

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

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Introduction

The already overtaxed international law of the sea was confronted with new problems in the spring of 1970. In April, the Canadian Parliament was asked to approve the *Arctic Waters Pollution Prevention Act*,¹ which claimed the right to regulate all shipping in zones

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¹ *Arctic Waters Pollution Prevention Act*, 18-19 Eliz. II, S.C. 1970, c. 47; reprinted in 9 I.L.M. 543; hereinafter cited as *Pollution Prevention Act*.

The Act was introduced on 8 April 1970, approved unanimously by the House of Commons on 9 June 1970, by the Senate on 9 June 1970, and received Royal Assent on 26 June 1970.

The application of the Act is as follows:

3. (1) Except where otherwise provided, this Act applies to the waters (in this Act referred to as the "Arctic waters") adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles; except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, there shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land such line of equidistance.

(2) For greater certainty, the expression "arctic waters" in this Act includes all waters described in subsection (1) and, as this Act applies to or in respect of any person described in paragraph (a) of subsection (1) of section 6, all waters adjacent thereto lying north of the sixtieth parallel of north latitude, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or such adjacent waters are in a frozen or a liquid state, but does not include inland waters.

stretching north of the Canadian mainland up to one-hundred miles. This new and — for Canada — startling claim was justified as a measure necessary to protect Canada's coastal and maritime resources against pollution. The timing of this claim was seemingly clear. In the summer of 1969, the U.S. tanker *S.S. Manhattan*, owned by the Humble Oil and Refining Co., had made a successful voyage through the Northwest Passage. It now appeared that ice-breaking supertankers might have a feasible route from the oil fields of Alaska's North Slope to the Eastern Seaboard of the United States. It also appeared to Canadians that incidents such as the 1967 *Torrey Canyon* wreck and the 1968 Santa Barbara oil spill might now pose a clear and present threat to Canada's Arctic environment. This threat was underscored in February 1970, when the Liberian tanker *Arrow* ran aground in Chadabucto Bay off Nova Scotia, polluting the waters and coast.

The timing of the Canadian hundred-mile anti-pollution claim also seemed to be related to mounting domestic pressures for assertion of Canada's national identity in the face of continuing trends towards political, economic, and cultural dominance by the United States. In the spring of 1970, the confluence of genuine environmental concern and nationalistic sentiments appeared to produce an initiative quite in contrast to Canada's traditional conservative and internationalist approach to international law issues.

This initiative came at a time when the United States was preparing its own initiatives with regard to the law of the sea. On May 23, 1970, President Nixon would make proposals for solution of maritime problems through international conferences leading to comprehensive international conventions and the strengthening and/or establishment of international organizations.² Canada was to view its own initiative as enlightened unilateralism, leading to badly needed new customary international law. The United States was to react sharply against the substance and the form of the Canadian initiative even before passage of the *Arctic Waters Pollution Prevention Act* on June 17, 1970.

The sharp U.S. reaction against the Canadian initiative was elicited not only by the claim to a hundred-mile pollution zone but

² See: U.S. Dept. of State Press Release No. 229, 3 August 1970, 9 I.L.M. 1046; U.N. Doc. A/AC. 138/25, 3 August 1970.

See generally: Draft U.N. *Convention on the International Seabed Area: U.S. Working Paper Submitted to the U.N. Seabed Committee*, (1970) 63 Dep't. State Bull. 209; Ratiner, *United States Oceans Policy*, (1971) 2 J. Maritime L. & Com. 226; Krueger, *An Evaluation of United States Oceans Policy*, (1971) 17 McGill L.J. 603.

as well by the announcement that Canada would extend its territorial waters from three to twelve miles.³ The seriousness of the Canadian break with the past was further underscored by Canada's submission of a reservation to its adhesion to the International Court of Justice, precluding adjudication of controversies arising out of the *Pollution Prevention Act*.⁴

Canada did not put the new *Pollution Prevention Act* into effect until August 2, 1972.⁵ But during the two years following its passage, the issue of Canada's claims became a *cause célèbre* of considerable importance. It attracted the attention of eminent publicists who have, in a short time, produced an impressive journal of literature on the subject. The controversies evoked by Canada's Arctic initiative continue.⁶ They are important in two ways. First, the merits of the claims to a twelve mile territorial sea, a hundred-mile contiguous

³ *An Act to Amend the Territorial Sea and Fishing Zones Act*, 18-19 Eliz. II, S.C. 1970, c. 68; 9 I.L.M. 553; hereinafter cited as *Territorial Sea Act*. The Act was introduced on 8 April 1970, approved by the House of Commons on 4 June 1970, by the Senate on 18 June 1970, and received Royal Assent the same day.

⁴ Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, 7 April 1970; U.N. Communication CN.53.1970; Treaties No. 3 of 21 April 1970; 9 I.L.M. 598.

⁵ The *Arctic Waters Pollution Prevention Regulations* were made effective 2 August 1972; see Canada Gazette, Part II, vol. 106, No. 14, at p. 1033.

⁶ See: Lloyd, *Canada's Arctic in the Age of Ecology*, (1970) 48 Foreign Affairs 726 (hereinafter cited as "Lloyd"); Johnston, *Canada's Arctic Marine Environment: Problems of Legal Protection*, (1970) 29 Behind the Headlines 1 (hereinafter cited as "Johnston"); Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, (1970) 69 Mich. L. Rev. 1 (hereinafter cited as "Bilder"); Cohen, *The Arctic and the National Interest*, (1970-71) 26 Int'l J. 52 (hereinafter cited as "Cohen"); Legault, *The Freedom of the Seas: A License to Pollute?*, (1971) 21 U. of T.L.J. 211 (hereinafter cited as "Legault"); Neuman, *Oil on Troubled Waters: The International Control of Marine Pollution*, (1971) 2 J. Maritime L. & Com. 349 (hereinafter cited as "Neuman"); Wilkes, *International Administrative Due Process and Control of Pollution — The Canadian Arctic Waters Example*, (1971) 2 J. Maritime L. & Com. 499 (hereinafter cited as "Wilkes"); Henkin, *Arctic Anti-Pollution: Does Canada Make — or Break — International Law?*, (1971) 64 A.J.I.L. 131 (hereinafter cited as "Henkin"); Green, *International Law and Canada's Anti-Pollution Legislation*, (1971) 50 Ore. L. Rev. 462 (hereinafter cited as "Green"); Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, (1971) 3 J. Maritime L. & Com. 1 (hereinafter cited as "Beesley"); Sutton, *Pollution Prevention in the Arctic — National and Multinational Approaches Compared*, (1971) 5 Ottawa L. Rev. 32 (hereinafter cited as "Sutton"); Milsten, *Arctic Passage — Legal Heavy Weather*, (1972) 15 Orbis 1173 (hereinafter cited as "Milsten"); Wulf, *Contiguous Zones for Pollution Control*, (1972) 3 J. Maritime L. & Com. 537 (hereinafter cited as "Wulf").

zone, and exclusive jurisdiction over straits in the Northwest Passage are controverted and significant in their own right. Second, the adoption by Canada of a unilateral approach to major problems of the law of the sea, especially those of environmental protection, raises major questions about the processes of international law. We have a clear-cut clash between a unilateral Canadian strategy emphasizing the building of customary international law opposed to a U.S. internationalist strategy emphasizing conventional international law and the development of international organizations. Underlying the debate are profound questions about the sources, definition and role of general principles of law in this epoch of change in the law of the sea.⁷

All in all, the particular character and broader implications of the Canadian-U.S. controversy over the "Canadian" Arctic seemed to the authors to invite an analysis in the manner of Harold Lasswell and Myres S. McDougal.⁸ No jurisprudential system has dealt so profoundly, comprehensively and provocatively with the dynamics of the international law-making process. We believe that the Lass-

⁷ See: R.L. Friedheim, *Understanding the Debate on Ocean Resources*, (Law of the Sea Institute, Univ. of Rhode Island, Occasional Paper No. 1, February 1969).

⁸ M.S. McDougal *et al.*, *Studies in World Public Order*, (1960); M.S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961), (hereinafter cited as "M. McDougal & F. Feliciano"); M.S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, (1962), (hereinafter cited as "M. McDougal and W. Burke"); M.S. McDougal, H.D. Lasswell, & J.C. Miller, *The Interpretation of Agreements and World Public Order*, (1967); D.M. Johnston, *The International Law of Fisheries*, (1965); M.S. McDougal, "International Law and the Law of The Sea", and W.I. Burke, "Law and New Technologies", in *The Law of the Sea*, (L. Alexander, ed., 1967), at pp. 3 and 204; W.T. Burke, "Ocean Sciences, Technology and the Future International Law of the Sea", in *The Future of the International Law of the Sea*, vol. 2, *Wealth and Resources*, (R. Falk & C. Black, eds., 1970), at p. 183; M.S. McDougal, H.D. Lasswell, & W.M. Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, (1968) 8 Va. J. Int'l L. 188; H.D. Lasswell & M.S. McDougal, *Criteria for a Theory About Law*, (1971) 44 S. Cal. L. Rev. 362; W.M. Reisman, *Nullity and Revision*, (1971); J.N. Moore, *Law and the Indo-China War*, (1972); note Moore's chapter 2, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell", at p. 47; D. Daniel, *Clarification and Appraisal of the Policy-Framework for International Legal Analysis; Inquiry into the Work of Myres S. McDougal*, (Ph. D. dissertation, Georgetown Univ.: 1971); H. Lasswell, "Future Systems of Identity in the World Community", in *The Future of the International Legal Order*, vol. 4, *The Structure of the International Environment*, (C. Black & R. Falk, ed., 1972), at p. 3.

well-McDougal analytical matrix is especially relevant to a controversy such as this, wherein an orderly examination of events, claims, normative issues and authoritative decisions about the law is equally feasible and desirable. Unlike many law of the seas controversies, we have in the Canadian case access to ample empirical and legal sources.

To be sure, the demands of the Lasswell-McDougal jurisprudential approach are great. It is not always possible to assemble and adequately interpret the facts and the records of claims and counter-claims requisite to the most fruitful application of this approach. But, it is believed, the Canadian-U.S. dispute over the law of the sea in the "Canadian" Arctic provides an important opportunity to employ the Lasswell-McDougal system, and thereby advance both the debate on the international law of the Canadian Arctic and efforts to build a more adequate philosophy and methodology of international law.

In addition to the formidable problems of gathering and interpreting the factual basis for this analysis, we also face the problem of doing justice to the concepts and methods of the Lasswell-McDougal jurisprudence. Lasswell, McDougal and their associates have developed their system through a process of unending review, correction, elaboration and expansion. A survey of their works shows changes in terminology, form and substance, sometimes quite nuanced. Those outside the mainstream of this most significant of contemporary international law theories and approaches will necessarily fall short in large and small ways in their understanding and application of the Lasswell-McDougal system. But this risk must be taken.

The purpose of the Lasswell-McDougal school is eminently practical. It seeks to improve the capability of publicists and practitioners to deal with the awesome problems confronting the world public order. Ironically, while there is a substantial theoretical literature criticizing the Lasswell-McDougal jurisprudence, there appears to be a relatively more modest literature reflecting efforts to try out this approach rather than to debate it in general terms.⁹ This study represents an effort to learn more about the Lasswell-McDougal system by using it. It does not purport to test or validate that system, or demonstrate that it is more desirable to follow than some other. It does attempt to demonstrate what results from an effort to channel

⁹ See: Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, (1972) 66 A.J.I.L. 60; McDougal, *International Law and Social Science: A Mild Plea in Avoidance*, (1972) 66 A.J.I.L. 77.

the material and legal components of an important contemporary international law controversy through the Lasswell-McDougal world public order matrix.

This study follows generally the organization in Myres S. McDougal and William T. Burke, *The Public Order of the Oceans*. This is reflected particularly in the division between the process of interaction and the process of claims. First, a brief summary is offered of the historical record of interaction in the North American Arctic. Next, the process of contemporary interaction in the North American Arctic is outlined. The main body of the study then examines the process of claims with respect to this region. A closing section of appraisal and recommendations undertakes to indicate the implications of the preceding analysis for the process of authoritative decision.

In our title and in this introductory section we have placed quotation marks around "Canadian" Arctic. We thereby hope to convey a fundamental uncertainty about the meaning of that characterization. As will be seen, Canadian official statements and the discussions of publicists tend to refer to the Canadian Arctic and to the Canadian Arctic Waters. The mix of considerations of geography, politics and law resulting in this characterization is not clear to us. Even if the characterization is political and legal as well as geographic, it is not clear what is claimed. We will, henceforth, drop the quotation marks around Canadian Arctic and Canadian Arctic Waters, but the issues to which they refer remain to be considered.

I. Historical Interaction in the North American Arctic

A comprehensive account of interaction in the Arctic Ocean would require a detailed description of relevant actors and a chronology of their activities there from ca. 320 B.C. to the present. Such a survey, the literature suggests, would be of considerable interest, for Arctic history contains the records of many truly epic adventures. The analytical focus of this section will, however, be confined to recent and contemporary interaction. The four historical periods most easily discerned in the Arctic process of interaction are: (1) the period of discovery and exploration; (2) the period of early aviation; (3) the period of aviation and the Cold War; and (4) the period of "exploitation". The latter three will receive the bulk of attention.

To be sure, any subcompartmentalization of history is arbitrary. Arctic history is complex, riddled with overlapping activities and impervious to attempts at isomorphic reconstruction. Hence, the object in establishing historical boundaries is simply to facilitate

analysis and to provide signposts indicating the *dominant* trends in Arctic interaction at various times. Before each period is approached individually, however, a broad characterization of the process of interaction is in order.

One quality of the process that is essential to grasp at the outset is that it is intimately tied to the broader interactive arena of the North Polar Region — including lands, ocean areas, air space and ice areas. Thus, in the sections that follow, a broad spectrum of Arctic enterprises will be examined or discussed. Heavier emphasis will, of course, be accorded to those activities directly related to ocean areas.

A more or less permanent feature of Arctic interaction pertains to the number of actors that it has attracted through the centuries. In comparison to other legal arenas, there have not been many. The more important national participants have been Norway, Denmark, Britain, Russia, the U.S.A., Sweden, Canada, Holland, Germany, France and, briefly, Ireland — a total of eleven actors.¹⁰

Another trait peculiar to Arctic interaction is the abundance of projects that have been organized jointly by any number of these actors combined. Such projects have ranged in objective from exploration to rescue, and have appeared throughout the region's recent history.¹¹ In 1882, for instance, the "International Polar Year" program was inaugurated. A series of expeditions followed which were later described as a "tremendous gesture of international co-operation for strictly scientific purposes".¹² Through the program, some 700 men from different nations participated in setting up and/or manning 49 research stations in the Arctic and Antarctic.¹³ This was followed in 1932-1933, when the International Meteorological Organization proposed the "Second International Polar Year".¹⁴

Finally, the Arctic process of interaction is also unique in that many of its component activities can be characterized as apolitical in intent and effect. The great Arctic explorer, Sir John Franklin, once stated that, "Arctic discovery has been fostered from motives as disinterested as they are enlightened; not from any prospect of immediate benefit, but from a steady view to the acquirement of useful

¹⁰ For relevant accounts, see: P.-E. Victor, *Man and the Conquest of the Poles*, (S. Sullivan, tr., 1963); L.P. Kirwan, *A History of Polar Exploration*, (1960).

¹¹ *Ibid.*

¹² J. Mirsky, *To The Arctic*, (1949); hereinafter cited as "Mirsky".

¹³ *Ibid.*

¹⁴ Fleming, *The Proposed Second International Polar Year, 1932-1933*, (1932) 22 *Geog. Rev.* 131.

knowledge".¹⁵ While Sir John's remarks overstate the case, for different objectives have motivated Arctic discovery and interaction at different times,¹⁶ they do represent the thinking of many early and contemporary Arctic participants.

a. *Period of Discovery and Exploration*

Discovery and exploration activities occupy approximately 2200 years of the process of interaction in the Arctic. This is the period that bears least relevance to the present study. The process during this long exploratory preamble lacked, with some notable exceptions,¹⁷ the sense of purpose, coherence and immediacy that contemporary legal analysis demands. Nevertheless, participation during this period retains some interest as a vehicle for the more interested scholar to acquire the broadest perspective on Arctic history. One may see, generally, the works of Greely, Victor, Kirwan, Mirsky and Taracouzio;¹⁸ in their summaries and descriptions, one will no doubt find "an adequate idea of the true aspects of such voyaging".¹⁹

b. *Period of Early Aviation*

Twelve years prior to Peary's ambitious declaration of "possession" on reaching the North Magnetic Pole (April 6, 1909),²⁰ the Swedish explorer, Andree, embarked on the first airborne expedition to the Arctic, in a drift balloon. Though his attempt ended in tragedy, it opened a new era in the Arctic process of interaction.²¹ Public and private flying expeditions followed, under sponsorship by a limited number of nations and groups. Among them we find Swedish (1931), German (1910 and 1932), Russian (1914), Norwegian (1923 and 1926), Swiss (1923), British (1924), American (1924, '25, '28, 1929 and other dates) and Italian (1928) participants.²²

¹⁵ Quoted in A.W. Greely, *Handbook of Polar Discoveries*, (1907), at p. 7; hereinafter cited as "Greely".

¹⁶ See *infra*, at pp. 334 *et seq.*

¹⁷ E.g., the development of Russia's Arctic regions after Peter the Great's death. See: T.A. Taracouzio, *Soviets in the Arctic*, (1938).

¹⁸ All previously cited. See also the many individual chronicles by explorers such as Peary, Ross and Greely.

¹⁹ Greely, *supra*, n. 15.

²⁰ R.E. Peary, *The North Pole*, (1910), at p. 297.

²¹ His remains were found on White Island in 1930. See W.L.G. Joerg, *Brief History of Polar Exploration Since the Introduction of Flying*, (1930); also L. Ellsworth, *Air Pioneering in the Arctic: The Two Polar Flights of Amundsen*, (1928); American Society of Mechanical Engineers, *Symposium on Arctic and Winter Flying*, (1933) 8 *Aviation Engineer* 21; Wilson, *Northwest Passage by Air*, (1943) 26 *Can. Geog. J.* 107.

²² Lloyd, *Arctic Air Transport*, (1946) 1 *Air Affairs* 218; hereinafter cited as "Lloyd, *Arctic Air Transport*".

Russia's Arctic flying represented the most serious and concerted of the early efforts. After 1924, Trevor Lloyd reports, Arctic flying in the U.S.S.R. may be considered to have become almost commonplace.²³ By the late 1930's the Russians had made it clear that intercontinental flying, *via* the Arctic, would be a welcome development.²⁴ In contrast, the U.S., Great Britain and other nations gave little official support to the concept.²⁵

Land and sea exploration did not, of course, cease with the introduction of the airplane, zeppelin, dirigible, and balloon. Paralleling the activities of these airborne pioneers were some 21 major earth and ocean-bound expeditions.²⁶ They included, among others, those of Peary (first to reach the North Pole), Stefansson (Victoria Island, Beaufort Sea), and the "Second International Circumpolar Year" (Arctic Siberia).²⁷

c. *The Period of Aviation and the Cold War*

If you shoot robot bombs (as Heaven preserve us from ever doing), they will cross the Arctic Circle, on their way from London to Seattle, from Peiping to New York, from San Francisco to Moscow. That is the way the bombers will fly if we ever permit them to.²⁸

Stefansson's commentary in 1945 was accurate, but hardly earth-shaking: the possibility of transarctic hostilities was brought to the surface earlier in 1940 by the Nazi invasion of Denmark;²⁹ it was followed by subsequent vying among the belligerents for control of Greenland and Iceland.³⁰ Thus, began phase 1 of the third period, during which military aviation dominated Arctic interaction.

(i) *Phase I*

The first order of business after the invasion was to plan and develop adequate air routes to Europe and the Orient. Since the time of the Armistice in November of 1918, the construction of flying facilities in Canada had progressed very slowly.³¹ Four major networks of bases had to be established as a result: The Northwest

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Mirsky, *supra*, n. 12: App. III, at p. 334.

²⁷ *Ibid.*

²⁸ V. Stefansson, *Arctic in Fact and Fable*, (1945), at p. 65.

²⁹ W.G. Carr, *Checkmate in the North*, (1944). Carr discusses the plans of the Axis powers to invade America.

³⁰ Lloyd, *Arctic Air Transport*, *supra*, n. 22, at p. 224; Pleischke, *Trans-Polar Aviation and Jurisdiction Over Arctic Airspace*, (1943) 37 A.P.S.R. 999.

³¹ Wilson, *The Expansion of Aviation into Arctic and Sub-Arctic Canada*, (1950) 41 Can. Geog. J. 130; hereinafter cited as "Wilson, 1950".

Staging Route, the Trans-Atlantic Ferry Route, the "Crimson" Route, and the Canol or Mackenzie Route.³²

The Northwest Staging Route (NWSR). Construction of such a route became an imperative with the entry of the U.S. into the War in December, 1941. Work on the project, however, had begun earlier, in 1940, at the request of the Joint U.S. — Canadian Defense Board.³³ The Route's main fields were located at Edmonton, Grand Prairie, Fort St. John, Fort Nelson, Watson Lake and Whitehorse,³⁴ and they were followed on the ground by the route of the Alaska Highway, whose object was in part to service them.³⁵

The Trans-Atlantic Ferry Route (TAFR). Both Canada and the U.S. planned and built the TAFR's bases. Canadian-built were those at Montreal, Mont Joli, the Saguenay, Seven Islands, Moncton, Sydney, Tor Bay, and Goose Bay. The U.S. built its facilities at Mingan, Stephenville and Argentia.³⁶ TAFR bases "added greatly to the efficiency and safety of the . . . ferry system and the anti-submarine patrols off the Atlantic and Gulf of St. Lawrence coasts."³⁷ They also helped the U.S. solve many logistics problems that its new bases in Greenland and Iceland presented.

The Crimson Route. This was the most politically and legally controversial, yet militarily least useful, of the four routes. It was built in its entirety by U.S. Government forces to provide the shortest journey from Los Angeles to northern European points. It consisted of bases at Churchill, Manitoba; Southampton Island and Frobisher Bay on Baffin Island; and Fort Chimo, Quebec. When in the early 1940's, new, more southerly routes were opened as a result of German activities in North Africa, Canada demanded and obtained the transfer of all "Crimson" bases.³⁸ The Prime Minister reasoned that it was only proper for Canada to contribute to the war effort by "taking responsibility for the provision of facilities in Canada and

³² *Ibid.*, at pp. 138-40; also, Lloyd, *Arctic Air Transport*, *supra*, n. 22, at p. 224.

³³ Wilson, *It Cost \$58,000,000* (1944) 17 *Can. Aviation* 27; hereinafter cited as "Wilson, 1944".

³⁴ Wilson, 1950, *supra*, n. 31, at p. 139.

³⁵ *Ibid.*; Wilson, 1944, *supra*, n. 33; Lloyd, *Arctic Air Transport*, *supra*, n. 22, at p. 228.

³⁶ Wilson, 1950, *supra*, n. 31, at pp. 139-40.

³⁷ *Ibid.*

³⁸ Lloyd, *Arctic Air Transport*, *supra*, n. 22, at p. 226; Wilson, 1950, *supra*, n. 31, at p. 140. These authors differ in the amount of money that they claim Canada had to pay to the U.S. for the bases. Wilson indicates a \$76,000,000 figure, while Lloyd offers a more conservative \$30,000,000 total. It is likely that they are referring to different bases or numbers thereof.

Labrador".³⁹ He added that "it was thought undesirable that any other country should have financial investment in improvements of permanent value such as civil aviation facilities for peace-time use in this country."⁴⁰

The Canol Route. The need for oil products in Alaska during the war and their availability in the Norman Wells field of the Mackenzie called for the development of a fourth air route.⁴¹ Facilities were again built by U.S. Forces with approval and assistance from the Canadian Government.⁴² In its final form, the route consisted of airstrips located at Fort Smith, Hay River, Yellowknife, Wrigley, Fort Norman, and other northern outposts.

(ii) *Phase II*

The end of hostilities marked a new threshold for Arctic interaction. The development of atomic weapons by the U.S. and their subsequent acquisition by the Soviet Union ushered in the Cold War phase of the third period. Overnight, Stefansson's prophecy had acquired unanticipated dimensions, for military technology had caught up with Arctic geographic conditions. Strategic concern with Arctic airspace thus continued to dominate international interaction. In 1955, construction of the "Distant Early Warning" (DEW) and "Mid-Canada" Lines was undertaken.⁴³ Both were projects of unprecedented proportions — particularly in the Arctic. Of the two, the DEW Line bears special interest for three reasons: (1) it was built on territory lying exclusively within the Arctic Circle;⁴⁴ (2) it was built by the U.S.A. in U.S., Icelandic, Canadian, and Danish territory, under management by Western Electric Co., an American firm under contract to the U.S. Air Force;⁴⁵ and, (3) it introduced twentieth century technology into the Arctic process of interaction

³⁹ Canada, Parliament, House of Commons, 82 Hansard 5708 (1944); see also *Cost of 24 Northern Airfields*, (1944) 82 Roads & Bridges.

⁴⁰ *Ibid.*

⁴¹ Finnie, *U.S. Army Taps Canadian Oil for Alaskan-Based Operations*, (1943) 14 World Petroleum 32; U.S. Congress, Senate, Special Committee Investigating the National Defense Program, "The Canol Project", *Hearings*, 78th Cong., 1st Sess., 9287 (1943).

⁴² Wilson, 1950, *supra*, n. 31, at p. 139.

⁴³ Bagnall, *Building the Distant Early Warning Line*, (1955) 47 Military Engineer 429. For earlier debates on the strategic pros and cons of the Arctic see: Jones, *Light, Darkness and Polar War*, (1949) 2 Air U.Q. Rev. 48; South, *Alaska and National Policy*, (1949) 3 Air U.Q. Rev. 44; *Arctic Flying in the Next War*, (1955) U.S. News & World Report.

⁴⁴ The path of the Mid-Canada Line is sub-arctic.

⁴⁵ Bagnall, *Operation DEW Line*, (1955) 259 Franklin Inst. J. 481.

(including the Arctic Ocean). In the words of the *London Economist*, "They [the Americans] are making a mass assault on the Arctic the like of which the northern wilderness has never seen before."⁴⁶ Designed as a 10,000 mile line of protective radar stations to guard against attack by assault bombers over the pole, completion of the DEW system required the work of 23,000 engineers for a period of over two and one-half years.⁴⁷ Its total cost is impossible to ascertain, but Sutherland reports a ten-year (1951-1961) joint U.S.-Canadian expenditure in continental air defense of over \$50,000,000,000.⁴⁸

During the early 1960's, technological developments (e.g., ICBM's and Satellite surveillance) rendered the DEW Line obsolete from a strategic standpoint.⁴⁹ Its facilities, however, continued to be utilized for surveillance and other purposes such as international communications and research.⁵⁰ But perhaps the project's most enduring effect was legal, rather than strategic. For through the DEW Line construction agreements, Canada obtained explicit and official U.S. recognition of its sovereign rights over territory in the Far North.⁵¹

II. The Process of Contemporary Interaction in the North American Arctic

A. Oil Exploration and Exploitation and Its By-Products

For present purposes, the period of "exploitation" will emphasize interaction that has occurred since the development of the Canol Oil Field of the Mackenzie began in 1942. This time frame was selected for three reasons: (1) Arctic oil exploration, production and transportation is precisely what triggered the international legal controversy under present consideration; (2) by 1942 Arctic participation had become clearly defined with the U.S., Canada, and the U.S.S.R. emerging as the principal actors; and (3) time and space limitations preclude a more comprehensive survey.

⁴⁶ *Radar in the Far North*, (1955) 174 *London Economist* 716; Roberts, *The Great Assault on the Arctic*, (1955) 211 *Harpers Mag.* 37.

⁴⁷ Chasen, *Distant Early Warning Systems in the North American Arctic*, (1967) 13 *Polar Record* 595; Koby, *DEW Line Airlift*, (1955) 28 *Can. Aviation* 27; Smith, *The Use of Polar Ice in Inter-hemispheric Air Operations*, (Dissertation No. 1472, Georgetown Univ., 1956).

⁴⁸ R.J. Sutherland, "The Strategic Significance of the Arctic", in *The Arctic Frontier* (R. St. J. MacDonald, ed., 1970), at p. 265.

⁴⁹ *Ibid.*

⁵⁰ Chasen, *Distant Early Warning Systems in the North American Arctic*, (1967) 13 *Polar Record* 595.

⁵¹ Sutherland, "The Strategic Significance of the Arctic", in *The Arctic Frontier*, *supra*, n. 48, at p. 256.

In addition, further analysis of the process of interaction will be devoted solely to American and Canadian exploitation activities and their "by-products", their relationship to other objectives, the situations and conditions under which they have taken and take place, and the various strategies employed by the participants, with the various outcomes and long-term effects. "Exploitation", then, is merely a convenient rubric pointing to the more salient, and perhaps central activities in the Arctic's recent history. It of course embraces many other types of projects (transport, shipping, research, etc.) that either paralleled, or are ancillary to, specifically exploitation enterprises.

It may appear objectionable to limit the participants to two Arctic nations: the U.S. and Canada. But certain reasons make this action operationally viable. First, though the Arctic process of interaction has always included significant numbers of international actors,⁵² the paramountcy of national participation remains a fact.⁵³ Second, Arctic national participation is currently, as always, quite limited in number. And, third, in terms of value position, intensity, frequency and quality of activities undertaken, and of political and legal interests possessed in the region (with the Soviet Union as the sole exception), these actors clearly predominate.

B. *Objectives and Base Values*

It will be assumed in this article that the central objective of the aforementioned actors in carrying out Arctic projects is, and has been, the enhancement or maintenance of their respective base value positions. These include power, wealth, enlightenment, well-being, respect, skill, solidarity and rectitude.

(i) *Power*

One of the more complex intellectual tasks that students of international law and relations must face is the conceptualization of the term "power". In the present context, however, the term will refer

⁵² Contemporary international actors include the International Commission for the Northwest Atlantic Fisheries (ICNAF); the International Court of Justice (ICJ), (*Anglo-Norwegian Fisheries Case*); the International Geographical Congress (IGC); the International North Pacific Fisheries Commission; the International Pacific Halibut Commission; the International Whaling Commission; and many others.

⁵³ The most celebrated challenge to the concept of national preëminence is John Herz's *Rise and Demise of the Territorial State*, (1957) 9 *World Politics* 473. His subsequent reaction, "The Territorial State Revisited", appears in J. Rosenau, ed., *International Politics and Foreign Policy*, (1969). See also: *International Politics in the Atomic Age*, (1959).

to military activities and capabilities, carried out or established by these actors, in the Arctic, for purposes of altering favourably their respective, and joint, coercive or defensive potential vis-à-vis other actors — or each other. Of special concern will be naval operations in the Arctic Ocean by their respective armed forces.

In the mid-1800's, the American Navy began operating in the Arctic with some frequency.⁵⁴ World War II, however, served as a powerful stimulant for the U.S. to improve its seaborne military capabilities in the region.⁵⁵ These ships, it was then speculated, would keep supply lines open to land forces stationed there to avert a Nazi invasion *via* the Arctic. Later, in the mid-1950's, the U.S. Navy was assigned a large share of responsibility for the success or failure of the prompt construction and subsequent maintenance of the DEW Line.⁵⁶ The erection of this network of defense installations in the Arctic demanded that multiple land, sea and air operations be carried out by the various branches of the U.S. armed forces in a coordinated fashion.

In the late fifties and early sixties, the U.S. Navy began to explore the strategic utility of the submarine (including nuclear subs) in the Arctic.⁵⁷ The successful journeys of the *Nautilus*, *Skate*, *Sargo* and *Seadragon* provided conclusive evidence of the technological capability of the American fleet to navigate under the polar ice-cap.⁵⁸

Conversely, the Arctic activities of the Canadian armed forces during these same periods reflected the subordinate role of a middle power caught in the midst of two emerging "superpowers". Technologically, Canada remained dependent rather than innovative;

⁵⁴ A historical summary appears in Shelesnyak, *The Navy Explores its Northern Frontiers*, (1947) 59 J. Am. Soc. Naval Engineers 471.

⁵⁵ See *American Forces in the Aleutians*, (1943) 35 Military Engineer 347; *Navy Arctic Talkie Film*, (1950) 42 Military Engineer 218.

⁵⁶ Leslie Roberts reports that in one summer, "ships were to deliver 50,000 tons of freight into the Eastern Arctic and much more to the Western Area...". See *supra*, n. 46, at p. 37; see also: *Summer Sealift Races to Supply DEW-Line Outposts Before Early Arctic Freeze-Up*, (1968) 9 F.C.C. News 1; *Blasting a Seaway*, (1955) 154 Engineering News Record 68. These operations, known as "SUNEC" and "Mona Lisa", continued with increasing magnitude through the 'fifties'. See, for example, U.S. Navy Sea Transportation Service, *It's the Arctic*, (1955) 5 Bulletin 4, at p. 20.

⁵⁷ Kittredge, *Under the Polar Cap: A Voyage that Must be Made*, (1958) 84 U.S. Naval Inst. Proc. 61; Anderson, *The Arctic as the Sea Route of the Future*, (1959) 115 Nat'l Geog. Mag. 21.

⁵⁸ Lyon, *The Submarine and the Arctic Ocean*, (1963) 9 Sea Frontiers 276. Lyon describes the Submarine Research Facility in San Diego where the geographic conditions of the Arctic Ocean were replicated for laboratory experimentation purposes.

strategically, her thinking was oriented along a "polar" alignment with the U.S., under whose protective "umbrella" she could find a secure niche.⁵⁹ Even more significantly, Canada perceived her role in Arctic, as well as hemispheric, defense, as one complementary rather than self-assertive in nature. Only in recent years (particularly since the conflict over Arctic rights of navigation began), has Canada attempted to enhance her independent, coercive/defensive potential in the region. Witness, for instance, the recent statement of policy made in the report on *1970 Government Activities in the North* by the Advisory Committee on Northern Development:

Department of National Defense... Long-term Plans. The Department of National Defense anticipates greatly increased military activity and involvement in the North. The types of activity envisaged will cover the full spectrum from military surveillance flights to national building projects...⁶⁰

The statement is followed by a "Review of 1970 Operations" that covers the categories of "General", "Maritime Forces", "Land Forces", "Air Forces" and "Communications". It closes with a broad statement of "Plans for 1971".

In terms of power, then, both as an objective and a base value, the U.S. has undoubtedly been, and remains, the leader. The strength and technological capability of her armed forces is overwhelming when compared to Canada's. Canada, on the other hand, possesses the advantage of owning vast expanses of territory in the Arctic, into which her limited might can be extended. Although, as the aforementioned report indicates, "Current planning does not envisage the stationing of operational troops in the North," said troops can "effectively be stationed at southern bases and moved to the North when required for a particular operation".⁶¹ Canada's forces seem to present at least a psychological deterrent to unwanted foreign intrusions in the region.

These calculations, however, should always be tempered by the historical context in which they must be examined. Canada and the U.S. are two nations whose behavioural record in terms of mutual conflict avoidance and resolution dates back, unbroken, to the Treaty of Washington of 1871. It thus remains an open question

⁵⁹ See generally: Melvin Conant, *The Long Polar Watch; Canada and the Defence of North America*, (1962); for an example of earlier views, see: G. Taylor, *Canada's Role in Geopolitics; A Study in Situation and Status*, (1942); see also the periodic literature of the Canadian Institute of International Affairs, *Canada in World Affairs*, beginning vol. I, 1941.

⁶⁰ At pp. 94-96. Hereinafter cited as "Committee on Northern Development".

⁶¹ *Ibid.*, at p. 94.

whether or not this fine tradition is about to be broken by international legal disputes over issues which seem to threaten neither state's immediate national security interests.

(ii) *Enlightenment*

The primacy of enlightenment (here defined as the acquisition and furtherance of scientifically gathered knowledge) as an objective in Arctic interaction has seldom been challenged. One must note, however, that the search has not always reflected a "pure" scientific spirit. In fact, more often than not, Arctic research projects have been, and are, pre-requisite to the attainment of other objectives; they serve, to coin a new version of an old term, as "goal-instrumental" objectives. Perfect examples of this kind of "enlightenment" are the many voluminous geological (stratigraphic, seismological, etc.) surveys undertaken in the search for the region's rich oil fields.⁶²

In the area of knowledge, the cooperative spirit that prevails between the U.S. and Canada again stands out.⁶³ This is perhaps best reflected in the institutional character that much of the recent research in the Arctic has acquired under the auspices of The Arctic Institute of North America (AINA).⁶⁴ Founded in Ottawa and New York in 1945 to sponsor research and to acquire and make available information about the North, the Institute has since expanded substantially and continues to supply a channel through which research projects can be orchestrated to maximize their return/cost ratio.

In addition, AINA, with support from the governments of Canada and the U.S., has since 1953 published fifteen volumes of *The Arctic Bibliography*. This tremendously helpful tool includes virtually everything that has ever been printed in connection with the Arctic region — irrespective of topic or authorship. Notably, the overwhelming majority of the *Bibliography's* entries deal in some way with enlightenment — they report on new or ongoing scientific findings and studies.

Enlightenment, viewed as a base value, on the other hand, reflects a disparity between the two neighbors. Without question, the tech-

⁶² See, for example, G. D. Hobson, *A Reconnaissance Seismic Refraction Survey in Hudson Bay, Canada*, (1966) 2 Proceedings, 7th World Petroleum Congress 813; D. H. Oswald, ed., *International Symposium on the Devonian System*, 2 vols., (1967).

⁶³ Purely national enterprises have also multiplied. A recent example is the establishment by the U.S. of an Interagency Arctic Research Co-ordinating Committee in 1968: (1969) 1 AINA Newsletter 7.

⁶⁴ Information about AINA is readily available through its offices in Montreal and Washington, D.C.

nological and scientific resources that the U.S. brings into Arctic interaction have been and are quantitatively and qualitatively superior to Canada's. Yet the relative merits of this fact, in terms of legal analysis, remain somewhat vague unless specifically linked to other base values, such as power and skill.

(iii) *Skill*

Above everything else, Arctic activities demand consummate degrees of skill by the actors, whether it be for navigation, exploration, construction, transportation or exploitation purposes. Conversely, continued exposure to the Arctic environment forces the participant — if he at all expects to improve on his performance, to whatever it may be related — to develop new, more refined skills.

(iv) *Navigation*

The skill to navigate Arctic waters is central to the arguments over jurisdictional rights.⁶⁵ Specifically, it refers to the relative ability and capability of American and Canadian naval personnel and vessels to successfully traverse these "waters". Without a serious potential to do so, claims to control and use of the Northwest Passage will be of little consequence. This crucial question, however, can be subdivided and expressed in even more specific terms: Can cargo vessels of the oil-tanker type cross the Northwest Passage? On a regular basis? If so, is it an economically desirable method for transporting oil? If it is not, what is the probability that the method will be economically sound? It may be a truism, but it needs restatement: the possession of skills by an actor does not necessarily translate into his intent to use them. Nor does it imply, *ipso facto*, that they are desirable from an economic standpoint.

The answer to the first question is, obviously, affirmative: the *SS Manhattan* crossed the Northwest Passage during the summer of 1969.⁶⁶ The ship, a modified 150,000-ton displacement, 43,000 s.h.p. oil tanker, made the voyage in approximately one month, between August 24 and September 21. The following spring it returned to the area for further testing under more severe weather conditions.⁶⁷

⁶⁵ Three main methods of navigating Arctic waters have been developed: drift surface navigation, sub-surface navigation, and conventional surface navigation. See Pharand's informative synthesis in *Freedom of the Seas in the Arctic Ocean*, (1969) 19 U. of T.L.J. 210. Because Canada's claims are issue-specific, however, we shall focus on oil tanker traffic, one form of conventional surface navigation.

⁶⁶ *Arctic Reconnaissance Voyage of S.S. Manhattan, 1969*, (1970) 15 Polar Record 60.

⁶⁷ *Second Arctic Voyage of S.S. Manhattan, 1970*, (1970) 15 Polar Record 355.

Consider, however, the problems of skill encountered during these two voyages and the cost of structural modifications that had to be made to the *Manhattan*:⁶⁸

- (1) the estimated cost of modifications was \$40,000,000;
- (2) the ship necessitated two icebreaker escorts during the first voyage: the Canadian ship, *Sir John A. MacDonald*, and the American vessel, *Northwind*;
- (3) it necessitated one escort for the second voyage: the Canadian vessel *Louis St. Laurent*;
- (4) during the first voyage, the *Manhattan* unsuccessfully attempted to cross a heavy ice floe blocking the McClure Strait, thereafter requiring the repeated assistance of the *Sir John A. MacDonald* for extraction. Eventually, the crossing was made along a more southerly route, *via* the Prince of Wales Strait into Prudhoe Bay, and onward;
- (5) during the second journey, *Polar Record* reports, "the tanker became stuck on several occasions. *Louis St. Laurent* also got stuck in an ice ridge. Altogether it took two weeks to cover a distance of only 550 kilometers." The report goes on to relate how "after completing tests in fast ice off Bylot Island on May 25, *Manhattan* was brought to a standstill by very heavy pack ice. In an attempt to free the ship, *Louis St. Laurent* got stuck alongside and was forced against *Manhattan's* side by ice pressure," both ships suffering structural damage.

It is perhaps useful to keep in mind that these experimental voyages were undertaken during the warmer summer and spring seasons, and yet were far from trouble-free enterprises. In fact, "the period during which transportation is possible generally does not exceed three or four months, due to the limits imposed by the opening and closing of the pack ice".⁶⁹ Given the present "state-of-the-art", then, the second question may be answered negatively.⁷⁰

⁶⁸ All facts summarized below are derived from the accounts quoted in the two preceding footnotes. These are, in turn, summaries of news releases of the Humble Oil and Refining Co., lessors of the S.S. *Manhattan*, and from stories that appeared in the *New York Times* of 26 October and 9 and 12 November, 1969.

⁶⁹ Sherman, *The Economics of Shipping in Polar Seas*, (1969) 14 *Polar Record* 481; cf. Lassiter and Devaney, *The Economics of Arctic Oil Transportation*, M.I.T. Sea Grant Report, No. MITSG 71-4, (1970).

⁷⁰ Pharand, *Freedom of the Seas in the Arctic Ocean*, (1969) 19 U. of T.L.J. 210, at p. 225, discusses some farfetched schemes to make the Arctic Basin navigable by raising the temperature of its waters. Others have suggested the submarine tanker as a more economical means of transport: Robertson,

Turning to economic issues, one must consider a variety of factors, including the need to construct new fleets of reinforced tanker vessels, or the adaptation of existing tankers, *à la Manhattan*, at considerable cost; the ratio between cargo, carrying capacity and icebreaking capability;⁷¹ the comparative estimates of shipping costs by sea as opposed to pipelines; insurance costs; the cost of supporting vessels (such as the *Northwind, et al.*); the cost of maintaining the tankers and the supporting icebreaker, etc.

We cannot pretend to establish the outcome of such a complex calculus in this article. It should be noted, however, that, generally, an optimistic consensus about the prospects for general shipping (as opposed to cargo-specific, i.e., oil-shipping) in the Arctic, exists.⁷² Finding out whether or not these prognostications are correct will ultimately require the acid test of experience. In the interim, all that the legal analyst can do is suggest that many questions about trans-Arctic navigational "skills" remain unanswered.⁷³

(v) *Wealth*

The category of wealth as a base value translates into the question of which actor — the U.S. or Canada — has brought, brings and can bring a greater reservoir of wealth to bear on Arctic interaction. The answer, again, must favour the economic might of the United States.

More relevant to the present discussion, however, is to view wealth as an objective sought by these two actors in the Arctic.

Transport by Submarine in Arctic Waters, (1966) 13 North 5; cf. Johannson, *Oy Wartsila Ab, Polar Shipbuilders*, (1972) 16 Polar Record 29.

⁷¹ Sherman, *The Economics of Shipping in Polar Seas*, (1969) 14 Polar Record 481.

⁷² Sherman concludes by stating that, "It is reasonably certain that the polar regions will witness even greater activities as nations... develop their natural resources..." and, moreover, that, "... transportation will be by surface cargo vessels, ...": *ibid.*, at p. 486. Similarly, Johannson predicts that, "Ice navigation will increase rapidly... and that it is likely that the traffic will be carried by ice-strengthened surface ships assisted occasionally by ice breakers...": Johannson, *Oy Wartsila, Polar Shipbuilders*, (1972) 16 Polar Record 29.

⁷³ For further information about ships and shipping, see: U.S. Navy, Bureau of Ships, *Operation and Care of Ships in the Arctic*, (1958) 6 J. U.S. Bureau of Ships 15; Vance, *Model Testing in Ice*, (1968) J. Soc. Naval Engineers 259; *De-Icing Apparatus for Ships*, (1970) 15 Polar Record 343; Milne, *A Small Research Submarine in the Arctic*, (1969) 22 Arctic 69; E. A. MacDonald, *Polar Operations*, (1969); Peschansky, *Breaking the Russian Ice*, (1969) 13 New Scientist 574; B. F. Slater, ed., *Arctic and Middle North Transportation*, (1969).

Specifically, the concern is with the potential of the Arctic region (particularly the North American sector) for petroleum production. Such a discussion, however, should not be circumscribed to merely determining the physical presence of oil and gas in Arctic substrata. The question of availability and exploitability is becoming an increasingly settled fact, both in Alaska and Canada, and in their respective continental shelves and adjacent ocean floors.⁷⁴ The potential for production is not, therefore, a function of incidence alone; rather, it is primarily dependent on the resolution of questions of politics and economics.

Because of their complex interrelationships, a clear demarcation separating these two kinds of factors is a practical impossibility. Yet, for purposes of analysis, it is useful to classify and enumerate them briefly. As regards political factors, consider, for instance, the plight of the oil industry executive. The following statement, quoted in a recent editorial, illustrates the point:

It's the uncertainties that are killing us. We put variables into calculations for every project. We try to anticipate the political and economic changes that might occur. But nowadays, we really never know for sure whether a project will be a winner. Conditions can change so drastically within a few months — by the time money is invested and the work done, a venture that looked good on paper can suddenly become a loser.⁷⁵

It is indeed a "crazy, mixed-up game, when the rules keep changing". When, how and by whom these rules shall be made or changed are the issues making up the political context in which calculations of potential must be made.

Moreover, it is a context of conflict, in whose vortex numerous opposed interests are pitted against each other in different ways: environmentalists are cast against (presumably indifferent) industrialists; two democratic regimes are faced with conflicting claims from both public and private sectors; these two regimes also contend with each other as international political actors, and they must separately contend with other powerful participants (e.g., U.S.S.R., Japan) and their inputs into the Arctic process of interaction. In short, it is a climate fraught with "uncertainties".

Some of the prominent areas of economic uncertainty have already been mentioned. To these, however, must be added more esoteric issues concerning world and regional price fluctuations,

⁷⁴ The "latest word on the oil industry's activities north of the Arctic Circle" appears in a series of articles under the general heading of *Arctic Report*, (1972) 70 Oil and Gas J. 67, 69, 78, 92.

⁷⁵ *Its a Crazy, Mixed-Up Game, When the Rules Keep Changing*, editorial, (1972) 70 Oil and Gas J. 15.

supply of, and demand for, oil, the moods of potential investors and the public, tariff barriers, export control regulations, and many others. Just how intimately these economic factors are tied to questions of policy can be illustrated by a recent statement concerning the American-Canadian standoff:

American diplomats also complain that Canadian authorities show little response to proposals for negotiations, and both seem content to let the problem fester. In the meantime, resentment among Canadians grows against American financial dominance of their industry, and Americans fret at the prospect of energy shortage.⁷⁶

In conclusion, the wealth objective, as far as Arctic oil goes, depends for its successful attainment on the propitious coincidence of factors of physical availability and accessibility; international (world and regional) and domestic, political, and economic climates; plus a host of other unpredictable variables (a disastrous oil spill, for instance) that may discourage the consuming public and their governments from continuing their respective pursuits of this goal.

(vi) *Well-being*

The category of national well-being can be defined broadly to include the social, political and physical welfare of a people. As a base value it is more instructive to focus on the first two, for these are the factors that condition, *a priori*, a government's range of policies in international interactions. Conversely, physical welfare is an objective of considerable importance whenever issues of ecology are raised. To what extent socio-political "well-being" may be considered an asset or a detriment in Canadian-American Arctic interaction is, to some degree, a question of judgment. Taken in this sense, the concept of national well-being is broad enough to accommodate a number of interrelated variables affecting intangibles, such as a people's sense of cohesiveness, its sense of public efficacy in the domestic political processes, and its actual degree of satisfaction against demands placed on decision-making bodies.

From this perspective, one might posit that America has suffered a great deal during the decade of the sixties. It has been a trying time, one during which, as R. Scammon and B. Wattenberg persuasively demonstrate, the average citizen has acquired a feeling of unspecified "malaise".⁷⁷ It has not been, in other words, an era of "good feeling" for the nation.

⁷⁶ *It's Time to Try Opening Diplomatic Doors in Ottawa*, editorial, (1972)
72 Oil and Gas J. 27.

⁷⁷ R. Scammon and B. Wattenberg, *The Real Majority*, (1970).

Similar problems have also plagued Canada, though not perhaps to the same extent. These include the separatist movement of certain groups in Canadian society, the role of government in Canadian society, the realization by most Canadians that their economy is singularly controlled by U.S. firms, and the frustrating effect of seeing Canada's identity become blurred by the adoption of encroaching American cultural values.⁷⁸ One is nevertheless tempted to suggest that, all other things being equal, Canada's exemption from fighting a Vietnam-type war during this same period has left her in a better base-value position than the U.S. is today, where national well-being is involved.

Well-being as an objective can be most effectively related to the satisfactory maintenance of the Arctic region's delicate ecological balance. Both nations share interests and responsibility in this respect since both own large, populated territories that lie within the Arctic Circle. Canada's stake, however, is much more direct and of a greater magnitude. First, its claimed sovereign possessions include the islands of the Arctic Archipelago and a vast crescent of contiguous Arctic lands. In contradistinction, Alaska's territory in the Arctic is almost exclusively contiguous, with no island system adjacent to its shores. Second, Canada's northern river systems drain into the Arctic Ocean, exposing a substantial portion of mainland Canada, and its inhabitants, to the consequences of man's activities in the Arctic.

This sense of immediacy cannot be perceived by the American public, for the entire state of Alaska is substantially removed from the U.S. mainland. If oil should spill into the Arctic Ocean off Alaska, only Alaskans feel the effects; if the same event occurs, say, in the McClure Strait, the well-being of a broader spectrum of Canadian society is likely to be sacrificed.

Developing the Arctic oil fields, however, does not just mean increasing the probability that an oil spill will blacken some part of the Arctic Ocean and its shores. It also represents an inflow of people and equipment, and the development of new roads, housing facilities, airports and other conveniences of modern life. It could mean, in other words, the systematic and permanent alteration of much of the region's natural environment.⁷⁹

⁷⁸ For a comprehensive empirical analysis, see: M. A. Schwartz, *Public Opinion and Identity*, (1967).

⁷⁹ See: Lammers, *A Letter from the Yukon*, (1970) 84 *Can. Naturalist* 67; Sage, *The Black Gold Rush and Alaska's Wildlife*, (1970) 13 *Animals* 64; Johnson, *Arctic Plants, Ecosystems and Strategies*, (1969) 22 *Arctic* 241.

Evidently, both nations must confront equally serious decisions concerning the future of their respective Arctic sectors; on that they seem to agree so far. "Who gets what" is a settled matter; it is "when and how" that remains to be decided, and it is in the making of these decisions that the objective of physical well-being becomes an issue of prominence.⁸⁰

(vii) *Respect and Rectitude*

Combining these value/objective categories enables one to examine two closely-related analytical concepts. Broadly speaking, respect has to do with the "prestige" or "status" that a nation commands in the international system. Rectitude refers to a nation's perception of its own behavior in moral terms, and to a similar evaluation of its behavior by other nations in the system.

As a base value, Canada and the U.S. bring into Arctic interaction qualitatively different respect assets by virtue of their disparity in power and other base value positions.

As previously noted, the U.S. has enjoyed unquestionable supremacy in terms of coercive/defensive capabilities, reservoir of wealth available, etc., since the conclusion of World War II. This supremacy has placed the U.S. at the top of the international ranking order in terms of status or prestige. So much so that, together with the U.S.S.R., it has acquired the sobriquet of "superpower". In contrast, Canada's projected international image is "... of a nation which, while it is able to enjoy the economic and social development achiev-

⁸⁰ The dangers of oil pollution in Arctic waters must be evaluated against the technological feasibility of controlling, preventing or cleaning up spills. Though no final solutions to these problems have been, or are likely to be, discovered, some progress is being made. See generally: Battelle Memorial Institute, *Oil Spillage Literature Search and Critical Evaluation for Selection of Promising Techniques to Control and Prevent Damage*, U.S. Coast Guard AD 666289, (1967); J. Glaeser and G. Vance, *A Study of the Behavior of Oil Spills in the Arctic*, U.S. Coast Guard, Office of Research and Development, (1971); G. A. Gilmore, et al., *Systems Study of Oil Spill Cleanup Procedures*, (1970); Estes and Golomb, *Oil Spills: Method for Measuring Their Extent on the Sea Surface*, (1970) 169 *Science* 676; T. Olson and F. Burgess, ed., *Conference on the Status of Knowledge*, (Galveston, 1966), "Critical Research Needs and Potential Research Facilities to Ecology and Pollution Problems in the Marine Environment", *Pollution and Marine Ecology: Proceedings*, (1967); J.E. Yee, comp., *Oil Pollution of Marine Waters*, (U.S. Dep't Interior Library, Bibliography no. 5, 1967); *The Battle Against Oil Pollution: New Method of Cleaning Up Ocean Spills*, (1970) 50 *Dock and Harbour Authority* 494; U.S. Congress, Senate, Committee on Commerce, *International Conference on Ocean Pollution*, (1972); Miller, *Ecological Balance in Semi-enclosed Seas*, (1972) 2 *Environmental Affairs* 191.

ed by the U.S., is at the same time free from both the guilt Americans experience as a consequence of their international power and the arrogance they can assume as the bearers of an idealized way of life."⁸¹

Both of these nations thus appear to enjoy a relatively high respect value-position. Nevertheless, the quality of the respect they command, and the methods by which they have sought it, differ.

Canada's recent assertions concerning the legal status of the Northwest Passage, however, have signalled a significant change of policy. That is, her Government has made it patently clear that they expect their claims to jurisdiction over Arctic waters to be fully respected.⁸² To underline the seriousness of these expectations, the Government has withdrawn its acceptance of compulsory jurisdiction of the International Court of Justice at the same time that it announced the new claims.⁸³ This action amounts to an assumption of broad responsibility by Canada for the resolution, management and/or avoidance of conflict in the region in question. In this connection, it is useful also to recall the remarks quoted above concerning the Government's forecast of military activities in the Arctic.⁸⁴

To be sure, America's reaction to Canada's metamorphosis has been one of sharp criticism.⁸⁵ But, from a respect standpoint, it has been comparatively mild. No rockets have been "rattled"; no oil tankers have been sent under military escort as a show of force; no ultimatum has been issued; in short, the U.S. and Canada appear to have, paradoxically, exchanged roles in terms of traditional methods of obtaining and maintaining international respect.

This exchange is troublesome because it appears to be inconsistent with Canada's rectitude base value position in relation to that of the U.S. As we noted in the preceding remarks, Canada has traditionally projected an image of righteousness through the means it has employed in approaching international problems. The U.S., of course, has also sought to project an image of moral correctness, but

⁸¹ P. Russell, ed., *Nationalism in Canada*, (1966), at p. 374; see also: G. Clark, *Canada: The Uneasy Neighbor*, (1965), particularly at p. 6.

⁸² E.g., the remarks of Prime Minister Trudeau after addressing the House of Commons, 8 April 1970, concerning the claims in question. Text provided by the Canadian Embassy, Washington, D.C. Hereinafter cited as "Trudeau Press Conference".

⁸³ *Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice*, U.N. Communication Cn. 53, 1970; treaty No. 3 of 21 April 1970.

⁸⁴ See: *Committee on Northern Development*, *supra*, n. 60.

⁸⁵ See: *U.S. Statement on Canada's Proposed Legislation* (U.S. Dep't of State, Press Release 121, 1970). (Hereinafter cited as "U.S. Statement".)

has been notably less successful in doing so than Canada — particularly during the past decade. Still, the present dispute reveals a continuing interest by Canada in moral self-assertion.

Both nations have justified their positions along lines of argument that combine moral (rectitude) objectives with more practical issues of their respective concern. For example, Canada in part argues it is right and proper to obey international law; but she also argues that if no existing body of law can cope with dangers of oil pollution in the Arctic, it is only right that Canada, herself, act.⁸⁶ Similarly, the U.S. argument is couched in moral terms, i.e., adherence to and use of international legal channels for the resolution of this kind of problem;⁸⁷ and in practical considerations, such as the likelihood that “merchant shipping would be severely restricted . . .”.⁸⁸ In effect, Canada and the U.S., if not seeking to increase, are at least endeavouring to maintain, their individual rectitude value-positions in the international arena through their behaviour in the Arctic process of interaction.

C. Basic Designs

(i) *Solidarity*

The objective of solidarity is present in both the Canadian and U.S. policy pronouncements about the process of interaction in the Arctic. Both states seem to seek the development of group attachments which emphasize “the oceans as a means of promoting broader identifications of peoples by providing a focus for organization of transnational loyalties and common sentiments”.⁸⁹ Canada repeatedly invokes the common purpose of all nations, but most particularly of all coastal nations, in protecting the ocean environment and their own territories from pollution. Critics of Canada’s Arctic policies are obliged to admit that this is a most potent appeal.

The United States, for its part, asserts the need for the solidarity of all mankind in dealing with the oceans in a comprehensive, systematic, collective fashion. Unfortunately for the U.S. position, it tends to take an abstract form reminiscent of the “International Common Good of the Social Thought” of the Catholic Church. Intellectually and morally it is admirable and, as a high level of abstraction, self-

⁸⁶ See: *Trudeau Press Conference, infra*, n. 110; also, see his remarks before the House of Commons, 24 October 1969.

⁸⁷ *U.S. Statement, infra*, n. 111.

⁸⁸ *Ibid.*

⁸⁹ M. McDougal and W. Burke, *supra*, n. 8.

evident.⁹⁰ Still, this principled call for community action on community problems may not carry the weight of the more immediately practical call of Canada for a halt to ocean pollution.

(ii) *Situations*

Geographically, the most notable general physical characteristic of the Arctic Ocean is its small size: it is "the smallest of the world's oceans".⁹¹ Secondly, "The ocean has a very wide and almost continuous continental shelf which protrudes above the surface of the water to form . . . the . . . islands of the . . . Canadian Arctic."⁹² Third, about two-thirds of the Arctic Ocean is covered by drifting pack ice, all-year-round.⁹³ Lastly, many parts of its waters are high-yield fishing and hunting grounds for whales, cod, walrus and seals.⁹⁴

What, then, are the more salient implications deriving from these situational facts? One which we have already noted is that of the ocean's inaccessibility to movement and navigation on a large-scale basis. Great barriers do indeed obstruct communication and transportation here, rendering the generalization that "... where one ship has just been, another can soon come..." false.⁹⁵

A second implication affects the distal relationships of interaction in the Arctic Ocean to land masses.⁹⁶ The short navigational season in the Northwest Passage, the necessity of using southern sea-lanes (as evidenced by *The Manhattan's* first crossing), and the tight geographic configuration of the Arctic Archipelago, together point to a clear fact: whatever happens in those waters as a result of oil-tanker

⁹⁰ E.g.: J. Epstein, *Code of International Ethics*, (1953), at pp. 48-54; H. Rommen, *The State in Catholic Thought*, (1945), at pp. 615-27; Pope John XXIII, *Pacem in Terris*, especially "Order in Human Beings", (1963), ss. 5-7; Vatican II, *Pastoral Constitution of the Church in the Modern World*, (1966), ch. 5.

⁹¹ "Arctic Ocean", 1 *Encyclopedia Canadiana*, (1957), at p. 203.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.* For a thorough description of the Arctic Ocean see: Pharand, *Freedom of the Seas in the Arctic*, (1969) 19 U. of T.L.J. 214; also, 1 *Encyclopedia of Oceanography*, (1966) at pp. 49-53; Hunkins *et al.*, *The Floor of the Arctic Ocean in Photographs*, (1970) 23 Arctic 175; and Kinney *et al.*, *Chemical Characteristics of Water Masses in the American Basin of the Arctic Ocean*, (1970) 75 J. Geophysical Research, Oceans, and Atmosphere 4097.

⁹⁵ M. McDougal and W. Burke, *supra*, n. 8, at p. 20.

⁹⁶ These and other relationships are discussed in detail in G. H. T. Kimble and D. Good, eds., *Geography of the Northlands* (1955). For a purely geographical/geological study of the land masses see J. J. Arens *et al.*, *Canadian North*, (prepared for the Technical Assistant to CNO for Polar Projects), OP-3A3/OPNAV PO3-4, (1956).

traffic is likely to affect adjacent land masses. Arctic coastal states thus face a concentration of direct interests in controlling and shaping further relevant interaction. This concentration of interests is probably the most significant situational factor in the Arctic Ocean's process of interaction.

Geographic constraints also increase the need for developing patterns of cooperation in carrying out frequent crossings of the Passage. Ships in this region normally require icebreaker escorts: Can U.S. vessels cross without Canadian assistance? The answer, though probably affirmative, is outweighed by other considerations. Sailing under Arctic conditions is a dangerous business and accidents can be expected to eventually happen. Need Canada render assistance to stricken U.S. vessels? To a tanker that has (hypothetically) spewed oil into her territorial waters? Many other pertinent queries come to mind. It is sufficient to indicate, however, that the systematic development of Northwest Passage sea-lanes will, at best, be difficult without increased cooperation among participants; at worst, disastrous.

A final note on situational factors concerns the relative levels of expectations of violence in the North American Arctic's process of interaction. Historically, these have been low at the intra level. That is, in the past Canada and the U.S. have twice allied to jointly oppose external security threats (presented, first by the Nazis, then by Russia). Canada's and America's Arctic sectors have, of course, been valuable strategic assets on both occasions. A complete reversal of this tradition of local harmony is, therefore, difficult, though not impossible, to visualize. As evidenced by the Peruvian/Ecuadorian-U.S. scrimmages, the potential for conflict among competing international actors is always a possibility.

(iii) *Strategies*

These situational characteristics of the North American Arctic have also limited the range of choice with respect to the strategies employed by the participants in pursuit of their objectives. McDougal and Burke have pointed out the possibilities for "non-competitive", rather than competitive, strategies in the ocean environments in the sense that "the activity of one participant does not preclude that of another".⁹⁷ However, the spatial arrangement of land and water masses in this region precludes the application of many "non-competitive" strategies. As previously indicated, tanker traffic in the Northwest Passage has so far been limited to southern crossings close

⁹⁷M. McDougal and W. Burke, *supra*, n. 8, at p. 25.

to the Canadian and U.S. mainlands. Even if technological breakthroughs in ship design and engineering should "open up" the more northerly McClure Strait, the relationship of navigation to land masses will remain close. All of the waters in question are either territorial waters or contiguous zone waters surrounded by Canadian territory. They are, moreover, notoriously hazardous to navigation. Thus, the freedom of participants to go their own way which has often characterized use of the oceans in other times and places — and which appears to have made possible non-competitive strategies of ocean use — is not to be found in the North American Arctic.

Since Canada and the United States pursue objectives in this area that place them in competition, the spectrum of means of persuasion and/or coercion (the diplomatic, ideological, economic and military instruments of foreign policy) may become relevant.⁹⁸ It may be assumed with confidence that neither the ideological (broadly, psychological) nor military instruments of coercion would be employed by either Canada or the United States against the other. But the diplomatic instrument has already been used forcibly by both parties, and it is conceivable that some forms of economic coercion may be put into effect.

The diplomatic instrument includes appeals to legal arguments and efforts to involve international organizations. It also involves traditional behind-the-scenes political manoeuvres as well as more overt negotiations. Since both Canada and the United States have sought to enhance their record and reputation as supporters of international law and organization, these diplomatic methods of persuasion and coercion take on a considerable force and cutting edge. Unlike other controversies involving heterogeneous participants from diverse ideological-political segments of the international system, the Canadian-U.S. controversies over the Arctic join adversaries from the same background, who speak the same political as well as normative language, employ similar methods in international politics, and are more vulnerable to the skilful use of the diplomatic instrument than would be the case if they were proponents of quite different viewpoints, such as those of the Communist or Third-World states.

To be sure, Canada has sought in its diplomatic counter-offensive to the United States' protests of April 1970 to distinguish herself as a middle power (very peaceful, concerned with environmental protection), thus in contrast to the U.S. as a great power, embroiled in wars, nuclear tests, and wide-ranging security measures, and concerned far more with maritime and "big business" interests than

⁹⁸ *Ibid.*; see M. McDougal and F. Feliciano, *supra*, n. 8, at pp. 27-33.

with environmental protection.⁹⁹ However, regardless of the elements of truth in this characterization, it is not the case that the U.S. and Canada stand in the relationship of a developed as against a developing, Third-World nation.

If the diplomatic instrument is already in use and of seemingly paramount importance as regards the interaction of Canada and the U.S. in the Arctic, the latent possibilities of the economic instrument of foreign policy are great for both parties. Private interests are merged with public interests on both sides. Private interests are also eminently dependent upon the exercise of public functions. Legal permission to extract and ship oil, gas and other minerals by land and sea depends upon the public policies of the two nations. Practically speaking, it is unlikely that private concerns can operate in this area without the cooperation and support of the two governments. Discriminatory treatment with profound economic consequences is within the power of each government.¹⁰⁰ More broadly, the close interrelation of the economies of the two countries is well known. A great variety of economic inducements and sanctions may be employed by Canada and the United States in support of their objectives in the Arctic.¹⁰¹

Finally, as will be noted with respect to claims to enforce Canada's prescriptions for the Arctic waters, the simple withholding of innumerable aids to navigation and survival in the area is an available form of coercion that appears too novel to include in the traditional category of the military instrument.¹⁰²

⁹⁹ *Supra*, at pp. 345-46.

¹⁰⁰ *Supra*, at p. 342.

¹⁰¹ On U.S. — Canadian economic interdependence generally, see: "U.S. — Canadian Economic Committee Meets at Ottawa; Statement by Secretary Rogers and Text of Joint Communique", (1970) 63 Dep't. of State Bull. 730-732; "United States and Canada; Good Neighbors, But — Interview with Pierre Elliott Trudeau, Prime Minister of Canada", 73 U.S. News and World Report 32-35 (July 3, 1972); "The International Implications of the Energy Situation: Statement by Under Secretary John N. Irwin II", (1972) 66 Dep't. of State Bull. 626-631; A.W. Cockerill, "Canada: A U.S. Economic Colony?", (1972) 136 Current 47-52.

With respect to dependence on fuel resources, see: L. Waverman, *National Policy and Natural Gas: The Costs of a Border*, (1972) 5 Can. J. Econ. 331. Waverman "... attempts to measure the increase in marginal transportation costs paid by final consumers because of the inefficient flow pattern created by restrictions of trade in natural gas": *Ibid.*, at pp. 331-332. He also reminds us that between one-fifth and one-third of gas reserves are found associated with oil: *Ibid.*, at p. 331.

¹⁰² *Infra*, Part two, Volume 19, number 4 of the *Journal*.

(iv) *Outcomes*

The success of the two main participants, Canada and the United States, in pursuing their objectives in the Arctic will be judged particularly with respect to the enhancement and sharing of the functions of communication, fishing, appropriation of oil and gas, and military security. Successes in these matters will be balanced against the short-term effects of these functions on the Arctic ecology.

In analyzing the claims and counterclaims of the Arctic participants, much will turn on these outcomes. As will be seen, the key concept of reasonableness depends in part on the actual mutual impact that pursuit of these competing objectives produces.¹⁰³ Since we are, at this writing, at the threshold of a period when Arctic interaction may be increasing markedly and wherein the influence of Canada's environmental policies are just beginning to be felt, it is too early to do more than speculate on the form these outcomes will take.

(v) *Effects*

It is likewise premature to do more than indicate that the long-term effects of the Canadian-U.S. interaction in the Arctic must ultimately be judged in terms of their consequences for participants and values beyond these two states and their values. All of the objectives of Canada and the United States mentioned above are likewise objectives of other states, groups of states, and of the total world community. Enhancement or diminution of the capability of traversing the region, of conserving/appropriating and distributing its wealth, of using it for the well-being, enlightenment, skill, and security of other participants in the world power process, are all effects that figure into the calculation whereby mature judgments will be made about the policies pursued in the Arctic. The expectations of all states will result from these judgments. More lasting judgments affecting respect, solidarity and rectitude will likewise derive from the effects perceived to have resulted from the contemporary process of interaction in the North American Arctic.

(vi) *Conditions*

All of the foregoing calculations must be made in the light of present and existing conditions in the world power process. Three principal aspects of this process warrant emphasis:

- (1) the structure and dynamics of the world power arena;

¹⁰³ *Infra*, Part two, Volume 19, number 4 of the *Journal*.

- (2) the state of relevant science and technology;
- (3) patterns and degrees of interdependence.

Obviously, these three aspects of world politics may be viewed primarily in terms of the most immediately relevant developments, i.e., power relations involving the U.S., Canada, and U.S.S.R. as Arctic powers; science and technology pertinent to the oceans and to Arctic environments; and perceptions of interdependence with respect to the North American Arctic and neighboring areas. But the concentric circles of relevant conditions spread out endlessly. Power changes in Southeast Asia may alter power relationships in the Arctic. Scientific and technological successes or failures in entirely different parts of the world may affect priorities for exploitation of the resources of the Arctic. Patterns and degrees of interdependence in other places with respect to other important subjects may add or subtract from the propensity to recognize and act in accordance with shared interests in Arctic waters.

The structure of the world power process is manifestly changing. The number and identity of "Great Powers" is in flux.¹⁰⁴ Alliances and rivalries are so much in disarray that the greatest fear of a major war is caused by the former partners of the "Sino-Soviet Bloc". After a decade of at least *pro forma* concern for smaller nations and the Third World, there is a discernible trend toward cooperation among the strong nations on practical questions of mutual interest and a lessening of efforts to erase the Rich Nations/Poor Nations dichotomy by direct and often competitive action.¹⁰⁵ These changes will affect the process of interaction in all aspects of the use and protection of the oceans. It will probably reinforce what is already a rather narrow participation in the process of interaction in the Arctic.

Developments in science and technology will continue to change the state of navigation and communication, appropriation of the living resources of the sea, exploitation of oil, gas and other fuel resources, and such security questions as the role of submarine launched missiles in deterrent systems.¹⁰⁶

¹⁰⁴ See generally: Brzezinski, *The Balance of Power Delusion*, Foreign Policy, summer 1972, at p. 54; Hoffman, *Will the Balance Balance at Home?*, Foreign Policy, summer 1972, at p. 60; Hoffman, *Weighing the Balance of Power*, (1972) 50 Foreign Affairs 618; Buchan, *A World Restored?*, (1972) 50 Foreign Affairs 644.

¹⁰⁵ See Friedheim, *The "Satisfied" and "Dissatisfied" States Negotiate International Law: A Case Study*, (1965) 18 World Politics 32.

¹⁰⁶ E.g., Burke, "Law and the New Technologies" in *The Law of the Sea*, (Alexander, ed., 1967) at pp. 204-27; Burke, "Ocean Sciences, Technology and the Future International Law of the Sea", in *The Future of International Law*

Crises in the supplies of fish and fuel will produce awareness of interdependence and the need for cooperative measures to assure continued production and distribution. But many of the same nations whose awareness is heightened with respect to these needs will at the same time become increasingly fearful of the ravages of pollution caused by uncontrolled use of the oceans. It will be in the dynamic interplay of such changing conditions that short-term outcomes and long-term effects of the process of interaction in the North American Arctic will be evaluated.

III. The Process Of Claims

A. Preliminary Comments

In the three years following passage of the Canadian *Pollution Prevention Act* of 1970, a substantial literature has dealt with the controversies to which it has given rise. These controversies concern the United States and Canada. There appears to be little available literature on the reactions of other states. What is interesting about these controversies has been their primarily theoretical and speculative nature. Little has actually happened in the North American Arctic to give substance to the claims, counterclaims, apprehensions and predictions of the public officials and publicists concerned.¹⁰⁷

Notwithstanding the real interests at stake, the focus of concern has been on the broad implications of the Canadian initiatives and the U.S. response rather than on any immediate practical consequences of the interaction and exchanges of claims and counterclaims by the two parties. No major threat to the Arctic environment has been forthcoming over these two years and no U.S. or other foreign activity has been interfered with by Canada, full implementation of Canada's regime having only become legally possible in August, 1972.¹⁰⁸ For the moment the debate is over principles and process.

Canada and the United States both claim that the issues at stake transcend the merits of Canadian conservation and anti-pollution measures. Understandably, the emphasis on the transcendent dimensions of the dispute is greater in the views of the U.S. Government and American publicists than it is in those of the

of the Sea?, vol. 2, *Wealth and Resources*, (R. Falk and C. Black, ed., 1970), at pp. 183-264.

¹⁰⁷ See bibliography, *supra*, n. 6.

¹⁰⁸ See *supra*, n. 5.

Canadian Government and its scholarly defenders. Nevertheless, Canada and the United States agree that the issues are universal, not particularistic. Over and above its justifications for instituting the new anti-pollution regime in the Arctic, Canada claims that it is setting a good and badly needed precedent as a contribution to the development of the international law of the sea. The United States professes broad sympathy with Canada's objectives but insists that Canada must not be permitted to set bad precedents which, the U.S. claims, violate present international law and divert development of the law into undesirable directions.

Given this emphasis in the current debate on the principles and process of the public order of the oceans, it is important to understand the nature of the claims and counterclaims. Unfortunately, this is not easy. Official and other authoritative Canadian expositions of Canada's claims are unclear as to the exclusive rights claimed. Apparently this lack of clarity is in part calculated and, indeed, necessitated by nationalistic domestic pressures. Moreover, the nature of the situations and functions covered by the Canadian claims is such that claims falling short of sovereign exclusivity may amount to assertions of exclusive competence with respect to all practical issues in the North American Arctic. Thus, a claim to exclusive competence to prescribe for and to apply authority relative to all known important functions and activities in the Arctic Archipelago amounts to a claim to exclusive jurisdiction, even if the words of the claim do not. As will be seen, the internationalist influences on the Canadian claims have produced assurances that sovereign exclusivity is not sought except in the expanded territorial sea. But nationalist influences have elicited suggestions that assertion of clear, total, exclusive competence is the logical culmination of the process of claims initiated by Canada.

(i) *The Claimants*

Reactions to Canada's claims may be expected from parties with immediate interests in the North American Arctic and interests in Arctic areas generally. Beyond that, almost any nation may find occasion to support or oppose Canada's Arctic initiative because of its serious implications for the public order of the oceans. Presently, however, the process of claims — as reflected in materials available to the authors — is confined entirely to Canada and the United States. Because of their obvious interests and their leading roles in community efforts to develop the public law of the oceans, Canadian-U.S. claims and counterclaims may be

expected to dominate if not monopolize the total process of claims relative to this subject.

It would obviously be desirable to interject the reactions of the Soviet Union, United Kingdom, Denmark, and other states with very important interests in the area. At this stage of research, the authors do not have sufficient evidence of the views of these nations to broaden the analysis beyond the Canadian-U.S. interactions.

(ii) *Objectives*

Canada's objectives appear to be three-fold:

(1) development of the natural resources of the Arctic area in the interests of "international trade and commerce", and "the economy of Canada in particular".

(2) protection of the "Canadian Arctic", in fulfillment of Canada's obligations 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".¹⁰⁹

(3) development through enlightened, unilateral measures of adequate international law, "where no law exists, or where law is clearly insufficient... to preserve this area until the international law develops".¹¹⁰

The objectives of the United States coincide substantially with those of Canada on the first two objectives. Thus, the United States agrees on:

(1) development of the Arctic as a "region important to all nations in its unique environment, its increasing significance as a world trade route, and as a source of natural resources".

(2) protection of the "Arctic region", in view of its "peculiar ecological nature" and "the potential dangers of oil pollution in that area".¹¹¹

¹⁰⁹ *Pollution Prevention Act*, Preamble.

¹¹⁰ Canadian Embassy, Washington, D.C., Transcript of Prime Minister Trudeau's remarks to the press following the introduction of legislation on Arctic pollution, the territorial sea and fishing zones, in the Canadian House of Commons on April 8, 1970, at p. 2 (Hereinafter cited as "Trudeau Press Conference").

¹¹¹ U.S. Department of State, Statement of April 15, 1970, "Arctic Sovereignty", reproduced as *U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction*, 62 Dep't. of State Bull. 610, at p. 611 (May 11, 1970), hereinafter cited as "U.S. Statement, April 15, 1970", page citations to Dep't. of State Bull.

But the United States disagrees fundamentally with the third Canadian objective relative to the process of public order of the oceans. The U.S. objectives in this regard are:

(3) rejection of the Canadian claims as adversely affecting "the exercise by the United States and other countries of the right of freedom of the seas in large areas of the high seas, without basis in international law";

(4) rejection of the Canadian claims as adversely affecting "our [U.S.] efforts to reach international agreement on the use of the seas";

(5) rejection of the Canadian claims so that they will not "be taken as precedent in other parts of the world for other unilateral infringements of the freedom of the seas";

(6) resolution of the broader problems of the public order of the oceans through "international solutions", in "a new international treaty dealing with the limit of the territorial sea, freedom of transit through and over international straits and defining preferential fishing rights for coastal states on the high seas".

(7) resolution of the specific problems of "the Arctic beyond national jurisdiction" by international agreements arising out of multilateral efforts guided by the United States and Canada.¹¹²

(iii) *Canada's Claims*

Expressed in terms of the studies of McDougal and Burke,¹¹³ Canada makes the following claims:

(1) to determine the width of the territorial sea and to delimit the boundary between internal waters and the territorial sea;

(2) exclusive, comprehensive, and continuing competence to control access to a Canadian Arctic contiguous zone;

(3) exclusive, comprehensive, and continuing competence to prescribe and apply authority in a Canadian Arctic contiguous zone;

(4) to take all measures necessary for self-defense against environmental threats in the Canadian Arctic;

(5) to deny treatment of the Northwest Passage as an international strait.

As yet, there is no clear indication whether Canada will claim exclusive rights of appropriation of resources in the waters of its Arctic contiguous zone. Such rights are claimed in Canada's expanded territorial waters and on the continental shelf.

¹¹² *Ibid.*

¹¹³ M. McDougal and M. Burke, *supra*, n. 8, at pp. 179-184.

B. *Canada's Claims to Determine the Width of the Territorial Sea*

Under Canada's 1970 *Act to Amend the Territorial Sea and Fishing Zones*, Canada extended its territorial sea from three to twelve miles.¹¹⁴ The Act authorized establishment of a system of straight baselines on "fisheries closing lines" across the entrances of bodies of water in special need of fishery conservation protection and where Canada has special historic fishing claims. Thus, Canada would establish exclusive fisheries zones in such areas.

Two claims, then, have been advanced: to determine the width of the territorial sea and to delimit the boundary between internal waters and the territorial sea. (The use of straight baselines, in consonance with the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*, will not be discussed in this article.)¹¹⁵

With respect to the first claim, Canada contends that, in Prime Minister Trudeau's words, "international law is moving from the three- to the twelve-mile limit, therefore we are asserting that Canada's territorial seas henceforth will be coming under the twelve-mile limit rule."¹¹⁶

The United States reaction to Canada's claims for the territorial sea, in the State Department Statement of April 15, 1970, was generally negative but conciliatory. The issue of the width of the territorial sea was treated as part of the broader complex of issues raised by the Canadian claims to a contiguous zone in the Arctic. The State Department Statement condemns all of the Canadian claims as adversely affecting U.S. "efforts to reach international agreement on the use of the seas". The Canadian claims on the territorial seas are rejected in the blanket statement that, "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".¹¹⁷

In the penultimate paragraph of the U.S. Statement, the heart of the matter is bared:

With respect to the 12-mile limit on the territorial sea, we have publicly indicated our willingness to accept such limit, but only as part of an agreed international treaty also providing for freedom of passage through and over international straits.¹¹⁸

¹¹⁴ *Territorial Sea Act*, *supra*, n. 3.

¹¹⁵ See Lloyd, *supra*, n. 8; Johnston, *supra*, n. 8.

¹¹⁶ Trudeau Press Conference, *supra*, n. 110, at p. 2.

¹¹⁷ U.S. Statement, April 15, 1970, at p. 610.

¹¹⁸ *Ibid.*

The United States, then, claims that the Canadian extension of the territorial sea to twelve miles is contrary to existing international law, disruptive of proper procedures for changing the law, and a threat to "freedom of passage through and over international straits". No explicit reaction to the Canadian straight baseline method is registered.

Three issues emerge from these claims and counterclaims:

- (1) Is a state justified in claiming a twelve-mile territorial sea?
- (2) Is unilateral action justified in asserting a claim to a twelve-mile territorial sea?
- (3) Do the Canadian claims with respect to territorial waters infringe upon the rights of freedom of passage through and over international straits?

Since the last issue is also directly involved in Canada's claims for a contiguous zone, it will be dealt with separately after those claims are discussed. The analysis which follows focuses on the present state of international law with respect to the width of the territorial sea and the permissibility of unilateral assumption of jurisdiction over a twelve-mile territorial sea given this state of affairs.

(i) *Basic Community Policies*

Basic policies historically held by the members of the world public order sought a compromise between the inclusive rights of freedom of the seas and the legitimate exclusive rights of states to territorial waters. Two expressions of this compromise have been the efforts to hold to a minimum the width of territorial waters and to protect the rights of innocent passage within such waters. Attempts to hold the line on expanding claims to wider territorial seas have had both practical and symbolic aspects.

In an age when even claims to less-than-sovereign jurisdiction in contiguous zones and continental shelves may produce substantially exclusive rights, extension of sovereignty in a wider territorial sea means outright diminution of the area of freedom of the seas. The more states succeed in extending their territorial seas, the less remains of seas free to all. With respect to all outstanding issues of sharing the resources of the seas, effective incorporation of enlarged territorial seas simply removes such waters from consideration. This has symbolic, psychological effects on the participants in processes relative to the public order of the oceans. Extension of territorial waters signals a lack of confidence in the prospects for successful resolution of current issues in ways that are both

satisfactory to the coastal states and responsive to the inclusive interest of the other states and the community.

When claims to sovereign, exclusive jurisdiction over the seas are very extensive, for example, as broad as two hundred miles, both their practical and symbolic effects on the public order of the oceans are evident. But claims need not be so exaggerated in order to have a significant, and perhaps harmful, effect on the balance within the world public order between exclusive coastal and inclusive maritime (and other) rights. The impact of a more modest extension of territorial waters may be great, dependent upon geography and the interests involved.

The broad symbolic, psychological effect of claims to extend territorial waters is underscored by the fact that most of the historic reasons for claiming exclusive, sovereign jurisdiction over adjacent waters are now recognized as irrelevant to most states' territorial waters. The three-mile limit was based on considerations of security. Today, the technology of war renders immaterial differences between territorial waters of three, six or twelve miles for most states in most conditions. Fishing rights, conservational and environmental protection, and other considerations relative to exploitation of the resources of the seas are not generally affected decisively by the extension of territorial waters a few miles. They are, of course, affected by claims up to two hundred miles. To be sure, in particular cases, security, fishing, environmental, and other vital interests may be greatly affected by extension of territorial seas just a few miles. But, more often, such interests are protected through various forms of contiguous zones wherein exclusive, sovereign ownership and jurisdiction need not be and are not claimed.

In view of these considerations, it is understandable that the policies of most of the leading maritime states and the opinions of the leading publicists have sought to limit extension of territorial waters. Basic community policy has tended to follow two working guidelines:

- (1) The width of the territorial sea should be kept as narrow as possible.
- (2) The presumption is always against claims to wider territorial seas.

This latter presumption must be overcome by a showing of the reasonableness of the extension in terms of the demonstrable needs of the coastal state and the acceptability of its infringement on the existing rights of other states and of the community.

Obviously, the presumption against extension of territorial waters would be further overcome by a showing that the extension served to protect important rights of other states and of the community.¹¹⁰

C. *Claims For A Twelve-Mile Territorial Sea*

(i) *Clarification of Policy*

The normal way to analyse Canada's claim to a twelve-mile territorial sea would be to start with the general presumption against unilateral claims on this subject, and then to examine the substance of the claim in question. However, the normal sequence is not appropriate in this case since there is little to suggest that Canada questions the general position that states are not free to claim any territorial sea they wish. Canada contends that it is only joining, not initiating, a trend toward claims to twelve-mile territorial seas. The U.S. counterclaim is that the form and timing of the Canadian claim is unjustified in law and unhelpful at this point in the development of the law. Accordingly, it appears appropriate to start with the legal status of the question of the width of territorial seas, and then to examine the reasonableness of Canada's unilateral claim to a twelve-mile limit.

A further clarification should precede analysis of trends in a decision regarding the width of the territorial sea. Thus far it appears that Canada remains among the states that retain the traditional view that the territorial sea should be relatively narrow, no more than twelve miles. Canada has not made claims for exclusive, sovereign control over hundreds of miles of high seas as have such states as Ecuador and Peru.¹²⁰ It will be argued in the assessment

¹¹⁰ M. McDougal and W. Burke, *supra*, n. 8, at pp. 452-453, 488-489; M. McDougal, "International Law and the Law of the Seas", in *The Law of the Sea*, (L.M. Alexander, ed., 1967), at p. 20.

¹²⁰ See: Chile's *Presidential Declaration Concerning the Continental Shelf and Coastal Fisheries in the Adjacent Seas*, June 29, 1947, and Peru's *Presidential Decree No. 781, Concerning the Continental Shelf and Coastal Fisheries in the Adjacent Seas*, August 1, 1947: United Nations, *Laws and Regulations on the Regime of the High Seas*, at pp. 15-16, 16-18; *The Declaration of Santiago*, signed by representatives of Chile, Ecuador and Peru in 1952, United Nations Legislative Series. *Laws and Regulations on the Regime of the Territorial Sea*, (1957), at pp. 723-29; *The Declaration of Montivideo on the Law of the Sea of 1970*, (1971) 10 I.L.M. 1081.

See: M. McDougal and W. Burke, *supra*, n. 8, at pp. 3-4, 44, 492-498, 502-503, 956; Kunz, *Continental Shelf and International Law: Confusion and Abuse*, (1956) 50 A.J.I.L. 828; Loring, *The United States-Peruvian "Fisheries" Dispute*, (1971) 23 Stan. L. Rev. 391; and Loring, "The Fisheries Dispute", in *U.S. Foreign Policy and Peru*, (D. Sharp, ed., 1972), at pp. 57-177.

of Canada's contiguous zone claims that its functional control of seas therein may well amount in practice to exclusive control. Nevertheless, it is important to emphasize that Canada's claims to a twelve-mile territorial sea should be judged primarily in the context of the claims and counterclaims of other states adhering to the twelve-mile outer limit on exclusive, sovereign control to coastal sea areas.

Three main issues dominate the question of extending territorial seas: (1) access through straits; (2) fishing rights within such areas; and (3) pollution.

With respect to straits, a basic issue is the extent to which international practice supports a right to innocent passage through straits connecting the high seas, or national waters and the high seas. The debate over the character of the right of access is complicated by the question whether straits acquire an international character simply because of their geographic location, or whether actual use by international maritime traffic is required. Further, there is disagreement over the rights of public warships in international straits.

The issue of fishing within territorial waters is but a part of the broader issues of conservation and allocation of fishing rights. A major reason for expanded claims to territorial seas is protection of fisheries. Yet twelve-mile territorial seas are not adequate to protect many fisheries; hence claims to fifty, one-hundred and two-hundred mile "sovereign" territorial waters. In calculating the positive and negative implications of extending territorial seas to twelve miles, the gains for coastal fishing rights may come to be viewed as modest compared with the difficulties engendered for innocent passage generally and access to straits in particular. Accordingly, the reasonableness of a claim to a twelve-mile territorial sea may be judged in considerable measure in the light of the claimant state's policies with respect to free access and innocent passage.

However, and against the traditional emphasis on the importance of access and innocent passage in territorial waters including straits, there is increasing awareness of the threat of pollution to the coastal state resulting from deleterious practices and from accidents that may result from the exercise of the rights of passage by international shipping. Here again, as in the case of protecting coastal shipping rights, the question may be raised as to whether a twelve-mile territorial sea permits markedly more effective anti-pollution measures than a narrower sea. Again, as in the case of balancing fishing rights against rights of access and

innocent passage, it may be asked whether the more preferable answer to pollution threats may not be contiguous zones of considerable distance but limited exclusive claims rather than slightly enlarged (e.g. three to twelve miles) territorial seas.

(ii) *Trends in Decision*

The failure of the 1958 and 1960 Geneva Conferences to fix a width for territorial seas is well known.¹²¹ It will also be recalled that at the 1958 Conference the United States appeared to acknowledge the hopelessness of the effort to retain the three-mile limit when it proposed a six-mile limit plus a six-mile contiguous zone, in which the coastal state would have exclusive fishing rights subject to historic rights of others. The fact that this compromise proposal obtained the highest vote of any, even though it failed to obtain the necessary two-thirds vote, suggests at least these points of possible consensus:

- (1) against exclusive territorial seas in excess of twelve miles;
- (2) in favor of twelve-mile, near-exclusive territorial seas combined with fishing zones;
- (3) in favor of no more than six miles with respect to exclusive jurisdiction over shipping (innocent passage).

The practice of states appears to have coincided broadly with these points of consensus for a decade or more after 1958. But more states are claiming a twelve-mile territorial sea, to the point where such a width appears to be the only one likely to find broad acceptance.¹²² Meanwhile, conservative states such as the United States have followed the precedents of other states, in-

¹²¹ See: M. McDougal and W. Burke, *supra*, n. 8, at pp. 526-48 (for description), 548-61 (for appraisal and recommendation); United Nations, *Second United Nations Conference on the Law of the Sea*, "Synoptical table concerning the breadth and juridical status of the territorial sea and adjacent zones", (CA/Conf. 19/4, February 8, 1960, and A/Conf. 19/8, Annexes), at pp. 157-63, in M. Whiteman, 4 *Digest of International Law*, (1965), at pp. 21-33.

¹²² "Among 138 states, whose national claims were compiled by the U.S. Department of State in early 1972, only 30 states will uphold the 3-mile limit, and of these 30 only 7 can be regarded as important industrial states. More than ninety other states in eastern Europe, Africa, and South America have claimed a 12-mile or broader territorial sea": F. Kruger-Sprengel, *The Role of NATO in the Use of the Sea and the Seabed*, (Woodrow Wilson International Center for Scholars, Ocean Series 304, Washington, D.C., October 1972, G.J. Mangone, ed.), citing *Limits in the Seas, National Claims to Maritime Jurisdictions*, International Boundary Study, Series A., no. 36, January 3, 1972, Department of State, Bureau of Intelligence and Research, Washington, D.C.

For U.S. and Soviet recognition of this trend, see *infra*, Part two, Volume 19, number 4 of the *Journal*.

cluding previously conservative Canada, in claiming exclusive fishing zones up to twelve miles, including the three-mile territorial sea.¹²³ Indeed, the U.S. Department of State has termed exclusive twelve-mile fishing zones acceptable in view of the overwhelming practice of states.¹²⁴ Thus, if one breaks down the question of territorial seas and/or contiguous zones into the two most relevant inclusive interests, the following may be observed:

(1) Twelve-mile zones are acceptable with respect to fishing rights.

(2) Twelve-mile territorial seas are increasingly claimed but they are questioned and resisted because maritime states will not concede the greater control of coastal states over passage of ships in waters formerly considered high seas. Accordingly, states such as the United States still characterize as contiguous zones fishing and other zones beyond three miles, which states such as Canada are now claiming as part of territorial waters.

McDougal and Burke have criticized the concept of contiguous zones as it has been defined in the 1958 Geneva *Territorial Sea and Contiguous Zone Convention*. They find this definition unacceptable because of its inflexible twelve-mile limit and its limited, specifically authorized functions, that is, enforcement of customs, fiscal, immigration and sanitary regulations. They point out that historically there have been contiguous zones: zones adjacent to territorial seas, extending farther out to sea than twelve miles. Contiguous zones

¹²³ The Act, approved October 14, 1966, 80 Stat. 908, provides:

Sec. 1. There is hereby established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect of fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

Sec. 2. The fisheries zone has as its inner boundary the outer limits of the the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

¹²⁴ Bishop says:

The European Fisheries Convention of 1964 provides for exclusive fishing by the coastal state within six miles outward from the baseline of its territorial sea, and then for an outer belt between six and twelve miles outward from the baseline of its territorial sea, in which fishing is limited to the coastal state and to other parties whose vessels have habitually fished in that belt between 1953 and 1962.

(W. Bishop, *International Law: Cases and Materials*, (3rd ed., 1971), at p. 630). Bishop cites in support of the U.S. act evidence of state practice reported in S. Rep. No. 1280, Committee on Commerce, 89th Cong., 2nd Sess. (1966): *Ibid.*

for security and fishing are notable types not included in the 1958 Geneva definition. Moreover, it is questionable whether anti-pollution zones such as that claimed by Canada can be satisfactorily dealt with as a "sanitary" zone in the sense of Article 24 of the 1958 Geneva *Convention on the Territorial Sea and Contiguous Zone*.¹²⁵

These questions underscore the interrelation of the concepts of territorial seas and contiguous zones, as well as the difficulties of restricting both concepts within an inflexible twelve-mile limit. If Canada is correct in its belief that a twelve-mile territorial sea is — or will soon be — the norm, variants of the 1958, Article 24 "contiguous zone" are now — or soon will be — irrelevant. A new, expanded, more flexible definition of contiguous zone will have to be forthcoming. If Canada is not correct, we shall need two or more terms for "contiguous zones", depending upon whether they extend more or less than twelve miles and whether they deal only with the 1958, Article 24 subjects of fishing and anti-pollution, or with other subjects, notably security.

The relevant literature appears increasingly to concede the inevitability of extension of the territorial sea to a width of twelve miles. But the same writers remain unsatisfied with the status of innocent passage generally and of passage through straits in particular.¹²⁶ In the literature on the Canadian-U.S. controversy, the treatment of Canada's claim to a twelve-mile limit is relatively perfunctory, except for the issue of the effect of this extension of territorial seas on passage through straits, a subject to be treated separately below.¹²⁷

In view of the apparent trend towards claims to a twelve-mile territorial sea, or a combined, near-exclusive, territorial sea and contiguous zone of twelve miles, a trend recognized by the United States even as it has protested Canada's twelve-mile claim, the heart of the U.S.-Canadian controversy would appear to lie not in the fact that a wider territorial sea is claimed. Rather, it is the unilateral assertion of the claim and the continuing debate over the effect of such claims on straits that draws objections.

¹²⁵ M. McDougal and W. Burke, *supra*, n. 8, at pp. 604-607; M. McDougal, "International Law and the Law of the Seas", in *The Law of the Sea*, (L.M. Alexander, ed., 1967), at p. 20.

¹²⁶ See: Ratiner, *supra*, n. 2, at pp. 245-246; Kreuger, *supra*, n. 2, at pp. 645-46, 665-78; Bilder, *supra*, n. 6, at pp. 1180-82; Kruger-Sprengel, *supra*, n. 122, at pp. 22-25.

¹²⁷ Bilder, *supra*, n. 6; Milstein, *supra*, n. 6, at pp. 1179-82.

As observed earlier, the Canadian claim to a twelve-mile territorial sea does not appear to question the basic community policy against unilateral claims. This point becomes clear if we consider the "Principles of Mexico on the Juridical Regime of the Sea", adopted by the Inter-American Council of Jurists, Mexico City, 1956, which concludes:

Each state is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defense.¹²⁸

The Canadian claim does not go to the extreme of the "Principles of Mexico". It is not based on a broad claim of reasonableness, but rather on a trend in state interaction and claims with which Canada wishes to identify itself. For this reason, Canada is willing to submit its claim to a twelve-mile territorial sea to adjudication.¹²⁹

It would appear that this Canadian claim, then, is not contrary to contemporary trends in decision. If this is the case, the U.S. is reduced to the objection that Canada's initiative is inopportune at this point in the process of authoritative decision-making. The United States, concerned about other issues which are far less close to resolution than extension of territorial seas to the twelve-mile limit, and anxious to resolve them in packages including the issue of the width of the territorial sea, objects to Canada's adding her weight to the consensus that would settle the territorial sea question without resolving other more difficult issues.

(iii) *Appraisal and Recommendation*

Overall appraisal and recommendations regarding Canada's twelve-mile limit must be deferred until analysis has been completed with respect to the integrally related issues of the contiguous zone and the status of the Northwest Passage as a strait. However, a preliminary reaction to the Canadian twelve-mile claim is in order. On balance, this claim is reasonable both from the standpoint of Canada's legitimate, exclusive interests and the inclusive interests of other states and of the international community. In light of the trend to a twelve-mile limit, it is not an early, pioneering, or provocative claim. Rather, Canada is claiming equality with a substantial number of states that have already claimed twelve miles.¹³⁰

¹²⁸ Resolution XIII, "Principles of Mexico on the Juridical Regime of the Sea", Final Act of the Third Meeting of the Inter-American Council of Jurists, Mexico City, January 17 - February 4, 1956 (Pan American Univ. 1956).

¹²⁹ Trudeau Press Conference, *supra*, n. 110, at pp. 2, 5.

¹³⁰ See *infra*, Part two, volume 19, number 4 of the *Journal*.

Moreover, the unilateral character of the Canadian claim and its expression of Canada's unwillingness to wait any longer for achievement of a binding consensus on the width of the territorial sea through the conventional approach comes in the context of Canada's long record as a moderate — or even conservative nation — on this and other law of the sea issues. Further evaluation of Canada's territorial sea claim on its merits and as a contribution to the process of authoritative decision will follow as part of a comprehensive reaction to the total Canadian position on the waters of the North American Arctic.

[End of Part I]
