra*, n. 6, at p. 41 (fn. 45).

[235] Barrow Strait is less than twenty miles wide; Prince of Wales Strait less than six miles wide. Pharand, *supra*, n. 234, at pp. 49-50.

international straits. In its April 15, 1970 statement, the U.S. Department of State asserted that its willingness to accept a twelve-mile territorial sea was conditional: "... only as part of an agreed international treaty also providing for freedom of passage through and over international straits."[236] The Northwest Passage was not mentioned explicitly.

The Canadian note of April 17, 1970 replied:

> It is idle, moreover, to talk of freedom of the high seas with respect to an area, large parts of which are covered with ice throughout the year, other parts of which are covered with ice most of each year, and where the local inhabitants use the frozen sea as an extension of the land to travel over it by dogsled and snowmobile far more than they can use it as water. While the Canadian Government is determined to open up the Northwest Passage to safe navigation, it cannot accept the suggestion that the Northwest Passage constitutes high seas.[237]

This part of the Canadian note apparently applied to the waters of the anti-pollution contiguous zone generally, but includes the waters through which the Northwest Passage routes pass. Turning specifically to the territorial seas, the Canadian note stated:

> The Canadian Government is aware of United States interest in ensuring freedom of transit through international straits, but rejects any suggestion that the Northwest Passage is such an international strait. The widespread interest in opening up the Northwest Passage to commercial shipping and the well-known commitment of the Canadian Government to this end are themselves ample proof that it has not heretofore been possible to utilize the Northwest Passage as a route for shipping. The Northwest Passage has not attained the status of an international strait by customary usage nor has it been defined as such by conventional international law. The Canadian Government reiterates its determination to open up the Northwest Passage to safe navigation for the shipping of all nations, subject, however, to necessary conditions required to protect the delicate ecological balance of the Canadian Arctic.[238]

As may be seen in the two quotations above from the Canadian April 17, 1970 note, Canada appears to be saying that the whole route of the Northwest Passage does not qualify as an international strait. The Canadian claims barring status as an international strait apparently include both the new, twelve-mile territorial sea claim and the contiguous zone claim. Underlying these claims is a somewhat vague but potent assertion that all of the waters of the area are "Canadian" and unique. For example, in strongly rejecting the U.S. suggestion that a special international regime be established

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[236] *Supra*, n. 111.

[237] *Supra*, n. 146.

[238] *Ibid.* See: Morin, *supra*, n. 185, at pp. 218-20.

for the region, the Note states that, "the Canadian Government cannot accept any suggestion that Canadian waters should be internationalized", and that "the Canadian Government obviously cannot participate in any international conference called for the purpose of discussing questions falling wholly within Canadian domestic jurisdiction".[239]

(i) *Basic Community Policies*

The law of the sea seeks to reconcile the rights of coastal states with those of states whose ships pass through territorial waters as part of international navigation necessary to the interest of the international community generally and to each state individually. The concept of "innocent passage" as a solution is, of course, a call for a three-way judgment of reasonableness in which the rights of the coastal state, the flag-state and the community are balanced. Presumptions and expectations probably tend to accord greater weight to the interpretation of "innocent passage" by the coastal state with respect to most of its territorial seas, although this is a controversial assumption. But it appears that international law has gradually evolved to the point where the presumption is for inclusive use over exclusive coastal claims where shipping passes through straits whose geographical position and actual use make them vital connecting lanes for ocean shipping.[240]

Several basic questions emerge, then, with respect to straits: How is a strait defined? What constitutes reasonable coastal state control of a strait and what constitutes innocent passage through a strait? In the assessment of "reasonableness" and "innocence", the following points are important:

(1) What is the extensiveness of the authority asserted? It may range from complete to occasional denial of passage, claims to competence to prescribe and apply authority with respect to navigation, pollution, security, and other threats to coastal well-being, or even to internal matters on passing ships not clearly of concern to the coastal state.

(2) What is the character of the area subjected to authority? Is it highly important to international navigation?

(3) What is the relationship between the authority claimed and the significance of the interests sought to be protected? What alternatives are available to protect these issues?

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[239] Canadian Note, April 16, 1970, *supra*, n. 146, at pp. 613-14.
[240] M. McDougal and W. Burke, *supra*, n. 8, at pp. 196-97

(4) What are the modalities and degrees of interference exercised by the coastal state? Are the modalities limited to functions such as navigation, health, pollution regulations or are they more general and potentially arbitrary for example, requiring prior clearances and authorizations for passage as a matter of principle, irrespective of concrete functional requirements? Do the coastal regulations in fact seriously interfere with international navigation?[241]

In weighing the reasonableness of coastal restrictions on straits and the innocence of passage through straits, reference to the values of the parties is imperative. *Power* is a major issue touching the strategic interests of the parties and of broader groupings of states, as well as the international community. A strait is a source of power and a source of vulnerability which invites power considerations to play a paramount role in determining reasonableness. Power also affects the acceptability of claims to innocent passage. Some states will claim that no passage by warships can be innocent.[242]

Wealth is as important as power in the primarily military sense, insofar as control of straits is concerned. Many "lifelines", notably of fuel, run through straits. If they are interrupted, wealth and power are drastically affected.[243] In the case of straits in comparatively unknown parts of the world such as the Arctic, *enlightenment* is a major value to be protected.[244] *Well-being* of the coastal state, and perhaps of adjoining states, is affected by use of straits. High among the issues relating to well-being are pollution and the continuing fear of radiation from nuclear-powered vessels and warships carrying nuclear weapons.[245] *Skill* becomes a critical value in that the ability to sail through many straits requires navigational and supportive, scientific and technological resources ranging from highly useful to indispensable. In this connection, development of such resources by a state for its own utilization of waterways adds another dimension to the issue of "sharing" the sea lanes with foreign ships.[246]

Respect and *prestige* play a major role for coastal states controlling important straits and maritime states pledged to keep vital straits open — for themselves and/or the international community.[247] *Solidarity* is a major stake in efforts to keep straits free. The issue

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[241] *Ibid.*, at pp. 188-96.
[242] *Ibid.*, at pp. 192-93.
[243] See *supra*, at pp. 337-338.
[244] *Ibid.*
[245] See *infra*, at pp. 526 *et seq.*, for the Soviet case of the North East passage.
[246] See *supra*, at p. 338.
[247] See *supra*, at pp. 344-46.

is usually one in which there is a genuine community interest. *Rectitude* is also strongly at stake, since the effectiveness of the law — if it can be authoritatively expressed — can be judged with great clarity.[248]

A. Canada's Claims for the Northwest Passage Summarized

Canada's claims in the Northwest Passage may be summarized as follows:

Territorial Waters: Exclusive, comprehensive, continuing control over "straits" in Barrow Strait and Prince of Wales Strait, as well as in all waters twelve miles from Canadian coasts that might be used for international navigation.

Contiguous Zone Waters: Partial, continuing control over the waters of the route beyond twelve miles from Canadian territory.

(i) *Clarification of Policy*

The issues presented by the claims and counterclaims of the U.S. with respect to the Northwest Passage and key straits thereof are essentially:

(1) Are there international straits in the parts of the Northwest Passage falling under Canada's twelve-mile limit claim?

(2) If Canada's new twelve-mile limit includes international straits, are the anti-pollution measures now in effect violative of international law standards for the protection of innocent passage in straits?

The answers to these questions are difficult for a number of reasons. The definition of international straits is a controversial matter. The implications of the factual characteristics and record of use of the Northwest Passage are subject to disagreement. Finally, the reasonableness of the Canadian anti-pollution and other measures both in its new contiguous zone and territorial seas must be judged in terms of changing presumptions and expectations with regard to the balance of interests in international straits. Thus, even if it be held that Canada is obliged to treat the Barrow and Prince of Wales Straits as international straits, her claims may still be found reasonable. As remarked with respect to contiguous zones, the presumption in favour of freedom of the seas is increasingly challenged by the presumption for effective pollution control. The law regulating

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[248] See *supra*, at pp. 344 *et seq.*

international straits may change accordingly to justify greater exercise of competence to control access and to prescribe and to apply authority within international straits.

(ii) *Trends in Decision*

Article 16(4) of the 1958 Geneva *Convention on the Territorial Sea and the Contiguous Zone* provides:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.[249]

It is worth noting that the final provision of the Convention differed from the proposed provision of the International Law Commission in that the adverb "normally" was not retained to qualify the verb "used". On this point McDougal and Burke observe:

> The objective in deleting the word was, according to proponents of that course, to assure passage through straits which were actually used and to avoid friction over the concept of normal use. The opposition expressed the view that the right of innocent passage applied only to "recognized international seaways" (expression of delegate of Saudi Arabia) and that deletion of the word "normally" would restrict coastal competence even over straits which were not used for "regular international navigation." The Conference decision to delete "normally" apparently was intended to mean, therefore, that the right of access of both warships and merchant vessels *applies to a very wide category of straits, including those seldom or irregularly used for navigation.*[250]

It appears that the Geneva provision was heavily influenced by the decision of the International Court of Justice in the *Corfu Channel* case.[251] That decision is generally cited as a highly authoritative basis for a broad definition of international straits. The I.C.J.'s broad definition is of particular relevance to the Northwest Passage question because frequency of use was not judged in terms of such qualifications as "substantial", "customary", or "normal". The I.C.J. found it sufficient that the Corfu Channel has been "a useful route for international maritime traffic".[252]

Of course, many international straits are regulated by particular conventional regimes.[253] But, in the absence of a special regime, claims with respect to international straits should be dealt with

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[249] U.S.T.I.A.S. 5639; 15 U.S.T. 1906, at p. 1911. See: M. Whiteman, (1965) 4 *Digest of International Law*, at pp. 463-65.

[250] M. McDougal and W. Burke, *supra*, n. 8, at p. 212. Emphasis added.

[251] The *Corfu Channel* case *(Albania* v. *The United Kingdom)*, International Court of Justice, Judgment of April 9, 1949: (1949) 4 I.C.J. Reports 4, 257.

[252] *Ibid.*, at p. 28.

[253] M. Whiteman, (1965) *Digest of International Law*, at pp. 417-80.

in the light of the 1958 Geneva Convention and the *Corfu Channel* case. Most controversies over straits since 1958 have not turned on the issue of the sufficiency of international traffic. In perhaps the most controversial case, the Egyptian closing of the Straits of Tiran in 1967, the issue was the right of the coastal states to interfere with international traffic that was substantial by any criterion.[254]

Interpretation of the right of innocent passage through international straits has presented continuing problems. Some states, notably Communist, insist on the right to control innocent passage by warships through requirements for previous "authorization". Although such restrictions reflect reservations to the 1958 Geneva Convention, it is questionable whether they are not contrary to customary law as reflected in the *Corfu Channel* case.[255] Nevertheless, it appears that interpretations, even by states not making reservations to the Geneva Convention, render uncertain the enjoyment of the rights of passage in many straits. Accordingly, the accelerating trend to claims of a twelve-mile territorial sea is viewed with deep concern by maritime states.

Indeed, it appears increasingly that the whole question of freedom of passage through straits is subject to thoroughgoing review and in need of community action. It is estimated that approximately 120 straits are affected by twelve-mile limit claims. These include such vital straits as the Bering, Malacca, and Gibraltar.[256]

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[254] *Ibid.*, at pp. 465-80; O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, (1967) 11 Orbis 692, at pp. 707-10.

[255] M. McDougal and W. Burke, *supra*, n. 8.

[256] F. Kruger-Sprengel, *supra*, n. 122, at p. 24, citing Office of the Geographer, U.S. Department of State, *World Straits Affected by 12-Mile Territorial Sea*, (1971). It should be noted that the United States rejects the usage "innocent passage" through straits (e.g., Article 16(4) of the 1958 Geneva *Convention on the Territorial Sea*). Mr. Charles N. Bower, Acting Legal Adviser Department of State, has stated:

> The U.S. straits position is based on the fact that global communications require movement through and over straits and that an extension of the territorial sea from 3 to 12 miles would cause a large number of important international straits to become overlapped by territorial waters. Without a new legal concept ensuring unimpeded transit through and over such straits, states could assert that the doctrine of innocent passage would be applicable. The doctrine of innocent passage is inadequate for it has been interpreted subjectively by some coastal states as to what is prejudicial to their "peace, good order, and security". The U.S. free transit proposal provides for a limited right — the right for a ship or an aircraft to pass from one end of an international strait to the other end....

Hearing on S. Res. 82, Before the Subcomm. on Oceans and International Environment of the Senate Committee on Foreign Relations, 93d Cong., 1st Sess., June 19, 1973, at p. 4.

In the face of these developments, the United States and Soviet Union submitted a draft convention as early as 1968 in which the twelve-mile limit would be accepted subject to an Article on straits. The Draft Article would ensure that "all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas".[257] Designation of corridors for transit by coastal states was provided for. This Draft Article was submitted on August 3, 1971, by the United States in Geneva to Subcommittee II of the U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.[258]

Most recently, the United States has made a number of proposals designed to meet the concerns of coastal states regarding navigation hazards and pollution in straits resulting from international traffic, as well as regnlation of overflights. The essence of the U.S. approach is regulation by international conventions under the auspices and direction of IMCO and ICAO (International Civil Aviation Organization). Ships passing through international straits would be obliged to observe international traffic separation schemes. Such schemes exist now but are not binding. The U.S. hopes to make them binding at the Law of the Sea Conference. The U.S. also proposed free overflight over straits to be arranged in accordance with ICAO standards.[259]

Meanwhile, IMCO has sought to improve the regime of anti-pollution measures. 1971 Amendments to the 1954 London Convention have established new regulations on ship design and construction affecting large tankers, applied since January 1972. Further, IMCO is considering proposals to extend the 1969 Conventions to substances other than oil. Finally, IMCO undertook in a 1973 Conference on Marine Pollution to:

(1) prohibit all intentional discharge of oil wastes that pollute the seas;

(2) minimize further accidental oil spills through, *inter alia,* new regulations for vessels design and equipment, revisions in navi-

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257 Kruger-Sprengel, *supra,* n. 122, at p. 22 (fn. 41).

258 U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee, (1971) 55 Dep't. State Bull. 261, 263, 266. See: U.N. Doc. A/AC. 138/S.C. II/L.4.

259 U.S. Information Service: Statement by the Honorable John R. Stevenson, United States Representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Subcommittee II, (July 28, 1972).

gation rules, new traffic separation schemes, and new oil transfer procedures;

(3) extend controls to hazardous cargoes other than oil. The U.S. supports this initiative, urges adhesion to, and compliance with, past IMCO conventions, and proposes to improve and tie together the network of conventional regulations at the Law of the Sea Conference.[260]

In explaining the continuing U.S. position, U.S. Department of State Legal Advisor, John R. Stevenson, specifically singles out the Canadian approach as one to be sympathized with but resisted.[261]

Thus the basic issue remains: enlightened unilateralism versus an international approach combining a network of international agreements developed and overseen by functional organizations (IMCO, ICAO) and comprehensive codification and progressive development

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[260] Stated by John R. Stevenson, August 2, 1972. A conference in London in November 1973 produced the International Marine Pollution Convention.

> On November 13, 1972, representatives of 57 states, among 91 participants, signed the London Convention on the Dumping of Wastes at Sea. The convention requires adherents "to take all practical steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Quoted in *New York Times*, November 14, 1972, at p. 1, cols. 4-5; at p. 14, col. 1. The *New York Times* reports that in the London *Convention on the Dumping of Wastes at Sea*, "The enforcement of the anti-dumping measures and sanctions is left to individual countries. There is no attempt to coordinate penalties": *Ibid.*, at p. 14, col. 1.

[261] On the continuing U.S. efforts to develop the IMCO regime, see the following statements and documents in *U.S. Presents Proposals at Preparatory Session for Law of the Sea Conference*, (1973) 69 Dep't. State Bull. 397-415.

Statement by Ambassador Stevenson, Subcommittee II, July 18, discussing, *inter alia*, coastal seabed economic jurisdiction and reiterating U.S. position that "our willingness to move to a twelve-mile territorial sea is conditioned on international guarantees of free transit through and over straits used for international navigation": *Ibid.*, at p. 399.

Statement by Mr. Moore, Subcommittee III, July 18, discusses draft articles for the protection of the marine environment (U.N. Doc. A/Ac. 138/SC.III/L. 40): *Ibid.*, at pp. 402-406.

John Norton Moore's July 18, 1973 statement may also be found in Hearings on S. Res. 82, Before the Subcomm. on Oceans and International Environment of the Senate Committee on Foreign Relations, 93rd Cong., 1st Sess., June 19, 1973, at pp. 68-72, followed by the U.S. Draft Articles on the Protection of the Marine Environment and the Prevention of Marine Pollution: *Ibid.*, at pp. 72-75.

at the Law of the Sea Conference. Insofar as Canada aspires to the role of a leader in creating customary international law, this is how the situation rests at the moment with respect to straits. But it is necessary to bear in mind the unique aspects of the Canadian situation and claims. How does Canada's position compare with that of other Arctic powers?

The practice most relevant to the Northwest Passage would seem to be that of the Soviet Union with respect to the Northeast Passage. Pharand describes it as follows:

> Starting from Murmansk, the main lane runs through the Barents Sea, passing north of Novaya Zemlya, and proceeds across the Kara Sea into the Vilkitsky Straits of Severnaya Zemlya; having crossed the straits, the route traverses the Laptev Sea and doubles into a southern lane through the Dimitri Laptev Strait, and into a northern one through the Sannikov Strait, both of which lead into the East Siberian Sea. There the route divides again to pass on either side of the small Medvezhy Islands; it then resumes as a single lane along the coast south of Wrangel Island, into the Chikchi Sea and through Bering Strait...[262]

This route is used by some 300 vessels, carrying over 1,000,000 tons of cargo to Vladivostok. Use of this route cuts to roughly half the distance covered otherwise by way of the Panama or Suez Canals. Apparently, the Northeast Passage has a significant potential as an international waterway. But its use is limited by two physical problems: the depth of the water and the obstruction of ice. Use of the Northeast Passage is also restricted by the fact that the Soviet twelve-mile limit renders the Vilkitsky Straits and the strait south of the Medvezhy Islands territorial waters.[263]

In 1965 and 1967, U.S. Coast Guard icebreakers seeking to traverse the Arctic Ocean were prevented from entering Vilkitsky Straits by extremely strong Soviet protests and warnings. The U.S. protested after the 1967 incident that:

> There is a right of innocent passage for all ships through straits used for international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Union as being overlapped by territorial waters, and there is an unlimited right of navigation on the high seas of straits comprising both high seas and territorial waters.[264]

There is some evidence that the Soviet Union has thought of all of the waters adjacent to its coasts beyond the twelve-mile territorial sea as within its exclusive jurisdiction under a sector theory. How-

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[262] Pharand, *supra*, n. 234, at p. 22.

[263] *Ibid.*, at p. 22-27.

[264] (1967) 57 Dep't. State Bull. 362, quoted in Pharand, *supra*, n. 234, at p. 17.

ever, it appears that this is not the true Soviet view.[265] In any event, the obstacle to use by foreign vessels of the Northeast Passage appears to be two-fold. First, transit through the Vilkitsky Straits and the straits south of the Medvezhy Islands seems mandatory because of ice conditions. Since these straits pass through Soviet territorial waters they are subject to Soviet restrictions on the passage of warships. Thus far the foreign ships that have been turned back from these straits have been U.S. Coast Guard icebreakers which could fairly be considered "warships".[266] However, the Soviet restrictions on warships appear to be in violation of customary international law as clarified by the *Corfu Channel* case. A Soviet Reservation to the 1958 Geneva *Territorial Sea and Contiguous Zone Convention* with respect to warships is, in the judgment of Pharand, "incompatible with the object and purpose of the Convention and is of quite doubtful validity in international law.[267]

The record of passage of foreign vessels through the Northeast Passage is very minimal. It appears that the development of this waterway has been accomplished exclusively by the Soviets for the benefit of their own shipping.[268] In this respect the Soviet Union has a stronger claim to exclusive control than Canada does with respect to the Northwest Passage where U.S. contributions have

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[265] *Ibid.*, at pp. 28-38. See generally: W. Butler, *The Soviet Union and the Law of the Sea*, (1971).

[266] Pharand, *supra*, n. 234.

[267] *Ibid.*, at p. 41; see his discussion at pp. 38-9.

[268] *Ibid.*, at pp. 17-22. Pharand states:

> ...it appears that only three foreign ships have ever traversed the Northern Sea Route; the Swedish ship *Vega*, under the command of Nordenskiöld, became the first to sail the whole length of the Northeast Passage in 1878-79; the second was the Norwegian ship *Maud*, led by Amundsen in 1918-19. The third was the *Komet*, of the Third Reich, which traversed the entire passage from August 9 to September 5, 1940. The first two ships made voyages of scientific exploration, before the development of the Northeast Passage by the Soviets; the third voyage was made with the approval of the Soviet Union, and with the assistance of its icebreakers. Subject to the few exceptions just mentioned, it is doubtful if any foreign ship has ever crossed the Vilkitsky Straits without being escorted by a Soviet icebreaker pilot or receiving special permission from the Soviet Union. Thus the legal regime of ordinary territorial waters would apply to those straits of the Northern Sea Route which are too narrow to leave a strip of high seas in the middle; allowing for a breadth of 12 nautical miles from the coast and around the islands, there are two such passages: the Vilkitsky Straits, and the strait formed by the Medvezhy Islands and the coast.

Ibid., at p. 40.

played a major part in improving prospects for use. If the U.S.S.R. is consistent it should view favorably the Canadian claims with respect to the Northwest Passage.[269]

(iii) *Appraisal and Recommendation*

In balancing claims to access to straits supported by the principle of freedom of the seas with claims to control access supported by the principle of environmental protection (or of self-defense), it is difficult and unnecessary to produce a generally applicable formula or hierarchy of values. It is increasingly apparent that this balance will have to be determined contextually. With respect to the Northwest Passage, the following points may be made:

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[269] This point is examined on the basis of sparse evidence in Dehner, *Creeping Jurisdiction in the Arctic: Has the Soviet Union Joined Canada?*, (1972) 13 Harv. Int'l. L.J. 271. Dehner states:

> The Soviet Union, with the world's longest Arctic coastline, apparently reacted affirmatively to the Canadian claim. This Comment will examine the Soviet response to determine the nature and extent of Soviet support for the Canadian assertion. Because there is no definitive Soviet pronouncement on the subject, an understanding of the U.S.S.R.'s position must be based on the following factors: Soviet participation in international environmental agencies, Soviet attitudes towards the law of the sea, Soviet doctrine and practice in the Arctic, and 1971 Soviet-Canadian agreements and statements.

Ibid., at pp. 271-72. Dehner quotes Beesley, *supra*, n. 6, at p. 5: "The Soviet Government has ... clearly indicated its support for Canada's Arctic Waters Pollution legislation." Dehner notes the 1971 Trudeau-Kosygin talks, observing:

> Against this background of Arctic practice and doctrine, in 1971 the Soviet Union agreed with Canada as to the special status of Arctic waters and the responsibilities and rights of Arctic coastal states. Statements issued after the May, 1971 visit of Prime Minister Trudeau to the Soviet Union and after the October, 1971 visit of Premier Kosygin to Canada confirmed Soviet-Canadian cooperation on principles governing Arctic navigation.
>
> The Protocol on Consultations between the Soviet Union and Canada of May, 1971, recognized "the responsibility of both sides for preserving and protecting the environment in Arctic and sub-Arctic regions". The communique on Trudeau's visit stated that "the two sides share the opinion that they bear a special responsibility and possess corresponding rights with respect to ensuring the safety of navigation and protecting the balance of nature in the Arctic regions". While it is doubtful that the Soviets meant by "corresponding rights" the precise 100-mile claims made by Canada, they have nonetheless stated a basis for asserting special rights over Arctic waters beyond twelve miles from shore.

(1972) 13 Harv. Int'l. L.J. 271, at p. 285.

(1) The status, as international waterways, of the several possible Northwest Passages is unsettled and controverted. Clearly neither the Northwest Passage routes generally nor the straits within these routes and within Canada's new 12-mile territorial seas in particular qualify as international waterways on the basis of use in the past. These waterways probably will not qualify as international straits on the basis of ocean traffic in the near future, although this could change.

(2) If, as Pharand concluded in 1969, the Northwest Passage has a geographic character that qualifies it for status of an international strait,[270] the lack of traffic through it is not conclusive and Canada would be violating present international law if it were to control access through these waters in an arbitrary manner.

(3) Since the status of international straits numbering in the neighborhood of 120, is being placed in question by the trend to twelve-mile territorial sea claims, and, since this question is the subject of draft conventions to be considered at the Law of the Sea Conference, it seems pointless to take an "either/or" position on the Northwest Passage solely on the basis of the debate over the requirement for actual use to qualify as an international strait. Once again, the issue is not whether Canada's claims to control the Northwest Passage are "legal" or "illegal" but, rather, whether they are reasonable and generally conducive to the support of legitimate exclusive and inclusive values within the public order of the oceans.

(4) Accordingly, it is premature to pass final judgment on the effect of Canada's claims on inclusive rights in the Northwest Passage. We have little basis on which to judge the reasonableness of a Canadian regime in these waters. It is fair to say that if Canada were to adopt a position as arbitrary and hostile to inclusive rights in the Northwest Passage as the Soviet Union has maintained in the Northeast Passage there would be a violation of legitimate rights of innocent passage through waters that are potentially, if not actually, "international".

(5) Moreover, if Canada attempts to follow the Soviet model in the Northeast Passage to the extent of treating the whole area — land, sea and ice — as "Canadian", to be further developed as a solely "Canadian" enterprise to be shared only on the basis of Canadian policy rather than legal obligation, the inclusive rights of other states and of the world community will have been violated.

We recommended that Canada, the United States, and the Soviet Union — with perhaps other Arctic powers — develop the Northwest

[270] Pharand, *supra*, n. 234.

Passage cooperatively, in such a way that innocent passage and protection of the environment are both guaranteed. The nature of this cooperation should be dictated by these two objectives rather than by doctrinaire claims either to exclusive control by Canada or inclusive free access subject only to the still unproven and self-enforced international law of pollution.

It appears that the actual effects of the disposition of the Northwest Passage controversy on the regime of international straits will not be great in the short run. It is interesting to note that recent surveys of the impact of the twelve-mile territorial sea on international straits do not mention the Northwest Passage.[271] Accordingly, the effects of the processes of interaction and of claims relative to this matter will probably not make a very significant mark on the evolving law of the oceans. However, as both Canada and the United States agree, the degree of success that results from the respectively unilateral and international initiatives of these nations will be influential in determining future conditions in all of the relevant processes: interaction, claims, and authoritative decision.

Conclusion: The Process Of Authoritative Decision

For the Lasswell-McDougal jurisprudence, international law is a process, the "comprehensive process of authoritative decision, transcending all territorial boundaries, by which the peoples of the world clarify and implement their common interests". In this article we have been examining the Canadian Anti-Pollution initiatives in the Arctic in terms of the two processes that precede and form the societal bases for the process of authoritative decision, i.e., the processes of interaction and of claims. We will conclude this article with some indications of the relevance of the Lasswell-McDougal system to the continuing issues raised by the Canadian initiatives.

Following the Lasswell-McDougal format we will comment upon:

(1) constitutive and public order decisions in the law of the sea;

(2) the components in the process of authoritative decision: decision-makers, objectives, arenas, bases of power, strategies, outcomes, effects, and conditions;

(3) the decision phases: intelligence, promotion, prescription, invocation, application, termination and appraisal.

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[271] See, e.g.: *Sovereignty of the Sea,* Geographic Bulletin No. 3, published by the Office of the Geographer, U.S. Department of State; Table III, "Widths of Selected Straits and Channels", (October, 1969), at pp. 22-27.

(i) *Constitutive and Public Order Decisions*

Within the flow of authoritative decision in the global community, we discern two kinds of decision: Constitutive and Public Order. McDougal says:

> We may call these the "constitutional" or, preferably, the constitutive decisions. There are the decisions which determine who the authorized decision-makers are; what policies they are to follow; in what structures of authority they are to act; what their bases of power for sanctioning purposes are to be; and what procedures they are to follow in making all the different kinds of decisions necessary to clarifying and implementing general community policy.[272]

McDougal continues:

> The second kind of decisions, embraced within any comprehensive process of authoritative decision, are those that emerge from constitutive process for the regulation of all the community's various value processes. These are the decisions by which resources are allocated, planned, developed, and exploited; by which an environment is protected or devastated; by which populations are protected, regulated, and controlled; by which an economy is maintained or destroyed; by which health is fostered or neglected; by which human rights are protected or deprived; by which enlightenment is encouraged or retarded; and so on. One might describe this second kind or category of decisions in many different ways. For convenience we refer to them as "public order" decisions.[273]

These decisions, constitutive and public order, are made through the operation of the two basic sources of international law, treaties and custom. McDougal observes:

> Historically, international law has been made largely in two different ways. One way is by an explicit agreement process, in which varying numbers of states get together and project a common policy in relatively deliberate, explicit form. The other, and by far the most important, way has been by unarticulated, habitual cooperative behavior in different kinds of activities from which expectations about authority and control are derived. In this latter modality of law-making, it is not, as some recent clamant voices have asserted, the *unilateral* claim by one state that makes law, but rather the parallel claims by many states, made in a context of expectations of reciprocity and mutual tolerance. Fortunately, the practices of the United Nations have given a great assist to both these traditional

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[272] M. McDougal, *The Law of the High Seas in Time of Peace*, (1973) 30 Naval War College Review 35, at p. 37. M. McDougal and W. Burke, *supra*, n. 8; M. McDougal, H. Lasswell and I. Vlasic, *supra*, n. 8, at pp. 94-96; M. McDougal, "International Law and the Law of the Sea", in *The Law of the Sea*, (L. Alexander, ed.).

[273] M. McDougal, *The Law of the High Seas in Time of Peace, ibid.*, at p. 37. See: M. McDougal and W. Burke, *supra*, n. 8, at p. 36; M. McDougal, "International Law and the Law of the Sea", in *The Law of the Sea*, (L. Alexander, ed.), at pp. 5-7.

> modes of law-making and are beginning to add an institutional dimension more closely approximating genuine parliamentary enactment.[274]

Applied to the Canadian Arctic initiatives, these distinctions raise the issue of the level of decisions in question. It is clear that the importance of this subject is due in great measure to the fact that Canada has challenged the allegedly existing constitutive process.

With respect to the law of the sea, Canada is contending, *inter alia,* that:

(1) the "authorized decision-makers" are no longer only the maritime states but include coastal and other states with vital interests in the oceans;

(2) the "freedom of the seas" policies informing the old constitutive process are obsolete and must be revised to protect other values, notably conservation and prevention of pollution;

(3) the "structures of authority" provided by law of the sea conferences and resultant conventions, as well as by public order decisions of maritime states and resultant custom, are inadequate and unacceptable to Canada and other states;

(4) the "bases of power" of the old constituent structure of authority are inadequate to enforce measures designed to remedy unacceptable deficiencies in the law of the sea (e.g., the IMCO conventions) and are insufficient to deter Canada and like-minded states from challenging the old law of the sea.

Accordingly, Canada conceives of its claims and actions in the Arctic as "public order decisions" contributing to a revised and improved international constitutive process. While not entirely discounting the possible utility of at least regional and/or functional conferences and resultant conventions, Canada places its decisions in the category of customary international law in the making. However, since the Canadian initiatives are consciously cast in the form of claims to be weighed and accepted by other states and entities in the process of authoritative decision, it is important to repeat McDougal's caution that, "it is not, as some recent clamant voices have asserted, the *unilateral* claim by one state that makes law, but rather the parallel claims of many states, made in a context of expectations of reciprocity and mutual tolerance".[275]

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[274] M. McDougal, *The Law of the High Seas in Time of Peace, supra,* n. 272, at p. 38. Original emphasis. Morin, *supra,* n. 185, does not appear to emphasize the need for acceptance of Canada's unilateral initiatives through adoption of similar claims: at pp. 159, 244.

[275] *Ibid.*

Just how many "parallel claims" and how much evidence of "expectations of reciprocity" would be needed to vindicate Canada's initiatives are complex, difficult but necessary questions ahead. These questions are rendered more difficult by the ambiguities noted in this article about the real nature of the Canadian claims. Whether, for instance, Canada ultimately claims exclusive "sovereign" rights in the "Canadian" Arctic and whether her rationale is mainly the "uniqueness" of the Arctic environment will affect the extent to which clear claims of other states to exclusive "sovereign" rights based on other "unique" considerations may be judged "parallel" and conducive to "expectations of reciprocity and mutual tolerance".

These difficulties of relating Canada's claims to a possible emerging pattern of claims, however, appear to be of no greater magnitude than the difficulties awaiting international conferences on the law of the sea. It should be recalled that even when it was thought that state policies and practices on the law of the sea were "ripe" for codification, the effort was abortive in 1930.[276] In 1958 and 1960 it was hoped that notorious disagreements could be overcome at Geneva but they were not. The extent, quality and pace of radical challenge and abandonment of the claims and expectations of the traditional, 1958, law of the sea provides little encouragement for hopes for a successful comprehensive conference on the law of the sea in the near future. Indeed, McDougal may well be right in his long-standing skepticism about such conferences.[277]

Given these difficulties, Canada and those most concerned states might do well to seek modes of public order decision other than the polar extremes of unilateral claims and ambitious international conferences. If, for example, Canada would really limit its claims, clearly renounce exclusive sovereignty, confine their scope to the "unique" Arctic environment and seek regional/functional regimes on the basis of the reasonableness of measures such as the 1970 Anti-Pollution Act, adequate practical relief from environmental threats might be obtained. If the United States and other states with vital interests in the Arctic acceded to Canada's "unique" claims — as *unique* — public order decisions might emerge that protected the

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[276] League of Nations, *Acts of the Conference for the Codification of International Law*, (The Hague, 1930); on the failure to obtain agreement on the width of the territorial sea, see: M. McDougal and W. Burke, *supra*, n. 8, at pp. 522-26.

[277] M. McDougal, "International Law and the Law of the Sea", in *The Law of the Sea*, (L. Alexander, ed.), at pp. 3, 14; M. McDougal and W. Burke, *supra*, n. 8, at pp. 40-41.

respective interests of the parties to this process of authoritative decision.[278]

To be sure, qualification of such understandings as "unique" would not prevent their invocation by other claimants whose "unique" rationales might not be so persuasive. Moreover, there is no question that a particularistic regime accepting Canada's new claims would contribute significantly, perhaps critically, to the broad pattern of claims with respect to the oceans. The result might well be serious losses for the inclusive rights of global, regional and functional communities as well as for many states. However, unless dramatic changes occur with respect to the prospects for reform of the international constitutive process, the best hope would appear to lie with limited, responsible changes in the *status quo*, however imperfect rather than in the poles of a futile attempt to "hold the line" on the traditional law of the sea or an all-or-nothing gamble on one or even several global conferences.

It may be, of course, that Canada would not foreclose its possible claims of exclusive sovereignty in the "Canadian" Arctic. It may also develop that Canada is not content to rest on the rationale for its "unique" Arctic environment but will branch out in other areas where there is no "uniqueness" or there is a different uniqueness.

If, as pending legislation suggests, Canada extends its claims of near exclusive jurisdiction one-hundred miles beyond its territorial seas on its Atlantic and Pacific coasts, the strength of the argument of uniqueness is drastically diminished.[279] We then enter the realm

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[278] A possibly relevant recent model might be found in the U.S.-Brazilian agreement of May 9, 1972, whereby Brazil's claim to a two-hundred mile limit as well as U.S. opposition thereto are "noted" and pragmatic arrangements are made to protect the shrimp fisheries in the area: *Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Concerning Shrimp,* and the *Agreed Minute Relating to the Agreement,* (photostat of English Original, Department of State, U.S.A.), Brasilia, DF, Brazil, (May 9, 1972).

[279] The House of Commons of Canada, Bill C-186, 21 Eliz. II, 1972, 28th Parl., 4th Sess., First Reading, March 28, 1972.

The Explanatory Note to the proposed legislation states:

> The purpose of the Bill is to extend the concept and jurisdiction of the *Arctic Waters Pollution Prevention Act* to the waters of the Pacific and Atlantic Oceans to an extent of 100 nautical miles off the Pacific and Atlantic Coasts.
>
> The Bill seeks to change the title of the *Arctic Waters Pollution Prevention Act* to the *Arctic, Atlantic and Pacific Waters Pollution Prevention Act.*

I acknowledge the assistance of my student, Mr. David F. Ferreira, B.S.F.S. 1973, Georgetown, in investigating this possibility with the Canadian Embassy in Washington. We were given the impression that it was unlikely.

of claims such as those of the CEP states of Latin America, Brazil and Iceland. The kind of conciliatory practical accommodations which might meet the practical problems of the Arctic and not unduly encourage a run-away series of exclusive claims to the oceans would probably not be possible if Canada claimed great new areas of the Atlantic and Pacific.

(ii) *The Process of Authoritative Decision*

In the unfolding process of authoritative decision with respect to Canada's Arctic claims, some aspects of the Lasswell-McDougal value and phase analyses appear to be particularly significant. The *decision-makers* will be mainly national decision-makers, playing their dual role of meeting national and international responsibilities in accordance with the concept of *dédoublement fonctionnel.*[280] Important contributions will be made to the process of authoritative decision by the executive, legislative and judicial branches of Canada, the United States and other interested states. It is, moveover, quite conceivable that decisions taken for private corporations, e.g., Humble Oil, will contribute markedly to the pattern of acceptance or rejection of Canada's claims.

This estimate, of course, reflects our conviction that the future of Canada's Arctic claims and of the law of the sea generally will be determined by the processes of interaction, claim and authoritative decision yielding custom, not conventional law. We also judge that there is little likelihood that the basic issues raised by Canada will be subjected to international arbitration and none that it will be brought to international adjudication.

The *objectives* of the authoritative decision-makers ought to be consonant with the overriding objective of promoting "the fullest, conserving, peaceful use of the sea by all participants for achieving all their individual values in the greatest measure possible".[281] These involve: (1) securing reasonable inclusive uses of the oceans; (2) "rejection of all assertions of special interests — that is, of claims made irrespective of or against common interest"; (3) maintenance of an "evolving" balance "between different common interests — whether inclusive or exclusive" when these interests conflict.[282]

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[280] M. McDougal and W. Burke, *supra,* n. 8, at pp. 36-37, 40-41; M. McDougal, H. Lasswell, and I. Vlasic, *supra,* n. 8, at pp. 96-101.

[281] M. McDougal and W. Burke, *supra,* n. 8, at p. 37.

[282] *Ibid.*

Applied to Canada's case, the objectives of authoritative decision-makers should include the following:

(1) determination of the limits of "reasonable inclusive uses of the oceans", i.e., what should be the width and character of territorial waters, contiguous zones and international straits in the light of emerging trends in the processes of interaction, claims and authoritative decision;

(2) identification and rejection of "special interests" incompatible with the "common interests", if there are indeed any such "special interests" in the Canadian case;

(3) formulate the "evolving balance" between freedom of navigation, scientific activity, participation in the appropriation of the living and mineral resources of the oceans, on the one hand, and protection of the environment of the Canadian Arctic, the Canadian hinterland, and all areas and activities affected by them, on the other.

If we are correct in our estimates regarding the form in which constituent and public order decision about Canada's Arctic claims will be taken, the *arenas* in which the dynamics of claims and counterclaims produce new expectations will be disorganized and bilateral.[283] As in the case of controversies involving claims such as those of the Latin American CEP states and Iceland, the arenas for decision may be ships, aircraft, icy waters, remote control stations. Or the arenas may be in foreign offices, domestic legislatures and national courts.

Organized arenas such as UN Committees, General Assembly proceedings, and international conferences serve as points of claim, counter-claim and decision. But it appears likely that these arenas will be relevant to the determination of disputes over Canada's claims more in terms of the total pattern of acceptance or rejection of them in all arenas than on the basis of their supposed superior weight or authority.

The *bases of power* available to authoritative decision-makers, if our previous estimate is valid, will tend to be national bases of power.[284] The elements of national power surveyed in outlining the process of interaction will furnish the foundations for determining whether authoritative decisions become controlling decisions.

Thus, the power configurations in U.S.-Canadian relations may determine in part the extent to which the parties continue or alleviate their present confrontation. If somehow the process of authoritative

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[283] *Ibid.*, at pp. 38-39.
[284] *Ibid.*, at p. 39.

decision produces perspectives rejecting or limiting Canada's claims, the power position of the U.S. might provide bases for pressures to secure Canada's compliance with the emerging law. At the moment this possibility seems remote.

If, as seems more likely, the process of authoritative decision does not produce clear answers to the issues raised by Canada, or shows trends supportive of Canada's claims, a difficult problem will have to be faced. This is the problem of enforcing customary international law against the will of a powerful state which has vital interests at stake and can legitimately claim that it has opposed the alleged new legal perspectives to which it is urged to conform.

This problem looms as a major possibility. In this article we have emphasized the extent to which U.S.-Canadian differences over Arctic policies have been questions of principle. But they are also questions of vital interest, notably with respect to future appropriation of the oil and gas resources of the area. The United States, confronted by a growing consensus supporting Canada's position and faced with grave questions of protection of fuel sources, may be too powerful to handle. Or, a vulnerable U.S. may be amenable to compromises. In any event, the bases of power of the states concerned — and we have not discussed here the possible combinations of national power of other states, such as the Soviet Union — will play a central role in determining the future perspectives of the law of the sea in the Arctic.[285]

If it develops that there is resistance by Canada or the United States to an emerging consensus within the process of authoritative decision, the nations concerned may employ the traditional *strategies*: political-diplomatic-legal, ideological, economic, military, in support of their positions.[286] It is to be expected that the use of the political-diplomatic-legal instrument will dominate the interac-

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[285] A potent influence will surely be the U.S. "energy crisis". The U.S. has reserves of oil and natural gas for only ten and eleven years respectively. See: U.S. Geological Survey estimates published in "America's Energy Crisis", *Newsweek*, (January 22, 1973), at pp. 52-54, 59.

See generally: U.S. Department of Interior, *U.S. Energy Outlook*, vol. 2; American Gas Association, Arlington Virginia, *26 Reserves of Crude Oil, Natural Gas Liquids and Natural Gas in the United States and Canada*, (May, 1972), at pp. 1-2.

The upshot of current estimates of U.S. needs and of U.S. and Canadian oil and gas reserves is that Canada has untapped and unexplored fuel resources which will be greatly desired by the United States. Whether these needs will serve to strenghten or weaken the total power positions of the two parties remains to be seen.

[286] M. McDougal and W. Burke, *supra*, n. 8, at p. 40.

tion. Each side will seek to identify its position with the "true" interests of the international community. Supporting such efforts, major campaigns may be waged to influence national and international public opinion. Given growing concerns for environmental protection on the one hand and for assurance of adequate fuel on the other, the psychological (ideological in the Lasswell-McDougal system) instrument may play an extremely important role.

We have already pointed out the elements of economic interdependence in U.S.-Canadian relations and the potential effectiveness of economic coercion by the U.S. It would be tragic if this potential were to be mobilized for coercive purposes. But tragic or not, if the stakes grow increasingly, economic coercion seems quite likely. At this point it can only be emphasized that any use of economic pressures by either party to the dispute over Arctic policies should be made with the "right intention" of supporting legitimate exclusive as well as inclusive claims.

It is barely conceivable that the military instrument might be used by the parties to the Arctic controversy. It is possible that threat or use of military force in some local situation might provoke a military response. Surely such an eventuality should be avoided and if confronted, contained. Unfortunately the "self-defense" rationale and spirit of Canada's initiative tends to make such an eventuality credible. Moreover, unlike the U.S. relation with the CEP Latin American States in the "Tuna War", use of force in U.S.-Canadian Arctic relationships would probably be seen as involving vital interests. It would be imprudent to assume that these problems, if left unresolved, could not lead to military confrontations.

The *outcomes* of the process of authoritative decision will reveal whether or not the dialectical process of claim and counterclaim has produced law to resolve disputes over the Canadian Arctic. This law, in the Lasswell-McDougal jurisprudence, must contain two basic elements: patterns of authority and patterns of control. Decisions relative to the Arctic claims will be "authoritative" if they meet "community expectations about how decisions should be made and about which established community decision-makers should make them". They will be "controlling" if they are effectively sanctioned.[287]

The forms taken by the products of the process of authoritative decision may be characterized in terms of prescriptions emanating from the sources of international law. They may also be characterized in terms of the Lasswellian tasks or "authority functions"

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[287] J. Moore, "Prolagomenon to the Jurisprudence of Myres McDougal and Harold Lasswell", in (1972) 51 *Law and the Indo-China War, supra,* n. 8.

of the decision phase, to be treated at the end of this article. The basic choice with respect to possible prescriptions remains that between conventions and custom. We have repeatedly indicated our preference for custom as the best hope for an adequate law of the sea.

Among the reasons for this preference, in an age much given to efforts to solve problems through conventions drafted by near-global conferences, are the following:

(1) Custom reflects state expectations better than conventions; conventions are useful to the extent they relate to the state expectations about patterns of authority and control.

(2) Given the large number and heterogeneity of the international persons called upon to make conventional international law, custom is a more effective way of obtaining maximum consensus among the parties most vitally concerned with an issue.

(3) Customary law has the flexibility to deal with the changing character of international interaction and claims relative to the law of the sea.

Applied to the Canadian Arctic we expect the outcome of the ongoing process of authoritative decision to be:

(1) recognition of the twelve-mile limit for territorial waters;

(2) recognition of some kind of anti-pollution contiguous zone beyond the twelve-mile territorial sea. The principal unresolved issue is not the general acceptability of such a zone or its width, whether one-hundred miles or some other distance, but its restriction of exclusive coastal rights to reasonable measures necessary to the limited function of preventing pollution and its protection of other inclusive rights such as freedom of access;

(3) resolution of the impasse between exclusive claims to control straits affected by 12-mile limits and inclusive rights of transit through international straits.

The *effects* of these processes will be seen in the extent to which reasonable exclusive rights are balanced with inclusive rights. This balance is a two-fold matter. It involves the substantive content of exclusive and inclusive rights as well as the procedural precedents and expectations created.

We have emphasized in this article that the Canadian Arctic claims are important both for their content and for their possible impact on expectations about the way in which the law of the sea will be made. Given power bases of the main participants and the historic primacy of the law of the sea in the development of international law

generally, the *effects* of the process relative to the Canadian Arctic may have vital impact on the future of international law.

The *conditions* in which the world process of authoritative decision produces and elaborates new law promise to test the durability and flexibility of that law. We have mentioned earlier some conditions already to be found in the process of interaction, viz., changing structure and dynamics of the international political system, the changing state of science and technology, and new patterns of interdependence with respect to problems such as fish and fuel resources and threats of pollution.[288]

Additionally, the state of the world process of authoritative decision is itself a critical element in future conditions. Successes, failures and prolonged impasses within the process of authoritative decision will contribute to trends in the processes of interaction and claim. The very increase in attention currently being drawn to the law of the sea may make its fate more significant to the broad thrust of international politics than has been the case with any attempt of modern history to strengthen international law.

(iii) *The Decision Phases of the Process of Authoritative Decision*

Finally, it is useful to note the functions that must be performed by authoritative decision-makers in fulfillment of their functions on behalf both of their national and of the international community. All have said that these decision-makers are primarily responsible members of the relevant executive agencies, of the legislature, and of the courts in Canada and the United States.

The *intelligence* phase involves the "transmission or withholding of information relevant to policy action".[289] This phase is already well advanced in Canada and the United States. One reason for the substantial literature on this subject is the open and generous public information policies of Canada which makes necessary documentation readily available. Pertinent information about the issues in the Arctic generally is easily obtained. Since responsible judgments as to the reasonableness of the claims turns in great measure on informed estimates of practical questions such as appropriation of resources and estimates of pollution, it is obviously most beneficial

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[288] *Supra*, at pp. 352-53.

[289] H. Lasswell, "Future Systems of Identity in the World Community", in 4 *The Future of the International Legal Order*, (C. Black and R. Falk, eds.), at p. 30; on the decision phase see: M. McDougal, "International Law and the Law of the Sea", in *The Law of the Sea*, (L. Alexander, ed.), at pp. 11-13; M. McDougal, H. Lasswell and I. Vlasic, *supra*, n. 8, at pp. 113-127.

to the overall process of authoritative decision to begin with excellent intelligence.

The *promotion* phase involves "the active mobilization of support for major policies".[290] At this point in the evolution of problems in the Arctic, the promotion task is one of competitive public advocacy. The nature of the subject matter is such that this competitive public advocacy will not address strictly national audiences. Concern for the practical stakes such as energy sources and pollution is transnational. Sympathy for would-be enlightened unilateralism or for collective approaches exists both in Canada and the United States. The competition in promoting national policies may result in altering those policies as well as in contributing to international consensus.

Prescription is an ultimate object in this process, the "crystallization of general policies".[291] We have suggested that prescription take the form of contributions to customary law and that its formulations be flexible and capable of adaptation to rapidly changing conditions.

The *invoking* phase "is the provisional application of prescriptions to concrete situations".[292] Here is the point at which Canadian pollution prevention officers, judges and diplomats will be making Canada's policies operational. In reaction, commanders of U.S. private vessels, courts and diplomats will resist, accept or compromise.

The *application* phase brings the final application of the prescription.[293] If consensus is reached between Canada and the U.S., as well as other interested parties, application will be authorized by some kind of explicit or implicit international understanding. If there is no consensus, application will mean the highest form of a controverted policy.

Termination is the phase for "the ending of a prescription and the disposition of claims generated when the prescription was in force".[294] Quite possibly this stage might involve withdrawal of U.S. claims against Canada based on traditional legal prescriptions. Or, it could become necessary if Canada retreats from some of its positions. Given the changing, patently unsatisfactory state of most

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290 H. Lasswell, "Future Systems of Identity in the World Community", in 4 *The Future of the International Legal Order*, (C. Black and R. Falk, eds.), at p. 30.

291 *Ibid.*

292 *Ibid.*

293 *Ibid.*

294 *Ibid.*

of the international law prescriptions relating to the Canadian Arctic, considerable terminating is inevitable. For example, the limited contiguous zone permitted by Article 24 of the 1958 Geneva Convention is clearly outmoded and should be terminated.

Finally, "the *appraisal* phase is the assessment of success or failure in achieving public policy and the provisional assignment of responsibility".[295] Will the state of and prospects for the law of the sea and the exclusive and inclusive interests it seeks to protect and promote be better off when Canada's Arctic claims reach the point of resolution within the world process of authoritative decision? Despite the early reactions, generally along national lines, of Canadian and U.S. publicists, it is fair to say that we cannot possibly make more than a provisional appraisal at this point. In the broadest terms we may conclude as follows: If Canada restricts her claims to her unique Arctic environment and administers her pollution regime so as to respect the inclusive rights of others, her claims for territorial seas and a contiguous zone will be reasonable and worthy of acceptance by other states. Her position will be strengthened by adopting an attitude towards the Northwest Passage that is consonant with the U.S.-Soviet position on straits. Such an attitude will remove a problem that is probably one more of principle than of practical import.

If, on the other hand, Canada extends its claims to its East and West coasts, if its regime is effectively exclusive, if it becomes embroiled in an unnecessary controversy over international straits, Canada will not have contributed to the success of a world public policy for the oceans. Canada has asserted at every point in this important chapter in the history of the law of the sea that it seeks a better law for all. It is to be hoped that Canada will indeed follow a course that will enable those who appraise this chapter to judge that the law of the sea profited by Canada's Arctic initiative.

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[295] *Ibid.*, at p. 31. The inquiries of Mr. David E. Ferreira, *supra*, n. 279, at the Canadian Embassy in Washington produced the impression that Canada's enforcement of the Arctic anti-pollution regime has been minimal, with primary reliance on voluntary observance.