CANADIAN SOVEREIGNTY OVER THE ARCTIC ARCHIPELAGO

A Thesis
Submitted to the College of Graduate Studies
in partial fulfilment of the Requirements
for the degree of
Master of Laws
in the College of Law
University of Saskatchewan

by
W.H. McConnell
Saskatoon, Saskatchewan, 1970

ABSTRACT

The central problem of the thesis is to investigate the international legal validity of the Canadian claim to the Arctic Archipelago. In order to consider the bearing on the problem of the "sector principle", the area investigated comprised the islands, waters and permanent ice lying between the 60th and 141st meridians of west longitude extended to the North Pole, which meridians are northerly projections of Canada's easternmost and westernmost boundaries.

After a brief review of the facts and law surrounding the transfer of British Arctic possessions to Canada in 1870 and 1880, the international law applicable to archipelagic formations and to the acquisition of title to terrae nullius was examined. There followed, in the perspective of international law and the historical precedents, an examination of the Canadian claims to (a) the islands of the Arctic Archipelago, and (b) the adjacent waters, especially in the aftermath of the two voyages of the Manhattan and the Canadian legislation of June, 1970, extending territorial waters to a breadth of twelve miles and creating a large anti-pollution zone.

It was concluded that Canada's claim to the islands was very strong, either under the "prescription" or the "consolidation" doctrines, especially in the absence of serious adverse claims, and in the light of a vigorous Canadian manifestation of animus occupandi for several decades, at least.

Although the validity of the recent Canadian Maritime claims had been questioned by the United States, it was suggested either on the basis of the "consolidation" doctrine or in view of the evolving norms of the international law of the sea that here also Canada could make out a strong case in support of the legislation of June, 1970.

CONTENTS

ACKNOWLEDGEMENTS

I wish to express my gratitude to the College and Dean of Graduate Studies for the award of a graduate fellowship making possible the year of study resulting in this thesis.

For their generous help in guiding my research, I am most grateful to my supervisor, Professor D. Colwyn Williams, to Professor Douglas A. Schmeiser of the College of Law, and to Professor R.M. Bone of the Department of Geography.

For the provision of charts, books and other material relevant to the thesis, I wish to express my thanks to Dr. W.O. Kupsch, Director of the Institute of Northern Studies, University of Saskatchewan.

Others to whom gratitude is extended are Captain T.C. Pullen of the Department of Transport; Ian Watson, M.P. Chairman of the House of Commons Standing Committee on Indian Affairs and Northern Development; Inspector G.A. Potts, Liason Officer, R.C.M.P., Ottawa; Brigadier-General L.B. Bourgeois, Canadian Armed Forces, Ottawa; Dr. N.S. Novakowski, Canadian Wildlife Service, Department of Indian Affairs and Northern Development; David Hume of the Public Archives of Canada, Ottawa; Commissioner S.M. Hodgson of the Northwest Territories; the Royal Norwegian Ministry of Foreign Affairs; Dr. Ivan Head and Dr. G.V. Laforest of the Privy Council Office, Ottawa; L.H. Chambers of the Canadian Broadcasting Corporation, Toronto; and the Information Service of the Department of Indian Affairs and Northern Development.

PREFACE

When dealing with a subject as swiftly developing and as topical as Canadian sovereignty in the Arctic, the writer is continually in danger of being overtaken by events. As recently as 1963, one learned author suggested, with no disclaimers, that the legal status of Canadian Arctic waters was a purely academic matter, since there was little prospect that the Northwest Passage would ever become an international ocean thoroughfare. The 1969 and 1970 Arctic voyages of the S.S. Manhattan have transformed what was once a remote contingency into a probability. And this probability, of course, along with its anticipated consequences, has confronted the Canadian government with legal and political problems of considerable magnitude.

In addition to the problem of defining the precise legal status of archipelagic waters, the government was faced with the associated problems of devising measures to regulate use of the Northwest Passage by vessels of maritime nations in the interests of safe navigation and to prevent oil pollution. The decade of the Sixties was a period in which a series of disastrous oil spillages dramatized the woeful ecological consequences of pollution of the seas. The pollution problem became especially acute with the development of large fleets of supertankers after 1967. An additional disturbing element of this problem was the largely unknown effects of pollution in frigid northern waters.

If the legal status of Arctic waters was conjectural, the Canadian title to the islands north of the mainland also required examination. As the following pages attempt to show, Canadian sovereignty over the archipelagic islands has not been as uncontested by other states, nor as clear from the legal point of view, as is sometimes contended. Some of the main legal problems in this regard have been isolated, and an attempt has been made to evaluate the Canadian claims.

In surveying the law applying to Canada's terrestrial and marine claims in the Arctic, it was essential to consider various international law precedents affecting analogous claims by other states in the past. An attempt was made to apply the governing principles extracted from these precedents to the specific Canadian problems. There is, of course, some room for disagreement here, as there is in the case of most legal controversies, but at least a conscientious effort has been made to pose the issues honestly and to answer them as frankly as possible.

CHAPTER ONE

CANADIAN SOVEREIGNTY OVER THE ARCTIC ARCHIPELAGO

The concept of sovereignty in international law has been developed from numerous territorial claims in disputed areas. It is, accordingly, of paramount importance in any investigation of a specific territorial claim to define initially the precise area in question. For the purpose of this enquiry, the dimensions of the "Arctic Archipelago" will be understood to comprise all those islands and waters, along with the contiguous permanent ice, situated between the 60th and 141st parallels of west longitude as they converge towards the Pole. Like all definitions, this one contains an element of arbitrariness and is broader than a purely geographical definition would be. It is useful, however, as indicating the maximum boundaries of Arctic territory which have been claimed by Canada under the "sector principle."[1/] It will be necessary to investigate, as the enquiry proceeds, whether distinctions should be made between the jurisdiction or powers exercisable by Canada and other states in various areas included within the Archipelago as so defined.

Within the physical dimensions referred to above, the object of the present enquiry is to ascertain whether Canada exercises sovereignty over the Arctic Archipelago. Violent controversies have agitated philosophers concerning the term "sovereignty." It is not proposed to enter into polemics or abstruse metaphysical debate, but it is nonetheless necessary to adopt a working definition of the term "sovereignty". The trend

---

1/ For a discussion of the "sector principle" vide infra, 31 ff.

of recent world events suggests that the term "sovereignty" is no longer intelligible when used in an absolute sense. If the term is used to connote "independence in fact, not merely in law",[2/] it is questionable whether any nation in the world today is "sovereign", in that sense. The range of choice in formulating foreign policy will be circumscribed by one's anticipations of the adverse reactions of others, even if one is a superpower. In addition, sovereignty may be conditioned by self-imposed norms or undertakings adopted, for instance, by signatories to the United Nations Charter or to other treaties. For present purposes, and having regard to the preceding considerations, one may understand the term sovereignty as the exclusive competence vis-a-vis the rest of the world to govern in a defined area. The central problem of the present investigation is to determine what competences Canada exercises over the Arctic Archipelago, both over the islands and the adjacent waters and ice, and whether, in accordance with the above understanding of the term "sovereignty", such competences are exercised to the exclusion of other powers.

The enquiry will begin with a brief survey of the archipelagic islands. In subsequent chapters there will be discussed: (a) the relevant international law applicable to territorial claims, especially as it relates to archipelagoes and polar areas; (b) the issue of Canadian sovereignty over the Arctic islands; (c) the issue of Canadian sovereignty over archipelagic water and ice, and (d) an evaluation of Canadian claims to the Archipelago and present government policy.

The principal islands of the Arctic Archipelago are listed in Table A. There are, of course, hundreds of smaller islands throughout the Arctic which have not been included. Because of the somewhat arbitrary definition framed for the Archipelago above, it should be

---

2/ Cf. "political sovereignty", defined in Schwarzenberger, A Manual of International Law, 4th ed., London, 1960, vol. 2, 691.

TABLE A

Principal Islands of the Arctic Archepelago

Northern Islands (Queen Elizabeth Islands):

	Area	
Ellesmere	82,119	square miles
Devon	20,861	
Melville	16,369	
Axel Heiberg	15,779	
Bathurst	7,609	
Prince Patrick	6,081	
Ellef Ringnes	5,139	
Cornwallis	2,609	
Amund Ringnes	2,515	
Mackenzie King	1,922	
Borden	1,344	
Cornwall	1,292	
Eglinton	551	
King Christian	448	
Lougheed	413	
Brock	396	
Cameron	396	
Byam Martin	376	
Meighen	293	
Graham	293	
North Kent	258	
Emerald	251	
Cobourg	141	
Little Cornwallis	139	
Baillie Hamilton	114	

Southern Region:

Baffin	183,810
Victoria	81,930
Banks	23,230
Prince of Wales	12,830
Somerset	9,370
King William	4,955
Bylot	4,200
Prince Charles	3,639
Stefansson	2,890
Air Force	596
Wales	439

mentioned that according to some classifications only the islands lying directly to the south of Parry Channel are actually characterized as the "Canadian Arctic Archipelago".[3/]

> The largest islands of Canada are in the North and all experience an Arctic climate. The northern group extends from the islands in James Bay to Ellesmere Island which reaches 83 07 N. Those in the District of Franklin lie north of the mainland of Canada and are generally referred to as the Canadian Arctic Archipelago; those in the extreme north --- lying north of M'Clure Strait --- Viscount Melville Sound --- Barrow Strait --- Lancaster Sound water passage --- are known as the Queen Elizabeth Islands.[4/]

Despite the convenience for some purposes of a dual classification of the islands, it has been thought preferable to treat them as a single archipelagic unit because of their configuration considered as a whole, and their many shared geological, geographical and historical associations.

Because of their remoteness from settled areas, the sparsity of their population and the exploration of the Arctic by several nations, doubts have been expressed in the past concerning the validity of Canadian title to the islands. In 1905, Dr. W.F. King, Chief Astronomer of Canada, prepared a thorough confidential report for the Department of the Interior on Canadian Sovereignty over the Arctic. That portion of his concluding observations

---

3/ See The Canada Year Book, 1969 (Dominion Bureau of Statistics) Ottawa, 1969, 10-11, (hereinafter cited as C.Y.B., 1969) and vide infra, fn. 15 at 29 for Pharand's employment of such a dual frame of reference for the Arctic islands in connection with the delimitation of archipelagic waters.

4/ C.Y.B., 1969. 10.

dealing with Canada's legal title to the Archipelago is worth quoting in extenso.

> Canada's title to the northern islands is derived from Great Britain's. Great Britain's title rests upon acts of discovery and possession. These acts were never, prior to the transfer to Canada, ratified by state authority, or confirmed by the exercise of jurisdiction &c. Canada's assumption of authority in 1895 may not have full international force.
>
> The conclusion from the foregoing seems to be that Canada's title to some at least of the northern islands is imperfect. It may best be perfected by exercise of jurisdiction where any settlements exist.5/

Since, with few exceptions, the islands of the Arctic were uninhabited or only seasonally inhabited by nomadic Eskimo bands, Dr. King's conclusion that a manifestation of Canadian authority would be necessary to perfect sovereignty over the Archipelago would scarcely be reassuring to the Canadian government. As he says, however, the Canadian title is derived from that of Great Britain. At the date of transfer, whatever it was, Canada could obtain no better title than Britain possessed: nemo dat quod non habet. As a preliminary step towards evaluating the worth of Canada's claim as successor in title to Britain, accordingly, the relevant transactions by which Canada acquired a claim to the Archipelago should first be surveyed.

The conveyance of the Arctic islands to Canada was effected by two Imperial Orders-in-Council dated, respectively, 1870 and 1880. In the first, dated July 23rd, 1870, there was a purported conveyance to Canada of Rupert's Land and the North-West Territories, but not precise geographical co-ordinates of either of these regions was given.

5/ King, Report Upon the Title of Canada to the Islands North of the Mainland of Canada, Ottawa, 1905, 7, (hereinafter cited as King).

As Dr. King observes, the descriptions of the indicated territories: "...seems never to have been determined on authority".[6] The Order-in-Council[7] derived its authority from the Rupert's Land Act[8] and ultimately, as the said Act recites in its preamble, from the British North America Act.[9]

Under the terms of the first Order-in-Council, Canada received the territorial rights previously vested in the Hudson's Bay Company by virtue of the Royal Charter of May 2nd, 1670; a preliminary consideration, therefore, would be the extent of the Company's proprietary holdings. By the terms of the Charter, the territory granted was deemed to be "one of our plantations or colonies in America", and received the appellation "Rupert's Land". Subject to the payment of a nominal rent and the pledging of fealty to the

---

6/ King, 3

7/ See "Her Majesty's Order in Council Admitting Rupert's Land and the North-west Territory into the Union", in British North America Acts and Selected Statutes, 1867-1948, Ottawa, 1948, 133-137.

8/ Section 5, Rupert's Land Act, 31-32 Vict., c.105 (Imp.).

9/ Cf. Article 146 of the B.N.A. Act which reads:

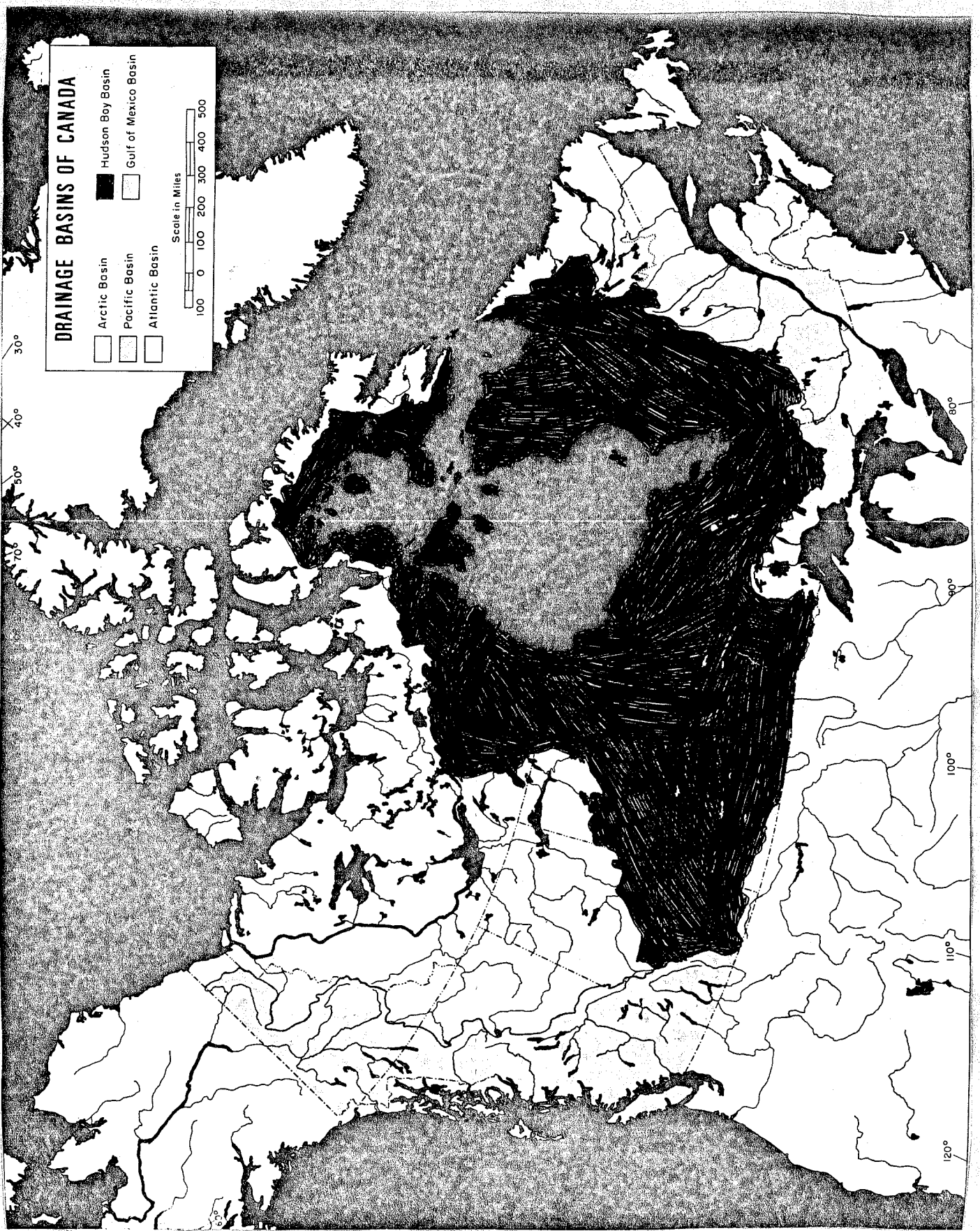
> 146 It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the Colonoies or Provinces of Newfoundland, Price Edward Island, and British Columbia, to admit those Colonies or Provinces or any of them, into the Union, and on Address from the Houses of Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the Provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Sovereign, the Charter constituted the Hudson's Bay Company and its successors as the "...true and absolute lords and proprietors" of the territory conveyed. A duly-appointed Governor and Committee of the Company was vested with legislative powers, and could enact laws and impose penalties within its domains so long as they were not contrary or repugnant to the laws of England. For these purposes certain designated officials of the Company were empowered to judge Company employees or residents of its territories in both civil and criminal cases, with mentioned exceptions where accused were to be sent to England for trial.10/

It will be appreciated from the foregoing that within the area of its activities, the Hudson's Bay Company had many of the attributes and exercised many of the prerogatives of a sovereign state. Within its vast territories, it was the provider of sustenance and the arbiter of justice for a heterogeneous population of natives, Company employees and transients. The Company lacked the powers of legation and treaty-making characteristic of truly-sovereign entities but vis-a-vis the inhabitants of its extensive domains it possessed most of the powers wielded by sovereign states. Since the 1870 Order-in-Council embraced Rupert's Land, it is most important to determine what were the areas under the Company's control. Unfortunately, the description in the Company's Charter is ambiguous.

10/ See Read, (1937) 10 Man. Bar News 451; and Charters, Statutes, Orders in Council etc., Relating to the Hudson's Bay Company, London, 1931, passim.

Table B


DRAINAGE BASINS OF CANADA
Arctic Basin
Hudson Bay Basin
Pacific Basin
Gulf of Mexico Basin
Atlantic Basin
Scale in Miles
100 0 100 200 300 400 500
30°
40°
50°
70°
80°
90°
100°
110°
120°

According to the Charter, the Company of Adventurers was to acquire:

> ...all the seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits, together with all the lands, countries and territories upon the coasts of the seas, straits, bays, lakes, rivers, creeks and sounds aforesaid, which are not now actually possessed by any of our subjects or by the subjects of any other Christian Prince or State.[11]

As Dr. King mentions, the above description has been variously interpreted. A common construction of the grant, at least since the mid-nineteenth century is that its territory comprised the watershed of all waters flowing into Hudson's Bay.[12] On the basis of such a construction "Rupert's Land," or the region under the Company's patent, would extend from Ungava Bay and Central Quebec on the East to the Rocky Mountain Divide on the West and from Southern Baffin Island and the Keewatin "Barrens" in the North to the American Boundary and Central Ontario.[13] This huge area, radiating in all directions from Hudson Bay, was ruled virtually as a fief of the Company for the two centuries following 1670.

In 1868, the Imperial Parliament passed the Rupert's Land Act,[14] which contained a recital of the Company's Charter and revoked most of the quasi-political and proprietary rights formerly exercised by the Company. The properietary rights were expressly revested in the British Crown. The Company was left, however, with the right to carry on trade and commerce within the area of Rupert's

---

11/ Quoted in King, 3.

12/ Ibid., loc.cit.

13/ See map facing 7 after C.Y.B., 1969, at 7

14/ 31-32 Vict., c. 105 (Imp.).

Land.[15] The revesting in the Crown of the rights of a predominantly political or administrative character was accomplished for the purpose of transferring political powers over the region to Canada. Accordingly, in 1869, the Canadian government made temporary provision for the administration of Rupert's Land,[16] and in the following year the Order-in-Council referred to was passed by Britain to admit Rupert's Land and the North-western territories to Canada pursuant to the Rupert's Land Act.

A defect in the description of Rupert's Land in the Charter of 1670 was that it was fundamentally a geographical rather than a political one. There were no demarcated boundaries. In the context of such a vast claim, there was room for disagreement with other states on the location of common frontiers. This was especially the case, of course, in the more northern and unsettled areas. If one applies purely geographical criteria, probably the only part of the Arctic Archipelago that would be included in Rupert's Land would be southern Baffin Island. What of the remainder of the Archipelago? The description of the North-western Territories, which presumably would comprise much of the

---

15/ Section 4 of the Rupert's Land Act reads:

> "Upon the acceptance by Her Majesty of such surrender of Rights of Government and Proprietary Rights, and all other privileges, liberties, franchises, powers and authorities whatsoever...and which shall have been so surrendered, shall be absolutely extinguished; provided that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce."

16/ The Northwest Territories Act, 32-33 Vict., c.3. Prime Minister Sir John A. Macdonald had made use of the occasion to appoint a troublesome cabinet colleague to administer the territory, Creighton, John A. Macdonald, The Old Chieftain, Toronto, 1955, 35-37.

-in-Council dated July 31st, 1880,[20] was as ambiguous as the instrument it purported to amend and amplify. In extremely general terms, the 1880 instrument sought to convey to Canada "all British territories and possessions in North America not already included in the Dominion of Canada and all islands adjacent to such territories or possessions," excepting only Newfoundland and its dependencies.[21] Since what was precisely in question was whether the islands of the Arctic Archipelago were in fact British

---

20/ The Order-in-Council of 1880 reads as follows:

> At the Court of Osborne House, Isle of Wight, the 31st day of July, 1880
> Present:
> The Queen's Most Excellent Majesty,
> Lord President,
> Lord Steward,
> Lord Chamberlain.
>
> Whereas it is expedient that all British Territories and Possessions in North America and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion
>
> And Whereas the Senate and Commons of Canada in Parliament assembled by an address dated the 3rd day of May, 1878, represented to Her Majesty
>
> "That it is desirable that the Parliament of Canada on the transfer of the before mentioned Territories being completed should have authority to legislate for their future welfare and good government and the power to make all needful rules and regulations respecting them, the same as in the case of the other Territories, and that the Parliament of Canada expressed its willingness to assume the duties and obligations consequent thereon."
>
> And whereas Her Majesty is graciously please to accede to the desire expressed in the said Address:-
>
> Now therefore it is hereby ordered and declared by Her Majesty by and with the advise of the Privy Council as follows:
>
> From and after the first day of September, 1880, all British Territories and Possessions in North America not

possessions, a naked conveyance of "British territories and possessions in North America" without the requested comprehensive description of the Arctic islands was of little value. What was needed was confirmation that all or certain of the archipelagic islands were claimed by the British Crown and were being transferred to Canada.

The reasons for the vagueness of the description in the 1880 Order-in-Council appears in a letter sent by the British Admiralty to the Under Secretary of State for Colonies early in 1879.[22] The letter transmits a report by F.J. Evans, Admiralty Hydrographer, and comments on the appropriateness of the proposed description for the delimitation of Canada's northern boundaries contained in the parliamentary address of 1878. The comments of the Admiralty disclose considerable doubt concerning the exact extent of British possessions in the Arctic:

> Remarking that the object of this Bill appears to be to define the limits of British North America, I would observe that prior to 1852, the northern limits of the Polar lands--- West of Greenland --- as discovered by British Navigators, did not extend north of the entrance of Smith Sound, From this position, Captain Inglefield

---

> already included within the Dominion of Canada and all islands adjacent to such Territories or Possessions shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion in so far as such laws may be applicable thereto.
>
> C.L. Peel.

21/ See the footnote immediately above.

22/ See letter dated 28 January, 1879, C.O. 42, Vol. 759, in "Arctic Islands Documents, 1873-1880" file, Department of the Interior, R.G. 15, A-2, Vol 5-6 Public Archives of Canada, Ottawa, (hereinafter cited P.A.C.).

> of the Royal Navy saw land to the North extending beyond the 79th parallel of Latitude. In 1853-5; again in 1860-1; and in 1873-3; American officers explored this region to beyond the 82nd parallel; Kennedy Channel (now named in the proposed Bill) being the boundary between the lands so explored on the West, and of Greenland on the East; to the former they gave the name of Grinnel Land. Our own Arctic expedition of 1875-6 pushed northward of the coasts explored by the Americans.
>
> In view of these discoveries by American citizens, it is a matter for consideration whether the proposed boundaries should include the words "Kennedy Channel and all the islands in and adjacent thereto". But as embracing, as would appear undoubted, British discoveries; the Eastern boundary might be defined as extending to Smith Sound as far north only as the 78½ parallel of Latitude. This, however, subject to the rights of this country established by the discovery of more northern lands made in the late Arctic expedition.[23/]

As a result of the above-mentioned letter, the highly specific Canadian drafted terms of conveyance for the Arctic islands were rejected, and there were substituted therefor the much more general and nebulous terms referred to above.[24/] In addition, it was decided not to effect the grant by an Act of the Imperial Parliament, but rather by an Imperial Order-in-Council.

The legal validity of conveying the Arctic islands by an Order-in-Council instead of by parliamentary enactment has been doubted.[25/] Those who question its legality emphasize that under Article 146 of the B.N.A. Act[26/] only certain specifically mentioned Province ,

---

23/ Ibid., C.O. 42, Vol. 759, letter dated 23 January, 1879 See Map at Table C.

24/ Vide supra, 11-13.

25/ Cf. King, 5.

26/ Vide supra, Fn. 9,6.

colonies and territories could be admitted to the Dominion by Order-in-Council. Assuming that the Arctic islands, or at least certain of them, did not in 1880 form part of Rupert's Land or the North-western Territory, and that the enumeration of Territories transferrable by Order-In-Council in Article 146 was exhaustive, there would be no constitutional authorization for a transfer by Imperial Order-in-Council. To adopy a contrary view would imply, for example, that the executive could, without parliamentary sanction, alienate virtually any British possession. Notwithstanding the above considerations, when confronted with the problem the law officers of the Crown considered that a valid title could thereby be transferred.[27/]

Doubts lingered, nonetheless, about the regularity of the transfer, and in 1895, ex abundanti cautela, imperial legislation was passed which provided that "...where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen in Council, or letters patent, the letters so altered shall be and be deemed to have been from the date of the alteration, the boundaries of the colony."[28/] Such legislation constituted retrospective parliamentary authorization for the grant in the Order-in-Council of 1880, whether or not the Order had been validly passed. Henceforward, Canada could claim both executive and legislative sanction for the conveyance of the islands, but the continuing absence of a definite description of the islands was bound to create doubts concerning the precise dimensions of Canadian sovereignty in the Arctic. Canada has, however, construed the Order

---

27/ See letter dated 3 April, 1879, (Adm.F. 1330-79 Canada) Arctic Islands Documents file, supra fn. 22, 13.

28/ 58-59 Vict., c. 34 (Imp.).

in-Council of 1880 as a definitive grant of the Arctic Archipelago,[29] and despite occasional controversies with other states,[30] there has never been a serious or protracted challenge of the Canadian claim by any member of the international community.

Canadian concern about northern sovereignty persisted, however, and in 1919 a somewhat trifling international incident caused a reconsideration of the whole problem by government circles in Ottawa. In 1919 Greenlanders crossed over the frozen ice to Ellesmere Island to kill muskoxen. When Canada protested to Copenhagen in the diplomatic note of July 31st, 1919, contending that the foreign Eskimos were not observing local game laws, no satisfactory reply was received from the Danish government. On the unofficial level, indeed, the explorer Knud Rasmussen argued on behalf of Denmark that Ellesmere Island was a species of no-man's-land not falling under the sovereignty of any country, and that Canadian game laws did not operate there. Rumours abounded in Ottawa that Denmark might explore and "colonize" the entire chain of islands north of Parry Channel, using Greenland as an area of lodgement.[31] In such a context, with no response whatsoever coming from the Danish foreign office, suspicions arose in the Canadian government of a possible, sinister Danish penetration in the northern part of the Archipelago. Canadian officials, such as J.B. Harkin, Commissioner of Dominion Parks in the Department of the Interior, and Loring C. Christie, later a leading Canadian diplomatist,

---

29/ See chapter three, infra, and C.Y.B., 1969, c.1

30/ Vide infra, chapter three, passim.

31/ Vide infra, 60-62.

considered what Canada could do to reinforce Canadian sovereignty. With reference to Ellesmere Island, Mr. Harkin recommended: "To securely establish Canada's title, occupation and administration are necessary. Therefore, next spring (1921?) an expedition should be sent north to locate two or three permanent police posts on Ellesmere land (sic). This probably should be followed by the transfer of some Canadian Eskimos to the island. Steps should be taken to encourage the Hudson Bay Co. or other traders to extend their operations northward. It is also desirable that detailed exploration should be carried out on this and adjoining islands."32/

On an even higher executive level, Christie prepared a memorandum late in 1920 for Prime Minister Arthur Meighen on measures that were imperative to establish Canadian sovereignty in the Arctic. This memorandum was also prepared in the context of a possible Danish claim to the islands north of Parry Channel, and especially Ellesmere Island:

> The necessity for taking concrete steps to confirm the Canadian assertion of sovereignty over the northern Arctic islands has now become more urgent; for information has been received that the Government of Denmark, instead of merely contemplating an expedition next year to settle Ellesmere Island as previously reported, have actually sent their expedition; indeed it is understood that it reached the scene of action in the summer of 1920.33/

32/ Harkin, undated memorandum, (fall, 1920?) Title to Northern Islands," (prepared for the Minister of the Interior) Artic Islands: Reports on Sovereignty file, Department of the Interior, R.G. 15; Series A-2; Vol.5-6, (P.A.C.).

33/ Memorandum from Christie to the Prime Minister, dated October 28, 1920, "Exploration and Occupation of the Northern Arctic Islands," Department of the Interior, R.G. 15, A-2, Vol. 1, (P.A.C.).

Confronted by the stealty exploration, use and occupation of the islands by Denmark, there were several steps the Government were advised to take immediately to forestall an adverse Danish claim. Mr. Christie emphasized that the permanent settlement of the area that might be necessary in a locality in the temperate zone would not be necessary in the Arctic. Some manner of "seasonal" occupation would be sufficient there. In the temperate zone, in his opinion, repeated local acts, showing an intention of a continual claim, would be necessary; in the Arctic, however, because of the inhospitable climate there might reasonably be intervals between the acts. Among acts which the Government could rely on to show animus dominendi were: (a) mapping expeditions, "...to complete the mapping of lands already known and to discover any lands not now known"; (b) steps to be taken at the same time and in conjunction with (a) to establish our customs, game law, and possibly police administration at strategically selected points; (c) the operations under (a) and (b) to be combined. The ship conveying the exploratory expedition should be classed as a revenue cutter, and could carry north customs, game law and perhaps police officers as well as others; (d) "...for the exploration work the name of Mr. Vilhjalmur Steffanson suggests itself, both because of his connection with the previous expedition, and because of the economical method of Arctic exploration and travel which he has developed..."[34/]

In a manner curiously similar to the supposed Danish penetration of the Archipelago, Christie advised that measures be

---

34/ Ibid., see paragraph 9, 5-6.

taken to substantiate a future Canadian claim to Wrangel Island, just off the Arctic coast of the Soviet Union:

> A further question that might with advantage be referred at the same time to the technical departments concerned is the feasibility of encouraging the quiet, unostentatious settlement of Wrangel Island by some Canadian development Co., such as the Hudson Bay Co. This if done would establish a basis for a subsequent assertion of Canadian title to the island, an asset that might prove of value in the future.[35/]

That the Canadian government was anxiously concerned about consolidating its claim to the Arctic island can be seen from the swiftness with which it implemented some of the above recommendations. Beginning in the early 1920's a large number of Royal Canadian Mounted Police detachments were established throughout the Arctic Archipelago, including Ellesmere Island,[36/] and Mr. Steffanson's subsequent expeditions into the Arctic were another manifestation of this concern.[37/] By such actions, and by the failure of the Danes to assert an adverse claim after 1920, Canada's claim to Arctic sovereignty was substantially strengthened in succeeding decades.

Concerning the related problem of the dimensions of Canadian sovereignty over arctic waters, which will be dealt with in chapter four, little controversy has hitherto arisen. It was only with the successful voyage through the Northwest Passage of the American supertanker S.S. Manhattan in 1969 that the use of the Passage as a commercial waterway became a probability. The need for an inexpensive method of conveying oil from Alaska's North Slope to the

---

35/ Ibid., paragraph 11, 7; on the ultimate Soviet acquisition of Wrangel Island vide infra, 54-55.

36/ Vide infra, 86.

37/ See Baird, The Polar World, London, 1964, 173, (hereinafter cited as Baird) and Riddell, Documents on Canadian Foreign Policy, 1917-1939, Toronto, 1962. 743.

eastern seaboard of the United States has stimulated research on arctic navigation. And associated with such navigation, of course, are the serious problems of arctic pollution, which caused the Canadian government to take extensive legislative measures in the spring of 1970. The necessity and legality of these measures will be examined below.[38]

38/ Vide infra, 112 ff. and 135 ff.

CHAPTER TWO

THE LEGAL REGIME OF ARCHIPELAGOES

The legally permissible delimitation of offshore waters will vary depending upon the category of island formation in question. The waters in the vicinity of an archipelago may be regarded as (a) a particular instance of the legal regime applicable generally to offshore waters, whatever such a general regime may prescribe; (b) a special legal regime applicable only to coastlines of a complex or irregular configuration (whether or not such coastlines belong to archipelagoes) and not to more "regular" coastlines; (c) a particular legal regime appropriate for archipelagoes alone, which seeks to differentiate archipelagoes from other geographical formations because of their peculiar characteristics and requirements, or (d) a portion of a "sector" including, possibly, the permanent ice, as well as the water, falling within the sector.

1(A) The Position of the Major Maritime Powers

In general, the major maritime nations have sought to restrict, as far as possible, encroachments on freedom of the seas by confining maritime belts adjacent to archipelagoes to category (a). Thus, in the case of the Hawaiian Island Archipelago the United States has made no claim for the application of a special regime to the islands, and the United States District Court of Hawaii has held that "inter-island waters beyond the three-mile limit are high seas."[1/] Accordingly, the delimitation of offshore waters here would constitute merely a specific instance of the general law of

---

1/ Civil Aeronautics Board v. Island Airlines, (1964) 235 F. Supp. 990.

the sea, making no special provision for archipelagoes or "island clusters." This accords with the traditional approach, invoked especially by the larger shipping nations in the interest of convenience, according to which archipelagic and other islands are regarded as distinct units, each with its individual belt of territorial waters, ordinarily three miles in breadth.

The British position also reflects this conservative standard. There may be difficulty here, however, in ascertaining exactly what constitutes an archipelago. Thus, an "archipelago" might be distinguishable from non-contiguous, scattered island groupings not merely according to geographical criteria, but also on historical or prescriptive grounds.[2/] Taking the American, British or Japanese position, it could be that if one took a hypothetical ring of islands not separated at their circumference by more than twice the breadth of territorial waters, the waters within the whole formation would be effectively enclosed.[3/] In such a case, there could be hundreds of square miles of empty water in the centre of the archipelago to which alien access would be cut off. Aside from such a hypothetical construct, the conservative view would regard the inter-island waters, where they were located beyond the relatively narrow belt of territorial waters, as being part of the high seas.

2/ Colombos, International Law of the Sea, 6th ed., London, 1967, 120, (hereinafter cited as Colombos).

3/ For a reaffirmation of the traditional Japanese support of the three-mile rule, see the remarks of Hishahiko Okazaki, Third Secretary of the Japanese Embassy in the Philippines, in Coquia, "The Territorial Waters of Archipelagoes," (1962) L Philippine Intl. L.J. 141, (hereinafter cited as Coquia).

The delimitation of archipelagic boundaries in such a manner primarily endorses the value of untrammelled maritime communications. As has sometimes been observed, it represents a marriage of free trade with gunboat diplomacy. Generally, nations with large maritime interests such as the United States, Great Britain, France and Japan have favoured such a system of delimiting offshore boundaries so that there will be as few regulations as possible inhibiting the movements of their naval forces and merchant fleets.

(B) Baseline Systems Enclosing Irregular Coastlines

Where the outer circumference of an archipelago has an irregular and complex configuration, as it almost always will, a system of straight baselines might be established connecting the outermost islands, rocks, shoals and reefs, and enclosing the whole formation. In such a case, the waters inside the baselines are ordinarily regarded as internal waters with a strip of territorial waters being measured outwards from the baselines. Using the Fisheries case[4/] as a precedent in constructing such a system the general trend of the coastline would be of more importance than the length of specific baselines, as long as the baselines were not unreasonably long. By the Royal Norwegian Decree of July 12th, 1935, Norwegian territorial waters were measured outwards from a series of baselines connecting 48 fixed points along the Norwegian coast, some of which were over 10 miles in length and one of which was forty-four miles long.[5/]

4/ I.C.J. Reports, 1951, see Colombos, 114, ff.

5/ Colombos, 114.

When Canada established a twelve-mile contiguous fishing zone along its eastern coast in 1967 one baseline, enclosing Newfoundland's Notre Dame Bay, was forty-nine miles in length.[6/] Although this baseline exceeds somewhat the length of the longest Norwegian baseline there is no reason, in principle, why it should not be acceptable if it adheres to the general trend of the coastline.

There are other methods, in addition to the straight baseline system, for delimiting offshore waters, such as the arcs-of-circles method. This method involves the drawing of intersecting arcs-of-circles with a three-mile radius from all promontories along the coast, creating an "envelope" with an irregular perimeter.[7/] The straight baseline and the arcs-of-circles system can be used in conjunction with each other along the same coastline where appropriate. Generally, straight baselines are more appropriate along a deeply indented or concave coastline, and the arcs-of-circles might be used further along the coast where there was a somewhat less irregular outward slope.

6/ See Schedule B to Territorial Sea and Fishing Zones Act, P.C. 1967-2025, SOR -67-543. The Gulf of St. Lawrence could be enclosed by straight baselines, without unduly stretching precedent, if baselines were drawn across Cabot Strait through St. Paul Island about midway between Port-aux-Basques, Newfoundland and Cape Breton Island (with the largest closing baseline being 45-miles long).

7/ For illustrations of the various methods of delimiting boundaries see Boggs,"Delimitation of the Territorial Sea," (1930) 24 A.J.I.L. at 546-547, and Shalowitz, Shore and Sea Boundaries, Washington, 1962, vol.1, passim.

(C) Distinctive Archepelagic Regimes

Certain states, such as Indonesia and the Philippines have unilaterally claimed as internal waters broad expanses of sea falling within a series of baselines around the external perimeters of their archipelagoes. These claims are put forward on economic and historical grounds as well as on the basis that the respective archipelagoes constitute geographical unities of a more or less compact nature.

The Indonesian claim was asserted by the Council of Ministers on December 13, 1957, as follows:

> The waters around, between and connecting the islands or parts of the islands belonging to the Indonesian archipelago, irrespective of their width or dimension are natural appurtenances of its land territory and therefore an integral part of the island or national waters subject to the absolute sovereignty of Indonesia.8/

The waters falling within the baselines were claimed as internal waters, the territorial sea of Indonesia being delimited outwards from such baselines to a breadth of twelve nautical miles.

The United States State Department, however, has strongly disapproved of the Indonesian claim. "The United States regards as wrongful and unacceptable appropriations of the high seas any claim to more than three miles of territorial waters as well as any alleged right to convert into internal or territorial waters large areas of the high seas in and around the islands which have traditionally been used as high seas by the vessels of all nations."9/

8/ New York Times, Saturday, 18 January, 1958, 3.

9/ Ibid., loc. cit.

In the case of the Philippines, the Philippine delegation to the 1958 Law of the Sea Conference at Geneva cited historical, geographic, political and economic circumstances to justify the appropriation of large expanses of archipelagic waters:

> In justifying their position, the Philippine delegation maintained that the Philippine Archipelago consists of a continuous chain of islands or islets lying closely together so that straight baselines could easily be drawn between appropraite points on outer islands or islets in such as way as to encircle the whole archipelago without crossing unreasonably large expanses of water and without infringing the principles laid down by the International Court of Justice in the Anglo-Norwegian Fisheries Case. Accordingly, it was proposed that a rule should be laid down under which outlying archipelagoes like the Philippines may be treated as a single unit and the waters lying between and within the islands should be considered as internal waters.10/

The relevant statement of the Philippine government on which this position was based reads as follows:

> The Philippine Government considers the limitations of the territorial sea as referring to those waters within the recognized treaty limits and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles. It may therefore be necessary to make exceptions, upon historical grounds or by means of treaties or conventions between the states. It would seem also that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of the coastal state. The Philippine Government is of the opinion that certain provisions should be made taking into account the archipelagic nature of certain states like the Philippines.11/

10/ Coquia, 145.

11/ Note verbale dated January 20, 1956, from the Permanent Mission of the Philippines to the United Nations. Document A-CN, Yearbook of the International Law Commission, 1956, vol.2, 70.

Both Indonesia and the Philippines are, of course, widely scattered groups of islands and the construction of a system of baselines enclosing them cannot easily be reconciled with the Fisheries precedent. When one considers that the Philippines is comprised of 7,104 islands, while Indonesia comprises 13,000 islands of which only some 3,000 are inhabited, the complexity of a system of baselines enclosing either of them become apparent. In the case of the Philippine Archipelago, some baselines are from 130 to 160 miles long,[12/] and similar baselines exist in Indonesia, the Indonesian Archipelago considered as a whole being more than 3,000 miles in length. It should be remembered that Indonesia and the Philippines belong to the genus of non-adjacent or outlying (mid-ocean) archipelagoes as contrasted with the coastal archipelagoes of such states as Norway, Yugoslavia, Iceland, Cuba or Australia.[13/] As the existence of Cuba and Iceland in the latter classification would seem to indicate, the distinction is not merely one of whether the archipelago appertains to an island or a continent, but rather whether the archipelago, considered as a whole, is preponderantly insular in nature or whether it is a compact group of islands along the coast of a larger land mass, whether such a land mass be classified as an island or a portion of a continent.

12/ See Philippines Republic Act. No. 3046, approved June 17, 1961, U.N.L.S. Supplement to the Laws and Regulations of the Regime of the Territorial Sea, Document No. A. -Conf. 19-5 Add. 1 at 3-4.

13/ See McDougal and Burke, The Public Order of the Oceans, New Haven, 1962, 411 ff. (hereinafter cited as McDougal and Burke), and Evenson, "Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagoes," U.N. Conf. on the Law of the Sea (U.N. Doc. No. A-Conf. 19-8, 1960) 1 Official Records, 289, (hereinafter cited as Evenson).

McDougal and Burke refer to the conflicting interests of archipelagic states such as Indonesia and the Philippines, in the systems they have established for delimiting their territorial seas, and other states in the international community:

> The island groups (non-adjacent archipelagoes) involved here are those unconnected with a continental coast, such as the Philippine Islands, Indonesia, the Galapagos Islands of Ecuador and the State of Hawaii in the United States. The major claim sometimes made is to delimit the territorial sea from a line connecting the outermost islands and to include all waters within the line as internal waters. The primary counterclaim asserts that an island in an archipelago does not differ from any other island and that each should have only its own belt of territorial seal; in this view, there would be no question of straight baselines or internal waters. A possible alternative to either outcome would be to permit the use of a single territorial sea for the islands as a unit but to regard the waters within the baseline as part of the territorial sea.14/

It is noteworthy that in this passage the authors describe non-adjacent archipelagoes as "those unconnected with a continental coast." As contended above, however, if "adjacency" is the criterion for differentiation between the various types of archipelagoes, with non-adjacent archipelagoes like Hawaii and the Galapagos, on the one hand, and coastal archipelagoes like those of Norway and Cuba, on the other, being extreme types, then the crucial taxonomic consideration is not the proximity of an archipelago to a continental land mass, but its character considered as a whole and its relation, if any, to its parent formation. In classifying the islands situated to the north of the Canadian mainland as a "coastal" or as a "non-adjacent" archipelago, for example, their relative position in relation to the North American continent might not be as important as their

---

14/ McDougal and Burke, 411.

character considered as a whole. No other continental state possesses such a large and far-flung group of islands on its perimeter. Although the islands extend from east to west for a distance of more than two thousand miles and from just north of the Canadian land mass almost to the Pole, they are relatively compact, and have a unitary aspect.[15/] It is not, of course, suggested that they would be classifiable as a non-adjacent archipelago, which is distinguishable because of its distance from the nearest continent but, geographically considered, they might belong to an intermediate category between "non-adjacent" and "coastal" archipelagoes.

The precise classification of the Arctic Archipelago could be of great significance, since the legal regime appliable to its waters could well depend on whether it resembled more the Indonesian than the Norwegian or Cuban archipelagoes. It is suggested that if contemporary international law is to have relevance to present needs, it must develop sufficient flexibility to reconcile the divergent interests of individual states and the world community.

15/ See, however, Pharand, "The Waters of the Canadian Arctic Islands," in (1969) 3 Ottawa Law Review, 414, where the author contends that the broad waterway through the centre of the Archipelago separates the archipelagic islands into two distinct groups. He argues that each of these groups might be enclosed by baselines, the seas within being claimed as Canadian territorial waters. The large corridor between the groups would be available for unrestricted international navigation. Professor Pharand's suggestion was made, of course, before the official announcement of Canadian government policy in April, 1970.

Where existing classifications do not fit a situation, new classifications and new norms, must be created. While striving to retain its coherence, international law must keep abreast of new needs in international society by developing new legal concepts where older ones prove to be inadequate.

The Arctic Archipelago is not similar to other archipelagoes discussed by McDougal and Burke on the one hand and by Evenson on the other. It has both the elements of "compactness" and "unity" presented by the Philippines and the characteristic of propinquity to a land mass presented by the archipelagoes of Australia or Cuba which, however, are not so large or distinctive as the Arctic Archipelago. The ice which binds together the various Arctic islands represents another significant natural difference between the arctic and other archipelagoes. In a globe on which there are an indefinite number of geographical gradations, and where sharply-defined abstract classifications may not fit specific formations, one should not be too hasty in classifying the Arctic Archipelago into the present perhaps overly-rigid categories. It might be suggested, in fact, that the Archipelago is an intermediate species between the genera, respectively, of coastal archipelagoes (e.g. Iceland, Norway) and non-adjacent archipelagoes (e.g.Philippines, Indonesia). This distinction is significant if one assumes, as do the Philippines, Indonesians and Norwegians that different legal regimes may apply to different types of archipelagoes.

(D) The Sector Theory

According to the sector theory, first enunciated in the Canadian Senate on February 19th, 1907, by Senator Pascal Poirier,[16] the poplar region was allocated respectively to those states bordering on the Arctic Ocean. The French diplomat and jurist Rene Dollot describes a "sector" as follows:

> Un procédé de répartition des terres polaires entre les Etats qui se trouvent placés au voisinage de ces terres, le secteur constitutant un triangle sphérique dont le sommet est au pôle, dont les côtés sont les méridiens et la base une côte ou des parallèles.[17]

In other words, hypothetical parallels of longitude are extended northwards to the Pole from those parts of the Arctic Ocean at the

---

16/ Senator Poirier's resolution was as follows:

"That it be resolved that the Senate is of the opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands situated in the North of the Dominion and extending to the North Pole," Canada, Senate, 20 February, 1907. In the course of his argument, Senator Poirier allocated "sectors" in the Arctic to Norway, Sweden, Russia and the United States (Alaska), in addition to Canada.

17/ Dollot, "Le Droit International des Espaces Polaires," in (1949) 2 Recueil des Cours, Academie de Droit International, 127 (hereinafter cited as Dollot). The passage may be translated: "A method of partitioning polar territory between states situated in the neighbourhood of such territory, the sector constituting a spherical triangle whose summit is at the Pole, the sides of which are the meridians and the base a seacoast of the parallels."

eastern and western extremity of each Arctic state. All undiscovered islands within the Arctic Ocean falling within each sector are allocated to the state possessing the sector. The exact legal status of the permanent ice and waters within the sectors has not been finally settled. In fact, the legitimacy of thus apportioning the Arctic regions, in so far as it implicitly excludes the possibility of northern possessions for states not having a northern frontier, has been strongly challenged.

As Dollot mentions, the virtue of the sector theory, if it can be called such, is that it authoritatively allocates sovereignty over undiscovered territory among potential claimants.[18] It recalls the celebrated partition of the New World between Spain and Portugal in 1493 in a Bull promulgated by Pope Alexander VI, a legacy of which is the rough geographical division between the Portuguese-speaking people of Brazil and their hispanic neighbours to the West. If there is a consensus in favour of the sector theory, and the delimitation of the sectors themselves is agreed upon,[19] the

---

18/ Dollot, 127.

19/ Controversy erupts from time to time between Great Britain, Chile and Argentina because of the overlapping of their sectors in Antarctica. In the south polar region there is no natural tableland extension to confer upon sector claims a degree of geographic legitimacy. Consequently, such "sector", claims are based on discovery and exploration of an area of lodgment along the coast or, as in the case of Great Britain, on the projection of meridians southwards from a colony, the Falkland Islands. Since Argentina contests the Antartic sector claim based upon it, see (1947) 41 A.J.I.L., 117 and Supplement, 11, for the Argentine claim. On Antarctic claims generally see, 1 Hackworth, International Law, 449-62; Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, 54-76, and Hayton, "Polar Problems and International Law," (1958) 52 A.J.I.L. 746-65.

principle may preclude petty quarrels over title to northern territory, such as the incipient issue between Canada and Russia over Wrangel Island, which was occupied by Canada for a time, but clearly fell within the Russian sector.[20] There is no doubt an element of arbitrariness, however, in making title contingent on the location of hypothetical lines. Even some states with an Arctic frontier have refused to endorse the sector principle. As Dollot mentions, the refusal by the United States to do so may reflect a vein of opportunism because there are, apparently, no territories located within the American "sector" between the State of Alaska and the Pole.[21]

Senator Poirier's 1907 resolution was neither seconded nor voted upon in the Senate, and could in no way be construed as a statement of government policy. In 1925, however, the Minister of the Interior laid claim to all lands "discovered or yet to be discovered" between the meridians of 60° and 141° west longitude.[22] Prime Ministers St. Laurent and Pearson have on different occasions endorsed the sector principle,[23] and have suggested that Canada has

---

20/ Morris, "Boundary Problems Relating to Sovereignty in the Canadian Arctic," (1969) 6 Musk-Ox Journal, 51.

21/ Dollot, 142; Cf. Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, 62.

22/ Canada, Parliament, House of Commons Debates, 1925, vol. 4, 4084.

23/ For Prime Minister St. Laurent's endorsement see House of Commons Debates, (1953-54) vol. 1, 700, and for Prime Minister Pearson's affirmation see "Canada Looks Down North," (1945-46) 24 Foreign Affairs, 638.

title to the waters as well as the territory noth of the mainland. On the other hand, Jean Lesage and Alvin Hamilton, during their respective tenures as Ministers of Northern Affairs and National Resources have placed Canadian claims in the Arctic more on the basis of "effective occupancy" than on the sector principle.

Mr. Lesage attempted to elucidate the government's position on Arctic sovereignty in replying to a question in the House of Commons in 1956:

> We have never subscribed to the sector theory in relation to the ice. We are content that our sovereignty exists over all the Arctic islands. There is no doubt about it and there are no difficulties concerning it. Our sovereignty has never been endangered by the installation of the D.E.W. line. We have agreements with the United States and the facts are there to prove we have sovereignty over our northern territory. We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty exists over the lands and over our territorial waters.24/

Referring to the so-called sector "lines" first places on Canadian maps in 1903, Mr. Lesage argued that they were not boundaries but that their purpose was merely "...to show the lines within which the lands and territorial waters around those lands were claimed by Canada, because at that time and for a number of years afterwards many of the islands of the Arctic had not been discovered

---

24/ House of Commons Debates, August 3, 1956 6955.

and it was not known what islands would exist in the interior of that sector."[25/] He added that the "broaded (sic) sector theory, "which Canada had not adhered to entailed a claim to "sovereignty over waters beyond your territorial waters."[26/]

Mr. Lesage's successor, the Honourable Alvin Hamilton, replying in Parliament in 1958 to a question posed by Mr. Lesage, left open the issue of the ownership of ice and waters adjacent to the Arctic Archipelago:

> ...The Arctic Ocean is covered for the most part of the year with polar pack ice having an average thickness of about eight feet. Leads of water do open up as a result of the pack ice being in constant motion but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen then that the Arctic Ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application.[27/]

25/ Ibid., 6958. Mr. Lesage may be in error in his last-quoted remarks inasmuch as he is implying that lines placed on a map in 1903 reflected a theory which was first put forward by Senator Poirier in 1907. It is noteworthy, as Professor Pharand has pointed out that "...the Physical Geography section of the Canada Year Book states that "in latitude it (Canada) stretches from Middle Island in Lake Erie, at 41° 41° N. to the North Pole," apparently with the sanction of the Department of Energy, Mines and Resources (Pharand, "Freedom of the Seas in the Arctic Ocean," (1969) 19 U.T.L.J. 229-230).

26/ House of Commons Debates, August 3, 1956, 6958

27/ Ibid., 1957-58, 1559.

Subsequently in Parliament Mr. Hamilton endorsed Canadian title to Arctic territory primarily on the basis of effective occupation.28/

While he was Canadian Ambassador to the United States in 1946, Lester B. Pearson asserted that Canadian sovereignty extended to "...the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries extended to the North Pole."29/ Mr. Pearson amplified his earlier statements, and attempted to recapitulate the position of successive Canadian governments in a television programme broadcase in November, 1969:

> ...I don't think we've ever claimed jurisdiction to anything that could be considered as open sea. What we have done in the past and there have been many statements about this from 1946 especially on, we have put forward what is called the "sector theory" and the land inside your construction of your east and west boundaries to the pole. Now we have thought that permanent ice could be assimilated to land but if its pack ice its not permanent.30/

Mr. Pearson's reference to "pack ice" concerned a report from Moscow by the Canadian Broadcasting Corporation that the Soviet Union was claiming title to pace ice within the Russian sector. The former prime minister explained that the significance of repeated government statements on Arctic sovereignty after 1946 was related to the developing 'cold war.' With the polar area acquiring enhanced military significance as the shortest route to many targets for nuclear-equipped aircraft or inter-continental

---

28/ Ibid., 1958, 1979 and 1989.

29/ Pearson, Op.cit., fn. 23 supra, 638

30/ C.B.C. Weekend, (television rboadcast), 9 November, 1969.

ballistic missiles, it was in the national interest to claim the Arctic sector as Canadian territory to establish a cordon sanitaire for defensive purposes. One would expect that, at least in this respect, there ought to be a large community of interest between Canada and the United States in sustaining the Canadian sector claim.

A parliamentary debate in 1969 disclosed the opinions of two other Canadian prime ministers on the sector principle:

> Rt. Hon. J.G. Diefenbaker: ...is it not a fact that Canada's stand through has been in favour of the sector principle and that view was expressed by Canada at the Geneva Conference in 1958 and not disputed by the United States or the U.S.S.R? Does the Prime Minister accept the sector principle, and if he does, and if that is still the policy of the government of Canada, then waterways are in the same position as islands and other lands?
>
> Rt. Hon. Pierre E. Trudeau: Mr. Speaker, I do not have the same understanding of this as the Right Hon. gentleman. I believe that the sector principle applies to the seabed and the shelf. If does not apply to the waters. The continental shelf is of course under Canadian sovereignty --- this is the seabed, but not the waters over the shelf.31/

In examining the statements made on the sector principle by successive Canadian prime ministers and cabinet mambers, it is difficult to deteet a uniform policy woven into the whole fabric. While the specific content of the policy is not clear, at least the four most recent prime ministers --- St. Laurent, Diefenbaker, Pearson and Trudeau --- have all found the concept of a sector principle, either alone or in conjunction with other indicia of title, meaningful, however variously they have interpreted it.

31/ House of Commons Debates, 10 March, 1969, 6396.

The Soviet jurist W. Lakhtine, in an article published in 1930, set out the reasons for the espousal by his government of a sector claim in the Russian Arctic, citing Canadian practice in support of its position.[32] According to Lakhtine, because of its physical environment the requirement of "effective occupation" as a basis for sovereignty over Arctic territory was "unreasonable." Lakhtine does not enunciate in detail why this should be so, but he is obviously referring to the inhospitable climate and the inaccessibility of the region which makes human habitation and normal pursuits difficult. Granted that "effective occupation" is not a prerequisite for Arctic sovereignty, he adds: "...we are forced to the collateral conclusion that we must disavow the whole triple formula of occupation, i.e., discovery, occupation and notification."[33] It follows that the traditional or customary modes of acquiring territory in other latitudes are not appropriate for the Arctic, and that there must be substituted for them "...the doctrine of the region of attraction." The consequence of adopting such a view is that "...lands and islands being still undiscovered are already presumed to belong to the national territory of the adjacent Polar State in the sector of the region of attraction in which they are to be found."[34] In his article, Lakhtine was actually expounding the rationale

---

32/ Lakhtine, "Rights Over the Arctic," (1930) 24 A.J.I.L. On the Soviet view of polar sovereignty see also Lapenna, Conceptions Soviétiques de Droit International Public, Paris, 1954, 256-263.

33/ Lakhtine, ibid., 710 (emphasis by Lakhtine).

34/ Ibid., loc.cit., (emphasis by Lakhtine).

of the Soviet "sector" claim to the Arctic which had been formally promulgated four years earlier. In the relevant decree, Soviet sector boundaries described as converging at the North Pole were situated between the meridian of east longitude 32° 4' 35" and the meridian of west longitude 168° 49' 30", which define, respectively, the extreme easternmost and westernmost limits of Soviet national boundaries.35/

Hackworth describes certain claims to Arctic territory made by Russia in 1916 as also falling under the "sector principle," but in this case there was no formal proclamation defining a specific Russian sector:

> On November 13, 1916, the Russian Ambassador in Washington sent a note to the Department of State calling attention to the annexation of certain newly-discovered lands in the Arctic. The Russian Government claimed as "part and parcel of the Empire" several Arctic islands lying near the Arctic coast as constituting "an extension northward of the Continental tableland of Siberia."36/

One might query Hackworth's classification of this 1916 claim under the "sector principle," however, since it reflects title by "continuity" or the geographical extension of the continental tableland, whereas the "sector principle" would appear more properly to be based on "contiguity", or the geographical nearness of the continental state to the Arctic region. A clear differentiation between the two bases of title can be made in that the former one would not seem to be as comprehensive as the latter. There could, for instance, be no further claims after the continental tableland came to an end, as it well might do before it reached the Pole (the continuity principle), but notwithstanding such "discontinuity", a claim under the sector principle (under "contiguity") could still be entertained right up to the Pole.

35/ Decree of the Presidium of the Central Executive Committee, U.S.S.R., April 15, 1926, cited in 2 Whiteman, International Law, Washington, 1963, 1268

36/ 1 Hackworth, International Law, 461.

A strict interpretation of the above Soviet Decree of 1926 would confine its operation solely to lands within the Soviet sector, discovered and undiscovered, which had not been recognized by Moscow as "property of another state."[37/] Associated with the mentioned claim, however, are extensive historic claims to Arctic waters covering the Northeast Passage from Novaya Zemlaya and Franz Josef Land to the entrance of the Bering Strait.[38/] The Soviet sector claim, along with the concurrent claim to historic waters, represents a more sweeping assertion of sovereignty over Arctic lands and waters than is made by any other polar state.[39/]

37/ 1 Hackworth, International Law, 461.

38/ See the illustrative chart appended to Mouton, "The International Regime of the Polar Regions," 1962, 111 Recueil des Cours, Academie de Droit International, (hereinafter cited as Mouton), and cf. Lapenna, op.cit., in. 32 supra, at 257-258: "Dès 1926, le Professeur Korovine exprime l'opinion que les mer arctiques doivent être traitées d'une facon analogue à celles des territoires arctiques, c'est-à-dire que la souveraineté de L'U.R.S.S. doit s'y entendre. Seule une telle interprétation, trés large, du décret du 15 avril 1926 --- écrivait alors Korovine --- assure les droit souverains de l'Union soviétique sur ces régions. Il s'agit des mers de la Mer Tchoukout qui se trouve dans les limites du secteur polaire soviétique. La mer de Behring... et la mer de Barents sont toutes les deux considérées par la doctrine soviétique comme mers ouvertes."

39/ Cf. Mouton, loc. cit.

The Soviet writer A.N. Nikolaev sets out the historical basis of the extensive Soviet claim:

> The author of this work is in full agreement with the Soviet scholars who regard as 'historic' and subject to the regime of internal waters of the U.S.S.R. the seas which form bays in the Siberian coast: the Sea of Kara, the Laptev Sea, the East Siberian Sea and the Chukchi Sea. Many centuries were required by Russian navigators to establish mastery over these seas, which now constitute a national waterway of the Soviet State. Through these seas passes the northern maritime route from Murmansk and Archangel to Vladivostok which was only opened through the prodigious efforts of our heroic Soviet people.[40/]

The arguments advanced by Soviet scholars to support a regime sui generis over broad expanses of Arctic seas might, for the most part, be used by other polar states to nationalize other polar waters. Vishnepolsky, for example, asserts that (a) rigorous ice conditions make all vessels attempting the "northern maritime route" absolutely dependent on Soviet ice-breaking and meteorological services for a successful transit; (b) the seas have not hitherto, in fact, constituted an international commercial sea route,[41/] and (c) ancient historical claims to the Kara Sea, forming the easternmost portion of the waters claimed, were unprotested by foreign states, and the Arctic seas generally were regarded as belonging to

---

40/ Nikolaev, Problema Territorialnykh Vod V Mezhdunarodnomprave, quoted in Evenson, 19.

41/ This argument, especially, would apply to such polar sea routes as the Canadian Northwest Passage.

Russia from the time of Ivan the Terrible (1533-1584)[42/]

The Dutch jurist Mouton emphasizes that, according to the Soviet Union, no right of innocent passage for foreign vessels exists through the above-mentioned Arctic waters, because they are claimed as "internal" seas. Actually, this would mean that there was no international sea route north of the Russian mainland since the areas to the north of Soviet "internal waters" would be rendered impassable by ice. In refutation of the common Soviet claim that the Northeast Passage was opened up by "Russian navigators" Mouton points out

---

42/ Mouton strongly disputes the Soviet claim on the following grounds: (a) In future, foreign icebreakers and reconnaissance aircraft might escort their own vessels without hindrance, and without Soviet assistance, through the Northeast Passage; (b) Although, by the Soviet view, unauthorized overflights by aircraft over "internal seas" would be prohibited equally with navigation of such seas by foreign vessels, the control of ice hazards would be required only on the latter ground, and the enclosure of a large area of airspace would pose a considerable inconvenience to international air traffic; (c) the term 'historic seas' is unknown in contemporary international law and 'historic bays' are not permissible without headlands of specific dimensions through which baselines might be drawn; (d) a claim to sovereignty over super-jacent waters of the continental shelf is unwarranted under the Geneva Convention on the Continental Shelf, 1958; (e) the impermanence and instability of polar ice are impediments to a valid claim to Arctic seas, since they are not assimilable to land "large canals and open places being formed and disappearing again"; (f) there are increasing indications that the Arctic Ocean will become a thoroughfare for ships of many nations, as well as for aircraft, witness the recent transits in the area of the North Pole by the U.S. nuclear submarines Nautilus and Skate, (Mouton, 201-202).

The Present Relevance of the Sector Principle

One may seriously question the relevance to present circumstances of the "sector principle." As originally conceived, the "sectors" were proclaimed by Canada and the U.S.S.R. to establish a claim to undiscovered territory contiguous to Arctic frontiers which they, as Arctic powers, could most conveniently exploit, and which might otherwise be appropriated by strangers. With the increase in exploration, polar navigation and aerial surveys in recent years, however, it is virtually certain that there are no remaining undiscovered islands in the Arctic Ocean. (Of course, if permanent ice were assimilable to land, the Canadian sector boundaries, which transect the permanent ice as they converge towards the Pole, could serve as actual frontiers.) It is clear that recent technological advances have made it easier for all states, whether or not they are physically adjacent to the Arctic, to establish scientific, meteorological, defensive or other installations in Polar areas. For states like Norway,[43/]

43/ In recognizing Canadian sovereignty over the Sverdrup Islands in 1930, the Norweigian note expressly stipulated: "...my government is anxious to emphasize that their recognizance of the sovereignty of His Britannic Majesty over these islands is in no way based on any sanction whatever of what is named 'the sector principle'." 1 Hackworth, International Law, 463.

and the United States,[44] which have repudiated claims under the sector principle, it might theoretically be possible to lodge rival claims in sectors appropriated by Canada or the U.S.S.R. on the basis that "effective occupation" or "exploitation" were superior ground of title.[45] Since there does not seem to be any further unappropriated territory in the Arctic, however, perhaps this question is an academic one.

In addition to their respective claims under the sector theory Canada and Russia have, through governmental acts, the administration of native peoples, serial rescues, police protection, defence activities and other acts, displayed the animus dominendi which is one of the essential ingredients of sovereignty. In other words, Canada has not relied wholly on the 'sector principle' to buttress its claim to arctic territory. It has, in effect, reinforced its claim by manifesting governmental control over the whole area.

44/ Cf. "....the United States has not recognized (the so-called 'Sector Principle') as a valid principle for claiming jurisdiction." Assist-and legal adviser Whiteman to Lt. Cmdr. John C. Fry, U.S.N., letter dated January 7, 1959, MS., Department of State, file, 703.022/12-1758, 2 Whiteman, International Law, 1268.

45/ If the capacity to exploit natural resources in territory having a harsh climate is the test of sovereignty, it might inherently discriminate against those states whose technology was relatively less well advanced than others, just as it is sometimes argued that the 'sector principle' itself discriminates against those who are geographically further removed from the Pole.

Although, legally speaking, they are independent grounds of title, the 'sector principle' and 'effective occupancy' are complementary inasmuch as the former indicates the geographical dimensions within which the Canadian government purports to exercise actual control. It should be stressed in this connection that the intention to exercise sovereign authority over a desolate and uninhabited region can be inferred, in part, from the terms of domestic legislation extending to it. If local legislation purports to extend to such an area, and there has been no protest by other states, either to such legislation or to official acts performed thereunder, notwithstanding the fact that it endeavours to control activities away from settled areas, there is still the animus dominendi which can through time give rise to a title superior to that which may be asserted by any other state.[46/] The judgment in the Eastern Greenland case is instructive in this respect. The principal issue in the case arose from Norway's claim to Eastern Greenland; the Norwegians contended that the eastern part of Greenland was a terra nullius which they might appropriate, Danish sovereignty being confined to the Southwest coast which was the main focus of Danish activities. In speaking of Danish legislation extending to unsettled parts of Greenland, the Court said:

> ....Legislation is one of the most obvious forms of the exercise of sovereign power, and it is clear that the operation of these enactments was not restricted to the limits of the colonies. It therefore follows that the sovereign right in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.[47/]

46/ Legal Status of Eastern Greenland, P.C.I.J. (1933), Series A/B, No. 53, 49.

47/ Ibid., loc. cit.

In the same case, the Court indicated that, in the absence of adverse claims to sovereignty over remote, unsettled areas, title could be substantiated with less rigour than would be necessary in densely populated regions:

> ....bearing in mind the absence of any claim to sovereignty by another power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed ....his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.48/

The United States has been consistent in its requirement that a more exacting test than mere discovery or physical contiguity (as under the 'sector principle') be applied to determine title to unoccupied lands or so-called terrae nullius. Thus, during the Coolidge administration, Secretary of State Charles Evans Hughes advised a correspondent of the reasons why the United States was reluctant to proclaim a title to certain Antarctic territory merely on the basis of discovery:

> It is the opinion of the Department that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country. In the absence of an Act of Congress assertative in a domestic sence of dominion over Wilkes Land this department would be reluctant to declare that the United States possessed a right of sovereignty over that territory.49/

48/ Ibid., 50-51. (The validity of Danish title to Greenland rested in part on the sovereignty over the island of the King of Denmark and Norway, to whose rights Denmark succeeded when the countries separated at the end of the Napoleonic wars).

49/ Secretary Hughes to A.W. Prescott, May 13, 1924, 1 Hackworth, International Law, 399.

The United States still declines to accept the 'sector principle' as a valid title to territory,[50] and has not itself asserted such a title in what is sometimes termed 'the United States sector' of Antarctica.[51] Shortly before the ratification by the United States of the Antarctic Treaty, 1959, which had the effect of neutralizing the Antarctic continent and suspending, during the currency of the treaty, territorial claims therein,[52] the State Department legal adviser declared: "the United States has not asserted any claim to sovereignty over any portion of Antarctica, although the United States has, at the same time, made if perfectly plain that it did not recognize any such claims made by other states."[53] Accordingly, both theoretically and in practice, the United States has shown reluctance to concede that title to territory in the polar regions could be acquired with greater faculty than in other areas. It is important to note, however, that Secretary Hughes's above-mentioned statement was made several years before the decision by the World Court in the Eastern Greenland case which, although it was predicated on a particular context, implicitly relaxed the requirements for the assertion of territorial sovereignty in polar areas.

50/ See fn. 44 at 42, supra.

51/ See fn. 19 at 30 supra.

52/ See Articles 1 and X11 in 2 Whiteman, International Law, 1232 ff.

53/ 2 Whiteman, International Law, 1250.

11 CASE LAW ON ARCTIC SOVEREIGNTY

Even if one assumes that the more rigorous test of ownership to unoccupied territory through "effective occupation" laid down in the Island of Palmas[54/] case and the Clipperton Island[55/] case applies, an argument could still be made out, as was indicated above,[56/] conferring on Canada and similarly-situated powers, sovereignty over their remote, sparsely settled Arctic lands.

In the Palmas case a dispute arose in 1906 between the United States and the Netherlands concerning title to the island of Palmas, a small, isolated island midway between the southernmost Philippine island of Mindanao and the nearest part of the Netherlands East Indies. By a compromis entered into in 1925 and setting out the terms of reference of the arbitration, the controversy was submitted for settlement to the Permenant Court of Arbitration at the Hague. Dr. Max Huber sat as single arbitrator in the case, applying both general international law and special treaty provisions.

The title of the United States rested on its succession to the rights of Spain as cessionary of that state under the Treaty of Paris of December 10, 1898, which ended the Spanish-American War. The Americans argued that the island was discovered

---

54/ Arbitral Award in the Island of Palmas Case, United States and the Netherlands, April 4, 1928, (P.C.A.) 26-27, see (1928) 22 A.J.I.L. 867 for the text of the decision (hereinafter cited as Palmas).

55/ Arbitral Award on the Subject of the Differences Relative to the Sovereignty over Clipperton Island, January 28, 1931, see (1932) 26 A.J.I.L. 390 for the text of the decision (hereinafter cited as Clipperton).

56/ Vide supra, 42-44 and chapter three, infra.

by Spain, and that it was a contiguous part of the Philippine archipelago. It had, moreover, been recognized as a part of Spanish territory by other European powers in 1648 in the Treaty of Munster, and in other later treaties.57/

The Netherlands, on the other hand, contended that with some inconsequential interruptions, they had actually administered the island since 1677 through the Dutch East India Company. Their administration constituted, in reality, "effective occupation" over the island, and was preceded by agreements with local native potentates who voluntarily submitted to Dutch rule. The relavant agreements excluded the local princes from entering into relations with foreign Sovereigns and even, in important economic matters, with their own nationals. The Dutch issued their own local currency which served as legal tender on Palmas, they assumed jurisdiction over foreign transients, and charged the local government with the duties of suppressing slavery, prostitution and piracy. There was an authoritative allocation of governmental functions between the Dutch, on the one hand, and local magnates on the other. While it would be difficult to categorize the exact status of the island within the Dutch Empire, the Dutch administered the territory's foreign relations and important parts of its internal government.

In giving his decision, Judge Huber gave paramount force to what might be called the 'prescriptive' title of the

---

57/ While the argument is understandable in the context of an adversary process, it is noteworthy that two of the important elements by which the United States urged that it was sovereign of Palmas, viz., 'discovery' and 'contiguity' are elements which it has found inadequate as a basis for title in polar areas: see Secretary Hughes's statement supra, 47.

Netherlands over Palmas. There had been a lengthy, continuous and peaceful (or unopposed) display of governmental authority by the Dutch over the island, while American title, if it were to be found, rested on the more tenuous grounds of 'discovery' or 'contiguity'.

> The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the eighteenth and early nineteenth centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any power who might have considered herself as possessing sovereignty over the area, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.58/

In contradistinction to the Dutch display of official authority, Spanish 'title', by contiguity had no foundation in international law, and discovery would yield only an inchoate title which had never been perfected by subsequent "effective occupation".59/

58/ Palmas, 908.

59/ Palmas, 910.

The Clipperton Island case, submitted to King Victor Emmanuel 111 of Italy by France and Mexico in 1909, involved a dispute over sovereignty to Clipperton Island, a barren, unoccupied coral reef situated approximately one thousand miles off the west coast of Mexico.

Mexico contended that the island had originally been discovered by Spanish navigators and belonged to Mexico, as successor to Spain, partly because of the papal bull which divided the New World between Spain and Portugal.[60/] The Mexican government produced a chart allegedly showing the island as being under Spanish sovereignty. The arbitrator considered, however, that the chart lacked official character, since there was no evidence that it had been made by direction of the Spanish government. Mexico had, apparently, performed no positive acts relating to the island, and relied solely on its right as successor in title to Spain.

France, on the other hand, had in November, 1858, claimed the island through a symbolic act of annexation performed by a visiting French naval officer. Annexation was followed by notification of French sovereignty to the world, notably in the Hawaiian journal The Polynesian on December 8, 1858. In the same year, Napoleon 111 granted a concession to a private individual to exploit guano beds on the island, but without any results. There were, in fact, no further French acts, or acts by any other state, manifesting animus occupandi over the island for many years. Towards the end of 1897, three persons collecting guano on the island raised the American flag on the approach of a French vessel. After enquiry by France, however, the United States disclaimed any intention of claiming the island. Shortly afterwards, the Mexican gunboat La Democrata landed a detachment of marines, ordering off the three inhabitants

---

60/ Vide supra, 30.

and hoisting the Mexican flag. On learning of the incident, France reasserted its claim to Clipperton Island and, after protracted diplomatic negotiations, agreed to refer the matter to the arbitration of the King of Italy.

In deciding in favour of France, the Italian monarch spoke of the conditions necessary to reduce a territorium nullius to the possession of a claimant state:

> It is beyond doubt that by immemorial usage having the force of law, besides the animus occupandi, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory by virtue of the fact that it was completely uninhabited, is, from the first moment when the state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.61/

61/ Clipperton, 393-94

Accordingly, in 1897 Clipperton Island was no longer a territorium nullius, but was effectively under the occupation of France. In the absence of serious adverse claims, French annexation, followed by notification in 1858, coupled with a continuing intention to occupy the island, was sufficient to obtain title. As the arbitrator said:

> ....Clipperton Island was legitimately acquired by France on November 17, 1858. There is no reason to suppose that France has subsequently lost her right by derelictio, since she never had the animus of abandoning the island, and the fact that she has not exercised here authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.62/

A perusal of the Eastern Greenland Case, the Island of Palmas Case, and the Clipperton Island Case impels one to the conclusion that in the case of terrae nullius which are either uninhabited or sparsely inhabited, and under the rule of no foreign sovereign power, the mode of acquisition of territory and the manifestation of the requisite animus occupandi is less exacting than would be the case with more advanced, or more densely populated and politically sophisticated areas.

The above cases should serve as valuable precedents in any litigation disputing Canadian claims in the Arctic, since the islands of the Arctic Archipelago were discovered and explored by British and Canadian explorers, were desolate in nature, being either uninhabited or sparsely populated, and have been under continuous British and Canadian administration for a lengthy period of time.63/

62/ Ibid., 394.

63/ For a development of this argument see infra, chapter three.

111 TERRITORIAL ISSUES IN THE CANADIAN ARCTIC

In the light of the foregoing cases, a very brief review of past territorial issues in the Arctic might be appropriate here. It would appear that the only states with claims adverse to Canada are (a) the United States; (b) the Soviet Union; (c) Norway, and (d) Denmark.

A. The American Presence in the Arctic

In the case of the United States, although the American explorer Admiral Roberty Peary supposedly annexed the North Pole and the "entire region" for the United States in 1909, there was never, subsequently, any "occupation" of the area in the sense of a firm intention to exercise sovereignty over it. The American government has, moreover, declined to endorse Peary's "annexation", holding that "ice" is not subject to national appropriation.64/

Even before 1909, in the 1870's and 1880's and during the Klondike Gold Rush there was some Canadian concern that the United States might make claims in the Arctic, because of the large influx of American prospectors, the vagueness of national boundaries and the use of American currency as legal tender; it was though that, without effective Canadian countermeasures, the whole area might acquire a substantially American

---

64/ 1 Hackworth, International Law, 450; on Peary's polar expedition see, inter alia, Neatby, Conquest of the Last Frontier, Athens, Ohio, 1966, 321, ff., and Caswell, Arctic Frontiers, Norman, Oklahoma, 1956, chapter nine.

character, which could be a prelude to annexation:

> ....The threat from the United States... stemmed from the possibility that the United States would establish de facto jurisdiction over territory claimed but not effectively occupied by Canada. The first instance was in the 1870's and 1880's when it became apparent that the most active traders and prospectors in the Yukon were United States citizens. In 1896 William Ogilvie reported to the Canadian government on the situation in the Yukon and suggested that some currency be sent to the Yukon partly in order to provide a medium of exchange more satisfactory than gold dust, but also because it "would emphasize the existence of Canada." He added that "what coin and bills are here are largely American."65/

Should the United States have annexed the Yukon, of course, it could easily have extended its territorial claims into the sparsely settled areas to the East, cutting off land access to the Canadian Arctic Archipelago and placing the future political status of the Arctic in doubt. Under such conditions, "effective occupation" of the Archipelago by Canada would have been virtually impossible.

A further and more recent instance of American penetration of the North constituting an incipient threat to Canadian sovereignty occurred with the establishment of joint American-Canadian radar and defence installations after the Second World War. As Rea says: "....Although these measures were themselves

---

65/ Rea, The Political Economy of the Canadian North, Toronto, 1968, 53, (hereinafter cited as Rea).

initiated out of fear of a Russian attack on North America, they led to some concern in Canada when, on a number of occasions, it appeared that jurisdiction had passed to United States authorities over personnel and facilities located on Canadian territory.[66/] Concern was also manifested in the House of Commons when an American periodical referred to Ellesmere Island as lying "north of Canada."[67/]

B. The Canadian Interest in Wrangel Island

In the case of the Soviet Union, the possibility of a dispute over title to Wrangel Island arose, but the incipient controversy did not even reach the diplomatic forum. Vilhjalmur Stefansson, an American, in 1922 urged that the island be claimed by Britain or Canada, in view of its possible future importance as a polar air base, but not much official interest was shown by either country in the proposal. In replying to a query by the Leader of the Opposition on May 12th, 1922, (while placing before the House estimates to pay expenses of the recent Stefansson expedition expedition), Hon. G.P. Graham, Minister of Militia and Defence, said: "....at the present time the Canadian flag is flying on Wrangel Island, and there are Canadians on the island, members of a previous expedition of Stefansson's." He added, "...the government certainly maintains the position that Wrangel Island is part of the property of this country."[68/] Government interest in the island dwindled, however,

---

66/ Rea, 53, and authorities cited there in fn. 116, and see Allen, "Will the Dewline cost Canada its Northland?" in Maclean's Magazine, May 26, 1956, and Masters, Canada in World Affairs, 1953-56 (C.I.I.A.)Toronto, 1959, 65-67.

67/ Rea, 53-54.

68/ Riddell, Documents on Canadian Foreign Policy, 1917-1939,Toronto, 1962, 743, see also 1 Hackworth, International Law, 464.

and as Baird mentions, it was impossible for some time even to send a relief party to succour the Canadian Eskimos whom Stefansson had left there, only one of whom was ultimately found alive. Further Alaskan Eskimos placed on the island by Stefansson were removed forcibly by a Soviet vessel in 1925, when the island was occupied by the U.S.S.R., apparently without Canadian protest.[69/] The island has since remained in the possession of the Soviet Union.

It would seem that Canadian and Soviet Arctic claims, far from being conflicting, should be mutually supporting. Together, the Soviet Union and Canada occupy more of the Arctic than all other polar states combined. They have both asserted "sector" claims, which are similar in principle, and if Canada makes claims to northern waters and ice it could cite Russian practice as a precedent. It would be a contradiction of the sector principle for Canada or the Soviet Union to dispute territory in the adjoining sector, since the principle implies reciprocity among arctic states. To act in such a way would call into question the legitimacy of the sector principle itself. Canada, in addition, is in the highly unusual position that whereas it could rely on Soviet support for its Arctic claims on the basis of reciprocity, it could also suggest to the United States that such an understanding with the U.S.S.R. was in the mutual interest of Canada and the United States for defensive purposes.

69/ Baird, 173.

C. Norwegian Exploration of the Canadian Arctic

In the case of Norway, a putative Norwegian claim to the Sverdrup Islands was settled in 1930 when the Canadian government paid the Norwegian explorer Captain Otto Sverdrup $67,000 in recognition of his services in exploring "Sverdrup's Islands," in the northernmost portion of the Arctic Archipelago.[70/]

D. The Danish Interest in Ellesmere Island

In 1920, the government of Denmark contended that Ellesmere Island, which was situated between the Danish possession of Greendland and the remainder of the Canadian Arctic Archipelago was a colony of neither Denmark nor Canada, but a terra nullius. Fairley describes the genesis of the dispute in 1919:

> ....The Danish explorer Knud Rasmussen, visiting Smith Sound, had indulged in some big-scale musk-ox hunting on Ellesmere Island, and when the Canadian government complained that he had not obtained permission he said he considered the whole region north of Parry Channel to be a no-man's-land, as indeed it appeared on most non-British maps; in April 1920 the Danish government endorsed his view.[71/]

During the controversy, Rasmussen amplified this point of view in a letter to Stefansson: "....as every one knows the land of the polar Eskimo falls under what is called "no-man's-land"

70/ 1 Hackworth, International Law, 465, and see Beriault, Les Problemes Politiques du Nord Canadien, Universite d'Ottawa, 1942, 103-104, (hereinafter cited as Beriault).

71/ Fairley, Sverdrup's Arctic Adventures, London, 1959, 278.

and there is therefore no authority in this country except that which I myself am able to exert through the trading station."[72] Had Rasmussen's view been acquiesced in, of course, it would have been a fairly simple matter for Denmark, using Greenland as a jumping off place, to create an infrastructure of governmental authority over all the islands north of Parry Channel, extending to the eastern fringe of the permanent polar ice.

The Danes themselves, however, were apparently fearful that their title to Greenland would be questioned, particularly by Norway,[73] and through a demarche settled their own and Canada's problems simultaneously. On 6 September, 1920, at the request of Denmark, the British government recognized Danish sovereignty over Greenland but Britain expressly made such recognition contingent upon the right to be consulted in advance should Denmark at any time contemplate the alienation of the island to a foreign power. It appears, as Beriault observes, that Denmark quietly dropped its representations on the legal status of Ellesmere Island when Britain recognized Danish sovereignty over Greenland.[74]

It is interesting that during the Second World War the Allies invoked the Danish promise of prior consultation

---

72/ Beriault, 104.

73/ For a brief outline of the Norwegian-Danish dispute over Greenland, vide supra, 43-44.

74/ Beriault, 105.

before alienations to ward off a possible Nazi acquisition of Greenland.[75] In this connection, Prime Minister King said in the House, after the fall of Denmark in 1940, that Canada would deal only with local Danish administrators on the island, and not with the government in Copenhagen presumed to be under German control.[76]

IV CANADIAN TITLE TO PERMANENT ICE?

There remains the question whether Canada can assert title to the permanent ice within its sector boundaries, as Prime Minister Pearson has urged.[77] The vexed question of national title to glacies firma has been the subject of protracted and inconclusive dispute among international jurists. Lauterpacht has argued emphatically that sovereignty over polar ice is not permissible:

> When, in 1909, Admiral Peary reached the North Pole and hoisted the flag of the United States, the question was discussed whether the North Pole could be the object of occupation. The question must, it is believed, be answered in the negative since there is no land at the North Pole.[78]

Scott[79] and Clute[80] are in firm agreement with Lauterpacht that ice is not subject to national sovereignty. Balch assumes an

---

75/ Ibid., 125, ff.

76/ House of Commons Debates, 1940, vol.1, 674.

77/ Vide supra, 34-35.

78/ Oppenheim, International Law, Lauterpacht (ed.) 8th ed., London, 1955, vol.1, fn 6, 556.

79/ (1909) 3 A.J.I.L., 938

80/ (1927) 5 Can. Bar Rev., 21.

an intermediate position, contending that North polar ice is not subject to ownership since it is in continual motion, but he does not discount the possibility of immobile ice being effectively occupied.[81] Other jurists, to a greater or lesser degree, have argued that claims to sovereignty over at least some forms of ice are permissible.[82]

Ignoring, for the moment, compromise positions like that of Balch, legal opinions concerning sovereignty over the ice are divided between those who, like the Russian Sigrist, assimilate "immobile ice" to "frozen land" and those who, like Lauterpacht and Oppenheim, regard ice fundamentally as water and hence not subject to appropriation as "territory." That the solution to this problem is not to be found in the simple dichotomy put forward by Lauterpacht may be inferred from the following passage describing the physical characteristics of Antarctica:

> ....A more or less land-locked ice cap in firm union with the bedrock beneath is, because of its origin, probably made up chiefly of frozen fresh water, or compressed and transformed snow, not frozen salt water. For all practical purposes it is perpetually solid as the land it "sits on". What industries or actions of the high seas can be exercised on and in such a medium. Whether certain portions of Antartica are shown to be only islands bound together

---

81/ (1910) 4 A.J.I.L., 265-266.

82/ See the authorities cited in 2 Whiteman, International Law, 1226, such as Rolland, Waltrin (Dollot), Lindley, Lakhtine, Hyde and Smedal all of whom argue that the frozen ice is "capable of occupation". To these names should be added that of Hayton, see next footnote.

> by solid ice or land depressed by the great weight of ice, it would seem proper to modify the concept of territory to accomodate such "glacies firma."[83/]

Especially if one accepts the hypothesis mentioned by Hayton that Antarctica is actually a number of island entities,[84/] exhibiting merely a superficial unity because of the thick ice cap, the possibility of acquiring property rights in such ice would be enhanced. What would be the difference, in such circumstances, between appropriating glacies firma over land or glacies firma over what really constitutes frozen seabed? In chemical composition, and in almost every conceivable quality and use there would be no distinction in the overlying ice except with regard to what lay underneath. One might ask, as well, what the difference would be between interior interstitial ice linking together the various hypothetical islands of Antarctica and ice overhanging the sea (ice shelves) along the fringes of the Antarctic Continent? The possibilities of exploiting the surface of the ice over the sea would be virtually identical with the possibilities ice in the interior over land. Indeed, if "exploitability" and "habitability" or "durability" and "permanence" are among the prerequisites for appropriating the terrestrial surface, one would find it difficult to make a valid distinction between such "ice and "land". For many purposes, and disregarding

---

83/ Hayton, "The Antarctic Settlement of 1959," (1959) 54 A.J.I.L., fn. 56, 360.

84/ For a discussion, to similar effect, of the Greenland ice sheet, see Sater, The Arctic Basin, (revised edition), 11.

for the moment chemical properties, the distinction would be more one of degree than of kind. The polar ice at the North Pole exhibits essentially the same properties, except that it is in motion. At both poles, the geological effect of compression over many centuries coupled with a negligible rate of evaporation have produced a solid mass of material, which for many purposes, can be assimilated to land, and on which permanent structures can be built with an expectation of stability and durability over long periods of time.

It is true, however, that the "ice shelves" around the periphery of Antarctica are moving slowly, and mobility is sometimes said to be a hindrance to the appropriation of a surface area by a state. "Territory" that moves, for one thing, cannot easily be identified; it will permit only certain kinds of activity on its surface, and structures built on it may be unstable. Without pressing the analogy too far, it might be argued that certain land forms also display instability and still, as long as they constitute "land", are subject to ownership. The most dramatic illustration of this, perhaps, is the old Continental Drift theory, which recently has received strong geological confirmation, and which indicates that whole continents are in a state of slow but continual motion. Other examples are islands like the Galapagos, which are of volcanic origin; developing deltas around the mouths of great rivers like the Nile and Mississippi, or land slowly subsiding beneath the sea like much of Western Europe. Like pack ice, these land structures display a certain amount of instability, but they can easily sustain most human activities.

Considerations like these suggest that a more functional test than the present essentially chemical one might be devised as a criterion for the appropriation of the earth's surface. Surely, the researches of historical geologists over the past century have taught us not to invest land, which is subject to alternate elevation and inundation as a result of various ecostatic pressures (the Arctic basin is rising, for instance, and may one day be land) with excessive structural stability.

Much research has been carried out on Antarctic ice shelves, particularly during the last two decades. One of the largest protruding shelves, the Ross Shelf, advances seaward at a rate of about one-third of a mile per year.85/ Icebergs form continually at the outer edges of such shelves, some of them "...tens of miles in linear dimension and many hundreds of feet thick."86/ Baird summarizes some of the research which may be of particular significance for the law of the sea:

> ....On the Ross ice shelf, in the neighbourhood of little America, many studies have been carried out in the various years when it has been occupied and in 1958-59 American glaciologists drilled practically through the shelf, 836 feet out of an estimates 850 feet thickness. They found, somewhat to their surprise, no trace of sea ice in the drill

---

85/ Baird, 282.

86/ Ibid., loc. ct.

> core, thus providing evidence against the theory that some ice shelves grow from accretion from below. The Ross Shelf at Little America consists of something like 1,200 years accumulated snow pressed by its own weight into plastic ever-spreading ice; the yearly addition being something like 20 centimetres (8 inches) of water equivalent.87/

An appreciation of the origin of ice shelves, as given above, might prompt a reconsideration of some of the theorizing by maritime lawyers on the limits of the territorial sea in polar areas. Colombos, for example, argues:

> The question has often been raised as to whether, in case the sea is frozen, the sovereignty of the riparian state extends to the limits of the ice forming a continuous pack from the shore, without taking into consideration the normal limits of the territorial sea. To admit the affirmative absolutely is to give to States, especially in the Polar regions, an excessive maritime belt as ice pack may assume immense proportions.88/

Without attempting to controvert what Colombos says, one might ask whether his conclusion would be the same if he realized that the ice shelves at the edges of both polar ice caps were not, in fact, "frozen sea" as he states, but accumulated snow, subject to very little seasonal evaporation, and hardening in layers through pressure over long periods of time. It is submitted that the fact that a state was not, in such a case, delimiting its offshore boundaries from "solidified sea water", but from a relatively solid and stable accretion of great

---

87/ Baird, 282

88/ Colombos, 129

compactness, formed wholly on land and only subsequently moving out to sea could make a difference in his conclusion. If one took an ice shelf of such composition extending, as is not uncommon, twenty miles out to sea, the leading edge of which advanced very slowly, forming icebergs, but any seaward loss being made up by the movement of other ice from the interior, the whole formation would have a relatively stable aspect. One would be dealing here normally with ice hundreds of feet thick and of great density. When all these geographical facts are considered, it is suggested that one could make a more cogent argument than that of Colombos that offshore boundaries could be delimited from prominent ice shelves. The ice shelves in the Arctic, which are formed mainly to the north of Greenland and Ellesmere Island, are essentially similar to those in Antarctica. Baird speculates that the very thick and almost stationary Ellesmere Island ice shelf, from which most Atlantic ice islands originate, must have formed in situ over several thousand years.[89/]

While conceding that the forty-five mile long Ward Hunt Ice Shelf to the north of Ellesmere Island has been stagnant since 1964-65, Pharand considers that in view of its "disintegration" through time "...it would be somewhat unrealistic for Canada to assimilate the remaining ice shelves to land in the measurement of its territorial belt."[90/] One may

---

89/ Baird, 69.

90/ Pharand, "The Legal Status of Ice Shelves and Ice Islands in the Arctic," (1969) Les Cahiers de Droit, 467.

agree with Pharand that there is some instability at the outer edges of ice shelves, and still argue that territorial waters should, in some manner, be delimited outwards from them. To adopt his position in an unqualified sense would signify that the "territorial belt" along much of northern Ellesmere Island would actually be drawn under thick permanent ice. One may argue that, on historical grounds, two functions for which a territorial belt was created were: (a) military defence, and (b) the regulation of navigation adjacent to national coastlines, with (a) being the predominant original consideration. If one were, in fact, to delimit territorial waters from the coastline, rather than from the ice shelves, which often protrude seawards for twenty miles or more from the nearest land, it would mean that the littoral state would have no jurisdiction to regulate shipping in hazardous areas where regulation may become increasingly necessary in the future. It would also mean that potential enemies could establish military installations on overhanging ice shelves without infringing national sovereignty, thus acquiring a vital area of lodgement appurtenant to national territory as a base of military operations.

If factors like the above are persuasive, one could claim the permanent ice or ice shelf as "territory" in order to extend outward from it the belt of territorial waters. This would be essential both for ensuring safe navigation and for defensive purposes. At a minimum, surely "seasonal" claims might be entertained. Eskimos utilize the shore ice for hunting and frequently establish camps on the edges of the ice sheets. If, as Pharand rightly asserts, there is some instability at the outer fringes of ice shelves, such an area of instability is still very small in comparison to the linear dimension of the shelves taken as a whole. To meet

his objections, it would be necessary in such cases to make a small adjustment by extending the belt of territorial waters seaward from straight baselines defining the area where the configuration of the ice shelves had been stable for decades or centuries. This need be no more cumbersome than many other complicated baseline systems.

V THE CANADIAN CLAIM TO THE ARCTIC CONTINENTAL SHELF

When one considers the extent of Canadian title to the subsoil of the Arctic continental shelf, it is difficult to make a definitive judgment because the law itself has not yet crystallized. It should be remembered that the law on this subject has developed only since 1945, when President Truman made his celebrated proclamation claiming the continental shelf appurtenant to the United States. Since that time, many nations have made similar claims, and an international Convention,[91] on the subject has come into operation.[92]

In the North Sea Continental Shelf Cases,[93] a dispute arose between Denmark and the Netherlands on the one hand and the

---

91/ The Convention on the Continental Shelf, Geneva, 1958, see 499 U.N. Treaty Series, 311; (1958) 52 A.J.I.L., 858.

92/ The Convention came into effect on 10 June, 1964, when the 22 ratifications or accessions required for that purpose by Article 11 had been received, see (1969) A.J.I.L. 605.

93/ See North Sea Continental Shelf Cases (Federal Republic of Germany-Denmark; Federal Republic of Germany-Netherlands) I.C.J. Reports, 1969, 3, and see the majority opinion (the court dividing 11-6 after the cases were consolidated) in (1969) 63 A.J.I.L., 591-636, (the majority opinion referred to will be cited hereinafter as North Sea Case).

Federal Republic of Germany on the other concerning a suggested Danish-Dutch apportionment of the North Sea continental shelf in such a way as to curtail the Federal Republic's share of the shelf. Since the general principles enunciated by the International Court of Justice in this case might be applied in delimiting the Canadian share of the Arctic continental shelf, they should be summarized here. Although the specific application of the legal principles enunciated by the Court may be difficult, the facts are not complex and may be set out briefly.

On December 1st, 1964, and June 9th, 1965, agreements were entered into between the Federal Republic, the Netherlands and Denmark extending their submarine boundaries for some miles offshore according to the principle of "equidistance". An equidistance boundary line was defined in the judgment as a line, "...which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party."[94/] The seaward boundaries arrived at by the foregoing agreements, however, did not exhaustively delimit the respective shares of the shelf of the three states as they never converged, extending merely for some miles out to sea. Further negotiations between the parties on the undelimited portion of the shelf proved fruitless. The Netherlands and Denmark wanted the "equidistance principle" referred to in Article 6 of the Convention applied throughout. If this were done, because of their convex, bulging coasts and the concave or recessing German coastline wedged between them, their respective shares of the shelf would be enhanced at German expense. The Federal Republic which, unlike Denmark and the Netherlands, had signed but not yet ratified the Convention, contended that the "equidistance" principle, although

---

94/ North Sea Case, 597.

referred to in the Convention, was not a customary rule of international law, and was not binding upon the Federal Republic. German counsel argued that in the absence of binding conventional rules, each coastal state was entitled to "a just and equitable share" of the appurtenant continental shelf. Instead of projecting equidistant boundaries seaward by straight lines between the concave German North Sea shoreline and those of the other parties, with the inevitable result that the boundaries would meet a relatively short distance offshore, the Germans argued that some other method should be applied. A more equitable solution, according to the Federal Republic, would be to extend the water boundaries out to the median line demarcating the shelf boundary between the United Kingdom, the proprietor of the western North Sea shelf, and those of its continental neighbours who owned the more easterly portion. The shallowness of most of the North Sea meant that almost all of it would be subject to national appropriation. If this alternative method were applied, Germany would receive a much larger pie-like wedge of continental shelf tapering out to the boundary of the English shelf, instead of the more severely compressed triangle it would receive under the equidistance principle.

The Court found that the Federal Republic was not obligated to apply the equidistance principle in delimiting its portion of the continental shelf. It had never ratified the Convention, the invoked principle was not a customary rule of international law, but merely one of several possible methods used to demarcate maritime boundaries. The contention of Denmark and the Netherlands, moreover, that the Federal Republic had impliedly acquiesced in Article 6 and the equidistance principle

by various acts was not accepted by the Court. The Court attached great weight to the consideration that as soon as the concrete delimitations of the North Sea continental shelf areas under the said method became apparent, the Federal Republic at once reserved its position.[95/]

Instead of what might be called the mathematical concept of "equidistance", the Court put forward as more appropriate the geographical concept of the natural extension or prolongation of the claimant state's land territory. Since this concept is especially significant in relation to a Canadian claim to the continental shelf adjacent to the Arctic Archipelago, the relevant judicial formulation is quoted in extenso:

> More fundamental than the notion of proximity appears to be the principle --- constantly relied upon by all the parties --- of the natural prolongation or continuation of the land terrtitory or domain, or land sovereignty of the coastal state, into and under the high seas, via the bed of the territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal state because --- or not only because--- they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well established principle of law recognized by both sides in the present case, mere proximity confers per se title to land territory. What confers the ipso jure title which international law attributes to the Coastal State in respect of its

---

95/ North Sea Case, 607.

> continental shelf, is the fact that the submarine areas concerned may be deemd to be actually part of the territory over which the coastal State already has dominion,--- in the sense, that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural --- or the most natural --- extension of the land territory of the coastal State, even though that territory may be closer to it than it is to the territory of any other State, it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.96/

As a result of the above reasoning, the Court advised the parties to come to an agreement on their respective shares of the shelf, not on the basis of "equidistance," but taking into account, for each Party (among other factors), "...all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other..."97/ In cases of overlap, the area should be divided between negotiating states in agreed proportions, or equally, and such features as the general configuration of the coasts, physical and geological structure, natural resources and "a reasonable degree of proportionality," (in relation to the length of the coast, measured "in the general direction of the coastline"), should be considered.98/

96/ North Sea Case, 610-611.

97/ Ibid., 631.

98/ Ibid., loc. cit.

A refreshing aspect of the foregoing judgment resides in its realistic approach to the problem of defining the legal limits of the continental shelf. The two-hundred metre depth referred to in Article 1 of the Convention,[99] is not invested with magical significance, but is used along with the general submarine topography to determine the extent of the national shelf. It would certainly conflict with geography if a gently sloping submarine contour, constituting a nation's continental shelf, were arbitrarily cut off precisely at the two-hundred metre depth.[100] Even the Article mentioned conjoins the two-hundred metre rule to the complementary principle of "exploitability". If natural resources are exploitable beyond the two-hundred metre depth, apparently a national claim to the continental shelf is maintainable to the point where they are no longer exploitable, or at least for a reasonable distance. The Article is not exhaustive or precise, but a provision of universal application cannot hope to be.. It is of interest, nonetheless, that the Article expressly

---

99/ Article 1 reads as follows:

> For the purpose of these Articles the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

100/ Cf. Mouton, The Continental Shelf, The Hague, 1952, 20 ff.

purports to extend its provisions to "islands", thereby removing any doubt of its application to the Canadian Arctic Archipelago.

Before proceeding to examine the possible configuration of the archipelagic shelf of the Canadian Arctic islands, it should be emphasized that the 1969 North Sea decision by the World Court is at most a guide, and that the principles enunciated therein, because of their specific European context, should be generalized with caution. The attempt by the Court to envisage the shelf as a concrete geographical reality, however, and to eschew, as far as possible, purely abstract mathematical rules, is very convincing. It is most unlikely that such a common sense approach would be abandoned in other geographical contexts. Such an approach promotes a desirable rapprochement of legal and scientific concepts. It will be attempted, therefore, briefly to apply this reasoning to the Canadian Arctic while conceding that, because of the still unsettled condition of the law, any definitive appraisals is premature.

An initial difficulty facing the jurist attempting to apply continental shelf law to the Arctic is that until recently the submarine topography of the region was unknown. A formidable obstacle was the thick covering of permanent ice which obscured much of the Artic sea floor until technological innovations enabled scientists to penetrate it. It was only in 1948, for example, that Gakkel discovered the Lomonossov Ridge, a huge underwater formation extending across the polar seas from the New Siberian Islands to the vicinity of Ellesmere Island. As Baird describes it, this formation "... averages

about 1,300 metres below sea level and thus is over 2,500 metres high with slopes up to twenty-four degrees...."[101] The Ridge would appear to resemble a submerged mountain of considerable altitude. Situated on either side of the Ridge are deep polar basins of some three thousand to four thousand metres in depth. The larger American basin extends from just off the northern coast of Alaska to the Lomonossov Ridge, bordering the western fringe of the Canadian Arctic Archipelago. On the other side of the Ridge, the smaller but deeper Eurasian Basin extends from the neighbourhood of Greenland and the Spitsbergen Islands to the northwestern Siberia.[102] The perimeters of these basins are significant in demarcating the absolute limits of any realistic continental shelf claims in the Arctic.

Along the western fringe of the Archipelago, deep extensions of the American basin, resembling underwater canyons, penetrate to considerable depths between various of the Canadian Arctic islands. One such projection in Amundsen Gulf, south of Banks Island, ranges in depth from just over 400 metres at its eastern edge to an extreme of around 800 metres at the perimeter of the Beaufort Sea. Another finger-like projection penetrating McClure Strait and Viscount Melville Sound consistently reaches depths of more than 500 metres. There are projections of like depths between the Sverdrup Islands just west of Ellesmere Island. The Baffin Basin, midway between Baffin Island and Greenland, is much deeper, reaching depth in excess of 2,000 metres over much of its area.[103] It is extremely unlikely that any international tribunal would hold that any of the foregoing regions of the Arctic could form appurtenances of the Canadian continental shelf in the Arctic. This signifies that perforce the Canadian

---

101/ Baird, 92.

102/ Baird, see the diagram of the basins at 92-93.

103/ See Hydrographic Chart 7000, Arctic Islands, (Davis Strait to Beaufort Sea including Connecting Passages), 1970, Canadian Hydrographic Service.

shelf will be indented by numerous projections along much of its perimeter.

Because of the as yet uncompleted geological exploration of the Archipelago, it is still not possible to say, in conformity with the judgment in the North Sea Case,[104] that the whole Archipelago (with the adjacent underwater areas) has a geological structure similar to the mainland. Many of the Eastern Arctic Islands, however, like the greater part of Eastern Canada, are underlain by rocks of the rich, mineral-bearing Pre-Cambrian Shield. Protrusions of this geological "basement" have appeared on eastern Devon and Ellesmere Island, on Boothia Peninsula, Somerset Island, and elsewhere in the Archipelago.[105] Much of the explored areas on the islands appear to be outcrops or extrusions of similar geological formations on the Arctic mainland of Canada,[106] and one may infer that the geological composition of the intervening seabed is similar. It is still, of course, premature to make any but the broadest generalizations on the subject, and for the present writer it would be pretentious to make any scientific judgments at all. If, as it is thought, the Arctic islands and adjacent submarine areas were once part of the mainland, their geological similarity with nearby parts of Canada would not be surprising. Since many of the islands have produced evidence of three great orogenic movements, and complicated layers of sedimentary and volcanic material overlay baserock in most areas, and since areas covered by thick ice have not yet been explored, the full geological analysis of the arctic continental shelf will require many further years of study.

104/ Vide supra, 69-70, and North Sea Case, 631.

105/ Baird, 183-183.

106/ See any good geological map, e.g., Geological Map of the Arctic, (Alberta Society of Petroleum Geologists), 1960.

Whatever the conclusions of further geological exploration may be, however, it would seem from what evidence there is that the archipelagic shelf is related to the mainland and the various environing islands. The whole Archipelago has a unitary aspect, and the configuration of its coasts (another element of connection stresses in the North Sea Case[107]) tie it closely to the Canadian mainland. There are no ascertainable sharp cleavages between geological formations in explored parts of the islands and the mainland, although there are deep underwater "canyons" around the perimeter of the Archipelago,[108] breaking up the evenness of the more compact central shelf, and a more reasoned judgment awaits further study.

It will be attempted, in the final chapter, to evaluate Canadian claims to the Arctic Archipelago on the basis of the foregoing legal considerations. Before this task is attempted, however, a more detailed examination of the problems of extending Canadian sovereignty over the Arctic islands and adjacent waterways in necessary.

107/ North Sea Case, 631.

108/ Vide supra, 73-74.

CHAPTER THREE

CANADIAN SOVEREIGNTY OVER THE ARCTIC ISLANDS

In the preceding chapter, certain adverse claims to territories and islands in the Arctic that are claimed by Canada were enumerated.[1] In that context, the general international law of archipelagoes, as it relates to Arctic territory, was examined, and some of the associated problems, such as the degree of control necessary to manifest animus dominendi, were raised.[2] Before proceeding to a discussion of the legal regime applicable to polar waters in the next chapter, the more specific indicia of Canadian title to the archipelagic islands will be surveyed. A fairly extensive literature now exists on sovereignty over the polar lands.[3]

1/ Vide supra, 52-58.

2/ Vide supra, 42-51.

3/ See, e.g., Balch, "The Arctic and Antarctic Regions and the Law of Nations," (1910) 4 A.J.I.L. 265-275; Breitfuss, "Territorial Division of the Arctic," (1929) Dalhousie Review, 456-470; Dollot, "Le Droit International des Espaces Polaires," (1949) 75 Hague Recueil, 117-194; Hayton Polar Problems and International Law," (1958) 52 A.J.I.L. 746-766; Head, "Canadian Claims to Territorial Sovereignty in the Arctic Region," (1963) 9 McGill L.J. 200-266; Hyde, "Acquisition of Sovereignty over Polar Areas," (1934) 19 Iowa L.R. 286-294; Inch, An Examination of Canada's Claim to Sovereighty in the Arctic," (1962) 1 Manitoba L.S.J., 31-53; Lakhtine, "Rights over the Regions and International Law," (1947) 1 I.L.Q., 54-58; Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931.

Lindley, in a classic work, set out the essential requirements for obtaining sovereignty over uninhabited lands which were unsuitable for settlement:

> The case of uninhabited lands which are not suitable for settlement requires special consideration. It has been suggested, for example, that the North Polar regions have a 'high strategic value,' and that Wrangel Island and other islands in the Arctic Ocean might contain minerals, or be of use as aircraft bases, or for purposes of wireless telegraphy, or in connection with the Arctic fisheries.
>
> In such cases, it would seem that an occupation would be rendered effective by the establishment of any organization (however rudimentary) or of any system of control, which, having regard to the conditions under which the area appropriated was being used or was likely to be used, was reasonably sufficient to maintain order among such persons, as might resort there.
>
> Again, small uninhabited islands are sometimes occupied for some special or temporary purpose, such as the collection of phosphate or guano, or the exploitation of the fishery. Here also no elaborate machinery is called for, and the presence of an official may be all that is reasonably required to ensure that order is maintained among the workpeople and others employed there.[4/]

Although, as Lindley indicates, an elaborate physical presence in the territory is not necessary, there must be an administration which purports to exercise exclusive authority within its boundaries. The primary functions of such an authority consist of the protection of life and property, the administration of law and military defence. It may be that in certain parts of the territory,

---

4/ Lindley, Backward Territory in International Law, New York, 1969, 158, (originally published in 1926).

these functions will rarely or never be invoked, but their mere availability, to the exclusion of competing authorities, may be sufficient to constitute the display of power needed for sovereignty. Some of these rules reflect the colonial heritage of European powers, and their application in areas where de-colonization is in progress might be placed in controversy, especially if they were used to rationalize the continuance of 'imperial' controls.[5/] As all of the conceivable rival claimants of Canada's Arctic territory, however, are Western powers, this issue has never really arisen in the context of the Arctic Archipelago.

As Lindley argues, a definite co-relation will exist between the demographic, economic and political characteristics of a dependent or remote territory and the administrative structure needed to assert effective control and thereby claim sovereignty over it. Where the population is sparse or non-existent, very little will suffice to manifest effective control. But as the population of the hinterland grows, as the economy becomes more productive and the people acquire political sophistication, a more elaborate governmental infrastructure is needed.[6/] More recently, Schwarzenberger has expressed the same idea:

5/ The international legal rules for the acquisition of 'backward' or unoccupied territory derive in part from the Berlin Conference of 1884 which codified the rules respecting the European colonization of Africa. Article 35 of Chapter VI of the Berlin Act, for example, reas as follows:

"The signatory Powers of the present Act recognize the obligation to insure the establishment (l'existence in the French text) of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights (droits acquis) and, as the case may be, freedom of trade and transit under the conditions agreed upon. (See Lindley, op.cit., 144.)

6/ Lindley, op.cit., 159.

> Effective occupation manifests itself by the establishment of adequate state machinery and the actual display of state jurisdiction. The degree of effectiveness required varies with circumstances, such as the size of the territory, the extent to which it is inhabited, as in deserts or polar regions, and even climatic conditions.7/

And although Lindley wrote in 1926 before the Palmas (1928) and Eastern Greenland (1933) decisions,8/ and Schwarzenberger afterwards (and Schwarzenberger was, of course, influenced by these decisions), in combination such decisions and writings indicate a strong current of law in support of the position they enunciate.

In so far as the effective occupancy of the Canadian North depends upon exploration, administration and settlement by Great Britain, Canada can establish a title going back some four centuries. Three years after Confederation, in 1870 (as discussed in chapter one), the title to that part of the Arctic claimed by Britain was transferred to Canada. Initially, the area was governed by a North-West Council and the Lieutenant-Governor of Manitoba, the seat of government being Winnipeg. In 1875, however, the North-West Territories Act was passed establishing a local administration under a resident lieutenant-governor.9/ Until 1905, the term North-West Territories included the prairie region between Manitoba and British Columbia, as well as the more northern

---

7/ Schwarzenberger, A Manual of International Law, 4th ed., London, 1960, vol. 1, 115.

8/ Vide supra, 43 ff.

9/ 38 Vic., c.49 (1875).

territories. Provision was made for the evolution of this immense region to self-governing status when there were sufficient numbers of non-alien whites to constitute 21 electoral districts, each having at least 1,000 persons within an area of 1,000 square miles. In 1888, the first Legislative Assembly was set up with 22 members. In 1897, the territory acquired responsible government, the executive being held accountable to the legislature and compelled to resign after an adverse vote on a major issue. The Legislature still lacked, however, borrowing powers or local control of natural resources. Between 1891 and 1901 the population grew from 98,967 to 165,555, and because of increasing settlement, in 1905 the areas below the 60th parallel of north latitude were transformed into the provinces of Saskatchewan and Alberta. Henceforward, the term "North-West Territories", had a narrower and more specific connotation. In 1898, the Yukon was created a separate territory with a form of non-responsible government, having a Commissioner and six appointed councillors. After many changes in the nature of its territorial government, in 1960 some measure of responsible government was established in the Yukon. In that year, it was provided that the Commissioner would consult with a representative local committee in preparing financial estimates.[10/]

The Yukon has a relatively more centralized form of government than the Northwest Territories, the latter region being governed largely from Ottawa.[11/] A division of powers between the territories and the federal government exists, however, with the enumerated subject-matters being not dissimilar to those set out in Articles 91 and 92 of the British North America Act. In the

---

10/ Rea, 27.

11/ Rea, 33.

Yukon, the Commissioner-in-Council can legislate on such matters as direct taxation, the incorporation of local companies, marriages, intoxicants, hospitals, roads and other local matters.[12/] In the Northwest Territories, the legislative powers of the Commissioner in Council are essentially the same.[13/] Throughout the 1950's in both territories, the respective councils were dominated by appointed members with the federal government retaining the major voice in the formulation of policy. In the 1957-58 session of Parliament the borrowing position of the Northwest Territories was enhanced when it was allowed to borrow money for local purposes, and to lend money to municipalities and local school districts; similar financial powers had existed for some time in the Yukon.

An examination of the relevant figures indicates that, despite recent increases, the population of the Canadian Arctic is among the smallest in the world for an area of its size and that economic development in the region has been correspondingly slow.

While population declined after the Klondike Gold Rush of 1897-98, from a total of 47,300 in 1901 to 12,300 in 1921 and thence rose slowly to 37,600 in 1961, the area remains one of the most sparesely populated in the world. More substantial recent increases in population are attributable partly to a fall in the death rate amounting to about 50 per cent in the period 1940-60,

---

12/ Rea, 29.

13/ Rea, 36-37.

resulting from better medical services. Taking the two years 1940 and 1960 as indices natural increase in the Yukon rose from 1.7 in the former year to 31.5 (per thousand) in the latter. The increase for the Northwest Territories was from 4.2 to 35.5 per thousand.[14/]

The custodianship of the North, including the Arctic Archipelago, for the most of the present century has been held by the Department of the Interior and the Department of Mines and Resources, which followed predominantly laissez-faire policies. When the latter department was abolished in 1950, Northern Affairs came under the aegis of several departments until 1954, when a new Department of Northern Affairs and National Resources was established.[15/] During the Pearson administration (1963-68), the last-mentioned department was reorganized into the new Department of Indian Affairs and Northern Development, with greater emphasis being placed on Indian and Eskimo welfare. The economic development of the Northwest Territories has not as yet afforded much opportunity to the native population to improve their standard of living owing to their different social development.

Professor Rea has suggested that industry might offer wage employment for the natives who, at the census, comprised a population of 15,500; this would seem to suggest a need either

---

14/ Rea, "The Problem of Economic Development in the Canadian Arctic," in (1964) 71 Queen's Quarterly, 92.

15/ Rea, 47.

for government-operated enterprises or for government guidelines and subsidies for northern industry.

At present, most of the economic development in the Subarctic is controlled by large corporations. Development has been left primarily in the hands of private enterprise; the only direct governmental participation in promoting local private industry being in the exploitation of uranium deposits, where federal policy seemed necessitated on grounds of defence and commercial profit. There has also been scattered defence installations, military roads and pipelines. The combined effect of these initiatives by both public and private sectors, however, has yielded only an insignificant proportion of total national commodity production; transportation and comparative processing costs have been prohibitive. In recent years, the net value of production in the North has represented about 0.2 per cent of the national total, comparable to the production of Prince Edward Island. While this figure represents a doubling of the 1920 production, the absolute and proportional increase has been quite small.[16/] It should be noted, however, that the discovery of huge oil deposits on Alaska's North Slope in 1968,[17/] and the voyages of the Manhattan through the Northwest Passage have dramatized the potentialities of commercial exploitation of the North and have stimulated Canadian initiatives, especially in

---

16/ Rea, op.cit., fn. 14 supra, passim.

17/ Vide infra, 100 ff.

the Arctic islands. Extensive exploration for oil in these islands has been carried out recently by Pan-Arctic, Limited, a government-sponsored company with exploration rights to seventy-million acres in the Arctic.[18/]

Despite encouraging recent developments, from the perspective of comparative economic development and population, the Canadian Arctic, and especially the Arctic Archipelago, must rank as one of the most underdeveloped regions of the globe. Perhaps the chief reason for this laggard development is that up to now government has conceived its role as an agent rather than as a principal. Perhaps correctly, it has considered that its accountability to the electorate, which was almost entirely concentrated in the southern part of the country, outweighed the desirability of developing the North where formidable transportation and processing costs impeded economic ventures. Until very recently, it was only in rare cases that the government could justify economically expenditures of money in the North. As custodian of the public purse, it has been reluctant to apply public monies to a remote and sparsely populated area when it was neither economically nor politically expedient to do so.

If one regards the criteria for "effective occupation" set out by Lindley and Schwarzenberger,[19/] along with the relevant case law, it may readily be appreciated that the Canadian government would not have to show the detailed administrative organization in the Archipelago that would be essential in more populated and more developed areas, in order to demonstrate Canadian sovereignty over the islands. Longstanding unopposed

---

18/ Vide infra, Fn. 31 at 115.

19/ Vide supra, 77-79.

administration, along with the acquiescence of the native population, and with the absence of any rival government, should suffice to show that the area has acquired a preponderantly Canadian character, and that there is growing international acquiescence that Canada does govern the region.

The vital task of maintaining order throughout the northern mainland and the Arctic Archipelago has been entrusted to the Royal Canadian Mounted Police. Although the R.C.M.P. have served primarily as a police force, in the absence of other government personnel they have discharged a large number

---

20/ "Apart from the question of the retaining sovereignty of the Islands through their occupation b by R.C.M. Police Detachments, the detachment personnel during their occupancy have carried out the duties of Post Masters, Customs Officers (reporting on the arrival and departure of vessels), all administrative work for the N.W.T. Administration, such as, collecting fur export tax. The have rendered assistance whenever called upon by various Government Departments interested in scientific aspects of the Arctic Islands, such as the collecting and preserving animals and birds, giving data on geographical formations, reporting on old Eskimo ruins, and (quite important) taking daily meteorological readings on instruments supplied by the Meteorological Services Branch of the Department of Transport. In addition to that they have made patrols all over their respective districts and these patrols in most cases were definitely of an exploratory character --- in other words adding to the general knowledge of the physical and geographical nature of the islands." (R.C.M.P., "Canadian Sovereignty in the Arctic," mimeographed article, undated.)

of detachments were opened in the most northerly areas of the Arctic Archipelago, many of them north of Parry Channel.[21] Personnel at these northerly detachments made regular patrols covering large distances in the vicinity of their respective posts. Personnel from Pond Inlet in northern Baffin Island, for example, have patrolled the eastern coast as far south as Home Bay and have made patrols on Somerset Island and the Melville Peninsula. The Dundas Harbour Detachment has patrolled Cornwallis Island and Ellesmere Island. The Craig Habour Detachment has patrolled Ellesmere Island extensively, visiting such points as Scoresby Bay, Makinson Inlet and Baumann Fiord and crossing the ice northwesterly to Axel Heiberg Island. The Bache Peninsula Detachment in northeastern Ellesmere Island has patrolled north along the west coast of the Island to Scoresby Bay and thence to Greely Fiord and Axel Heiberg Island.[22]

In addition to the above patrols, on two occasions Inspector Joy visited the extreme Northwesterly islands of the Archipelago, such as Lougheed Island and Ellef Ringnes Island.[23] These were among the islands, it will be recalled, which Denmark

---

21/ The R.C.M.P. Posts, along with date of establishment, follow: Pond Inlet, Baffin Island, 1921; Craig Harbour, Ellesmere Island, 1922; Dundas Harbour, Devon Island, 1924; Kane Basin, Ellesmere Island, 1924; Bache Peninsula, Ellesmere Island, 1926; Craig Harbour closed 1927 and re-opened 1933; Bache Peninsula closed 1933; Dundas Harbour closed 1933 and re-opened 1945; Resolute Bay Detachment on Cornwallis Island established at the joint Canadian-U.S. weather station, 1947. See R.C.M.P. "Canadian Sovereignty in the Arctic," 1.

22/ R.C.M.P., "Canadian Sovereignty in the Arctic," 1-2.

23/ Ibid., 2.

contended were res nullius in the early 1920's.[24] In the case of the joint-established weather stations at Resolute Bay on Cornwallis Island and at Eureka Sound, the respective sites were visited by the Royal Canadian Mounted Police long before the stations were established. Prior to the establishment of jointly-operated Canadian-American weather stations, and the Distant Early Warning radar system (the D.E.W. line) the presence of the Mounted Police throughout the Arctic and the Archipelago signified that it was Canadian law which was applied there, especially in the absence of pretensions by other states to enforce law and order.

It should be noted that among other duties performed by the R.C.M.P., certain officers have served in a judicial capacity in the Archipelago as Justices of the Peace. In the 1920's Inspectors Joy and Wilcox carried out duties pertaining to that office throughout the Arctic. In one notable case, Staff-Sergeant Joy (as he then was) investigated the homicide of a white trader, Robert S. Jones, by an Eskimo named Noo-Kud-Lah, which occurred on Baffin Island in March, 1920. Staff-Sergeant Joy carried out the police investigation, arrested the accused, found the body and also conducted the autopsy. Afterwards, in his capacity as Coroner he held the inquest, and as Justice of the Peace held the Preliminary Hearing on the charge of murder and committed the accused for trial.[25]

With the establishment of the Territorial Court of the Northwest Territories on July 1, 1955, Mr. Justice Sissons, and since 1966 his successor Mr. Justice Morrow, have flown to

---

24/ Vide supra, 56-58.

25/ R.C.M.P., "Canadian Sovereignty in the Arctic," 6.

all parts of the Arctic, constituting courts which applied Canadian law wherever they went.[26] Mr. Justice Sisson's compassionate understanding of Eskimo culture, and his attempt, wherever possible, to adapt Anglo-Canadian law to a radically different social system earned him much praise, but also stirred up antagonism in the higher bureaucracy in Ottawa.

The more formalized justice that the Territorial Court brought to the North reinforced the effective occupancy of Arctic lands, and served to demonstrate, on occasion, Canadian sovereignty over Arctic waters. With respect to the latter thorny question, the recent case of R. v. Tootalik, affords some assistance in ascertaining the extent of Canadian jurisdiction in the North. Although the case is subject to reversal on appeal, as it stands it would strongly support a Canadian claim to sovereignty over Arctic waters.

Tootalik, an Eskimo, was charged with violating the Northwest Territories Game Ordinance[28] by killing a female polar bear and two cubs in April, 1969, on the sea ice more than seven

---

26/ See Sissons, Judge of the Far North, Toronto, 1968, for the details of Mrs. Justice Sisson's judicial duties in the Arctic.

27/ (1970) 9 C.R.N.S. 92.

28/ O.N.W.T., 1960 (2d) Ch.2. The information stated: "The informant says that he has reasonable and probable grounds to believe and does believe that Tootalik, E4-321, of Spence Bay, Northwest Territories, on or about the 14th day of April, 1969, at or near Palsey Bay, Northwest Territories, did unlawfully hunt a female polar bear with young, contrary to item 6 (b) of Schedule B of the Game Ordinance."

miles from the west coast of the Boothia Peninsula.[29/]

Mark de Weerdt, Q.C., counsel for the accused Eskimo, argued inter alia that the Court lacked jurisdiction because the alleged offence took place outside Canadian territory or territorial waters.

In rejecting the argument of defence counsel, Mr. Justice Morrow cited statements by Prime Minister St. Laurent and Prime Minister Pearson affirming Canadian sovereignty in the Arctic seas north of the mainland.[30/] While conceding the importance of such statements, he suggested, on the basis of a study of authorities and precedents, that the "actual day to day display of sovereign rights" in the area was of greater significance that official assertions of jurisdiction; he then proceeded to examine executive and judicial acts manifesting authority over the sea ice off the mainland:

> One can go back at least 40 years to find Canada's R.C.M.P. patrolling the Arctic areas including patrols over the sea ice and attending to law and order and to the welfare of inhabitants (mostly Eskimo).
>
> Since 1955 when the Territorial Court of the Northwest Territories was set up under the Northwest Territories Act (R.S.C. 1952, c.331) it has been notorious that this court has administered the laws of Canada in all parts of the Territory,

---

29/ The location of the polar bears is not shown in the judgment, but was confirmed by Mr. Justice Morrow in a letter dated 10 December, 1969, to Professor D.A. Schmeiser. For factual details of the hunt and subsequent trial see Time (Canadian Edition), November 28, 1969, 13-14.

30/ (1970) 9 C.R.N.S. 96-97.

> including such of the Arctic islands as have inhabitants and this by going on circuit several times a year and by holding court in the various places visited. It is to be observed that at least on one occasion court was actually held in a ski-equipped otter sitting in the sea-ice off Tuktoyaktuk. Again in early 1956 the late Justice Sissons presided over a case involving an Eskimo named Allan Kaotok who was charged with committing murder on the sea ice some 60 miles North East of Parry River in Queen Maud Gulf. The Court did not hesitate to assume to itself jurisdiction to hear the case. It is interesting to note that the present alleged offence took place only some 200 miles from the situs of the Kaotok offence and 200 miles is of no real consequence in this large territory.31/

Even before the Tootalik case, accordingly, there were precedents for the assumption of jurisdiction by both the courts and the police over offences committed on the frozen seas north of Canada in areas which, on a narrow construction, might be regarded as international waters.

The Tootalik case may be used as an authority by proponents of a proclamation of Canadian sovereignty over the entire Arctic Archipelago, embracing waters, islands and permanent ice. It might be mentioned that the parliamentary committee headed by Ian Watson, M.P., which presented its report to Parliament on December 16, 1969, unanimously recommended that such action be taken.32/ In this connection, legislative action by the government to create an extensive Arctic anti-pollution zone and to extend territorial waters to twelve miles in breadth,33/ would most probably reinforce an eventual claim to Arctic sovereignty. If

---

31/ Ibid., 97-98.

32/ Vide infra, 112 ff.

33/ Vide infra, 116-125.

one avoids metaphysical subtleties, sovereignty, from a realistic aspect, may be regarded merely as a sum total of jurisdictional powers exercised in a given area to the exclusion of other authorities. With the accretion of jurisdictions in northern waters and throughout the Arctic Archipelago, a situation arises where the distinction between the totality of jurisdictions exercised by Canada and the concept of sovereignty is meaningless. It remains true, nevertheless, that in extreme cases, such as the exercise of jurisdiction over pirates on the high seas, a valid distinction may be made between jurisdiction as a legal concept and sovereignty as a political one.

On the unofficial level, dedicated oblate missionaries of the Canadian province have for many decades sought to bring Christianity to the northern Eskimo, along with lesser numbers of other orders. Among the Anglicans, Archibald Lang Fleming was consecrated first Bishop of the Arctic in Winnipeg on December 21, 1933,[34/] It is interesting that the focus of Bishop Fleming's missionary activities was Baffin Island, although his huge diocese, involving an area of two and three-quarter million square miles, embraced the entire Arctic Archipelago and North-west Territories as well as Northern Quebec.[35/] In the case of both Roman Catholics and Anglicans, who have displayed the greatest energy amongst the various churches in evangelizing the North, the dioceses concerned have formed part of the Canadian church establishments, with the respective bishops being ultimately answereable to the Roman Catholic and Anglican primates of Canada.

34/ Fleming, Archibald the Arctic, Toronto, 1965, 239.

35/ See ibid., 10-11, for a map of Bishop Fleming's diocese.

In the realm of military defence, although northern Canada has never been physically invaded, there have at times been threats of invasion to which the government in Ottawa responded. After 1945, for example, there was an apprehension of a Soviet Invasion over the Pole; even during the Second World War, it might be added, the threat of a Japanese invasion of the Canadian North via Alaska was not discounted.[36/]

The Distant Early Warning (D.E.W.) line, which was completed in 1957, was designed to maximize the interval of time between first alert; and attack during which interceptors would take to the air, retaliatory action would be started and civilian populations could take cover. A recent criticism of the D.E.W. line concept has been that the strategy it envisages is archaic inasmuch as it was fashioned to thwart an attack by manned bombers rather than the present incomparably swifter intercontinental ballistic missiles.

D.E.W. line radar stations, which were set up along the 70th parallel north latitude from Point Barrow, Alaska, to eastern Baffin Island, were organized under the joint auspices of the R.C.A.F. and the U.S. Air Force. The line, which comprises six sectors, is three thousand miles in length and is jointly manned by Canadian and American personnel. Although some anxiety was expressed in Canada[37/] that a substantial American military presence in the Arctic might pose a threat to Canadian sovereignty,

---

36/ Rea, 53-54.

37/ Vide supra, 52.

the rules of legal liability, to which the American government has agreed by treaty, provide that where visiting servicemen breach contracts entered into in their unofficial capacity, or commit torts against Canadian civilians, it is Canadian law that will be applied to resolve disputes. One commentator describes the relevant agreement as follows:

> The NATO Status of Forces Agreement entered into force for Canada on September 27, 1953. This agreement follows in its main features the provisions regarding immunity from civil jurisdiction of local courts in the unratified Agreement Concerning the Status of Members of the Armed Forces of the Brussels Treaty Powers, of December 21, 1949. It is the views of the United States, the principal sending state, which has always insisted on being granted complete immunity from local jurisdiction for its forces abroad, and, on the other, the views of the United Kingdom and other receiving European nations, which have favoured subjection of the visiting forces to local jurisdiction.38/

In the field of criminal law, the Canadian Supreme Court, in conformity with an emphasis observable throughout the entire British Commonwealth, has severely restricted the immunity from Canadian criminal law of visiting forces.39/

38/ Meron, "Civil Jurisdiction of Canadian Courts over United States Military Personnel in Canada," (1957) 12 U.T.L.J., 71-72.

39/ In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts, (1943) S.C.R. 483. See also Evatt, "The Visiting Forces Act, 1952," (1953-55), 1 Sydney Law Review, 225.

While individual servicemen are subject to a broad spectrum of local jurisdiction, if they act in an official capacity as agents of the sending state, the international law rules forbidding the impleading of foreign sovereign powers may apply. In this last case, the disputes must be resolved, if they are to be resolved at all, in the diplomatic rather than in the legal forum. The above legal provisions, however, disclose that in a great many situations American servicemen in the Arctic are subjected to the law of the local forum.

In the wake of Prime Minister Trudeau's policy statement of April 3, 1969, which emphasized that a Canadian military presence in the North would help to consolidate sovereignty,[40] military planners foresee an increased deployment of servicemen throughout the Arctic. About half of the 397 servicemen stationed in the far north in 1969 were concentrated at Inuvik, 1,150 miles north of Edmonton near the mouth of the Mackenzie River. Detachments of the Armed Forces were located at the four major D.E.W. line stations on Canadian Territory, and at Alert, on the northern tip of Ellesmere Island, 900 miles north of the Arctic Circle.[41]

It should be mentioned that the duty of protecting nationals and visiting aliens which is incumbent upon a Sovereign is discharged in part by the rescue flights provided by the R.C.A.F. for those lost in the Arctic. There have been many such rescue operations in the past. In 1968, there were four searches, and

---

40/ Department of National Defence, Information Services, Release AFN 167-69, dated November 19, 1969.

41/ Ibid., loc.cit. The four D.E.W. line stations are situated at Cape Dyer, Hall Beach, Cambridge Bay and Cape Parry, N.W.T.

in 1969 there were five major aerial searches north of the 60th parallel.[42/]

The R.C.A.F., using its big Argus patrol aircraft, also have conducted a large number of "sovereignty" flights over northern ice. Ranging 1,000 feet over the Archipelago between Thule, Greenland, and Yellowknife in the Northwest Territories, the route of the aircraft is directly over the Arctic islands. In 1969, Argus patrol aircraft flew 39 regularly-scheduled surveillance missions, for a total of 421 hours, and spent almost as much time again investigating reporting sightings of various kinds.[43/] Two Tracker aircraft flew on an ice-reconnaissance mission from Cape Dyer, Resolute Bay and Inuvik during the September, 1969, voyage of the Manhattan through the Northwest Passage. Other activities performed by the military in the North include communications research, mapping and engineering projects. Over a number of years, and especially between the wars, military surveyors and aerial photographers made maps of the entire Western Arctic.[44/]

In conformity with Mr. Trudeau's policy, The Department of National Defence plans to establish a northern headquarters base.[45/] In announcing this objective, Defence Minister Cadieux said that "three or four exercises" would be held in the Arctic in 1970 before the size and composition of an Arctic force was decided upon. A planned reduction of manpower of more than 20,000 men will reduce Canada's military establishment to 80,000 by 1973.

43/ Vide supra, fn. 40 at 2.

44/ Ibid., loc. cit.

45/ Saskatoon Star Phoenix, March 4, 1970, 13.

At the same time, there will be a lesser emphasis on Canada's role in NATO, and more use of the armed forces for various purposes within national boundaries, including their deployment at strategic locations in Northern Canada and the Arctic Archipelago.

In the contxt of military defence, it is interesting that the Canadian Air Defence Identification Zone (CADIZ), and the similar American zone, known simply as the Air Defence Identification Zone (ADIZ), would be analogous, at least in physical dimensions, to the Arctic anti-pollution zone.[46/] These zones were established just after the outbreak of the Korean War in 1950, when East-West relations had deteriorated badly and there was a growing fear in North American defence circles of hostile aerial attacks. The respective zones were of varying breadths, but certain of them extended seawards for substantially more than one hundred miles. When approaching these zones on the eastern and western coasts of the continent, although still over the high seas an aircraft was required to identify itself and to subject itself to appropriate traffic controls from the surface. It might be contended that the setting up of ADIZ constituted a U.S. endorsement of a very extensive contiguous zone for a specific purpose.[47/]

In addition to the development of the Arctic anti-pollution zone, the federal government has announced an allocation of $500,000 for the 1970-71 fiscal year for the Arctic Land Use Research (ALUR) programme. The programme seeks to eliminate

---

46/ Murchison, The Contiguous Air Space Zone in International Law, Ottawa, 1955, chapter 1. On the Arctic anti-pollution zone, vide infra,

47/ It is significant that the Canadian government is justifying the Arctic anti-pollution zone on grounds of national security, which would apply also to the creation of ADIZ and CADIZ, vide infra.

permanent damage to the Arctic environment, both on the northern mainland and in the Archipelago. Land-use regulations will be drawn up and applied in a number of zones the boundaries of which will reflect varying degrees of sensitivity to pollution. It has been one of the marked weaknesses in Arctic development heretofore that there have been virtually no regulations against pollution. Under the new regulations, as a condition of using land, developers will be required to obtain land-use permits from the federal government and to pay land use fees at a standard rate per acre. They will also be required to submit periodic reports to the federal government on their activities.[48/] These regulations, of course, will apply to both Canadian and alien corporations, and submission to them by the latter would be at least implied recognition of Canadian sovereignty over the Arctic.

The enforcement of game regulations is yet another way in which the federal government exercises control over the Arctic. Until 1966 when it was abolished, the Arctic Islands Game Preserve, including all of the islands of the Archipelago, was a sanctuary for wildlife.[49/] The Reserve was abolished, presumably to allow hunting for sport as an incentive to the local tourist industry. Nevertheless, game regulations applying to the islands are in effect and are applied under the jurisdiction of the Territorial Game Branch, Department of Industry and Development, in Yellowknife.[50/]

48/ Saskatoon Star Phoenix, May 5, 1970, 18.

49/ Novakowski (Canadian Wildlife Service), to writer, February 4, 1970.

50/ Ibid., loc. cit.

Until now, there has been no outside utilization of the game resources of the Arctic Archipelago, and only very limited resource use by the local inhabitants. There is more use, at present, of marine resources than of wildlife resources on land. When engaged in their limited exploitation of game, the inhabitants are subject to the Northwest Territories Game Ordinance,[51] and to federal Department of Fisheries and Forestry regulations respecting marine animals. In 1969, for the first time since 1917, muskoxen have been open to hunting by Eskimos; in 1970, twelve were allocated for hunting purposes in the southern part of Ellesmere Island and the northern part of the adjacent Devon Island.[52]

The Canadian Wildlife Service of the Department of Indian Affairs and Northern Development is now assisting in drawing up land-use regulations for the Arctic in order to maintain a safe ecological balance. The aim of the regulations is not only to forestall pollution, but to prevent the degradation of the environment in general.[53]

Reverting to the criteria for effective occupation laid down by Lindley and Schwarzenberger and in the relevant case law,[54] it is suggested that in view of the multifarious

---

51/ O.N.W.T., 1960 (2d), ch.2.

52/ Novakowski to writer, supra, fn.49

53/ Ibid., loc.cit.

54/ Vide supra, 77-79, and for a discussion of the relevant case law, vide supra, 43-51.

activities of the Canadian government in the Arctic, in the realms of governmental administration, police protection and the protection of aliens, defence and rescue services, missionary work by Canadian clergy among the Eskimos and Indians, extensive game regulations and anti-pollution policies, and in other ways, the government has manifested sovereign authority over the whole Arctic Archipelago. This conclusion is especially evident in view of the sparse population and low level of present economic development in the region, which reduces the need for detailed administration by the larger bureaucracy which would be needed elsewhere. It is also reinforced by the consideration that no other State within recent decades has questioned Canadian sovereignty over the islands of the Archipelago.

CHAPTER FOUR

CANADIAN SOVEREIGNTY OVER ARCTIC WATERS

1 THE DEVELOPMENT OF INTERNATIONAL MARITIME LAW

The two voyages of the Humble Oil Company's S.S. Manhattan through the Canadian Arctic waters in 1969 and 1970 dramatized, in an unprecedented way, the issue of Canadian sovereignty over Arctic waters. The public media, Parliament, and specialists in such subjects as ecology, navigation, external relations and international law vividly brought before the public the legal and political implications and the possibly drastic environmental consequences of the opening up of the Passage as a maritime thoroughfare.

The absence of a consensus on what might comprise an appropriate legal regime for Arctic waters heightened speculation. As one writer said: "...international law has not as yet taken particular note of the circumstances peculiar to polar waters, and there do not appear to be any special international conventions or agreements to cover them."[1/] Prior to the discovery on Alaska's North Slope in 1968 of what may be the richest oil deposits in North America, another writer understandably doubted whether uninterrupted surface passage between the Labrador and Beaufort Seas would ever become a reality. Until recently, there

---

1/ Smith, "Sovereignty in the North; The Canadian Aspect of an International Problem," in Macdonald, ed., The Arctic Frontier, Toronto, 1966, 228.

2/ Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions," in Castel (ed.) International Law Chiefly as Interpreted and Applied in Canada, Toronto, 1965, 251.

was an air of unreality about the whole question of a regular maritime route through polar waters.

Although the Geneva Conferences on the law of the sea codified much of the applicable maritime law, they said little or nothing about a peculiar legal regime for archipelagoes. There would not, in fact, appear to be any widespread recognition that archipelagoes constitute an exception to the delimitation of offshore waters along the more regular type of coastline.3/ In recent decades, however, there have been frequent innovations in the law of the sea, and a growing awareness of the need for new rules, and hasty or categorical judgments should be avoided.

3/ Alexander, "Offshore Claims of the World," in Alexander (ed.) The Law of the Sea, 1967, Ohio State University Press, 77. Vide supra, chapter two, for a discussion of the claims to archipelagic waters, based on straight baseline systems, made by Indonesia and the Philippines. In addition, there exists a growing tendency in Central and South America for states to claim up to 200-miles breadth of territorial sea, especially to protect their fishing industries. On March 25, 1970, President Medici of Brazil signed a decree claiming a strip of territorial waters 200-miles wide adjacent to the Brazilian littoral. Chile, Ecuador, Peru and a number of Central American countries have made identical claims. Almost 100 vessels of the California-based tuna fleet have been seized and fined by Ecuador and Peru for violating the 200-mile limit, which the United States does not recognize, in the past fifteen years. As a compromise, the United States is attempting to have Latin-American nations agree to a 12-mile limit. The Christian Science Monitor, Thursday, April 9, 1970.4

The assertion by many states of qualified rights over the high seas, for instance to regulate customs, fishing or pollution, and the assertion since 1945 of a right to exploit the resources of the subsoil and sea bed of the continental shelf,[4/] along with the judgment of the International Court of Justice in 1951 in the Anglo-Norwegian Fisheries Case[5/] represent innovations in the traditional law of the sea. As with President Truman's claim to rights in the Continental Shelf in 1945,[6/] the historical pattern has often been that a novel right claimed unilaterally by some state has developed into a precedent and subsequent claims by other states have gradually transformed what was initially a unilateral act into a recognized international custom. Accordingly, the mere fact that a claim is of an unprecedented nature, and has no pre-existing sanction, does not deprive it, in suitable cases, of contributing to the progressive development of international law.

In the case of the continental shelf, the justification for its appropriation by the littoral state was underlain by the

---

4/ See Alexander, (ed.) op.cit., fn. 3, supra.

5/ International Court of Justice, Fisheries Case, (United Kingdom v. Norway) Judgment of 18 December, 1951, Reports of Judgments, Advisory Opinions and Orders.

6/ The initial claim to a qualified right over the adjacent continental shelf was made on September 28, 1945, by President Truman, when he declared in an executive proclamation that "the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just," The exercise of such jurisdiction was not to affect the legal status of the superjacent waters, and when neighbouring states shared a continental shelf their mutual boundary was to be determined jointly "in accordance with equitable principles." See Fenwick, International Law, 4th ed., New York, 1965, 447-448.

fact that resource shortages and improvements in technology have made the hitherto inaccessible subsoil valuable. In these circumstances, it seems reasonable that the contiguous state should exploit such subsoil. Similarly, it could be argued that Canada might claim the subsoil under the permanent ice within its sector boundaries (which may lie beyond its shelf), since this is now becoming exploitable and economically valuable with the development of "commercial" submarines.

Until the initial voyage of the Manhattan there were no compelling pressures upon the Canadian government to enunciate any position on the legal status of Arctic waters. Except for an occasional exploratory expedition, polar waters appeared remote and impassible to the world's shipping interests.

11 THE VOYAGES OF THE S.S. MANHATTAN

Renewed interest in the feasibility of using the Northwest Passage as a commercial sea route was prompted by the discovery, early in 1968, of what may be the richest oilfields yet discovered in North America. Conservative estimates of the oil yield of the Prudhoe Bay area on Alaska's North Slope range from five to ten billion barrels, as against a yield of some five billion barrels for the richest oilfields formerly discovered on the Continent, in 1930, in East Texas.[7/]

This discovery of oil is of political as well as economic importance because of the unsettled international situation in the Middle East, which supplies about 28 per cent of the world's oil needs. With the global supply of oil barely adequate for existing requirements, geologists ranged widely over promising

---

7/ Newsweek, September 22, 1969, 80.

formations to find alternative oil deposits. It is essential for most Western states to have oil supplies which could be relied upon regardless of the world-wide repercussions of the Arab-Israeli confrontation.

Exploitation of the oil discoveries is not only of vast commercial and military significance; it would result in a more prosperous existence for Alaska's depressed native inhabitants. Eskimos, Indians and Aleuts, who constitute about twenty per cent of the State's population live, for the most part, in poverty, and the former reliance of the State on federal revenues to meet most current expenditures left little prospect for substantial betterment of their condition. Factionalism among Alaskan natives has until now prevented them from speaking with a united voice. Some two years ago, however, a coalitition of Alaskan native societies presented the American government with a claim to almost the whole publicly-owned territory of Alaska,[8/] on the ground of ownership by historic right. It is most probable that the claim envisages an eventual cash settlement which can be used to better native conditions in the State.[9/] Such a settlement would come from the federal government which has the power of disposition over the lands involved. In response to the claim and pending settlement the federal government placed the public lands involved under a moratorium. Whatever the legal merits of the native societies' case may be, they have a good moral argument as the original inhabitants of the State. Whatever the outcome of this case may be, Alaska will be able to help the

---

8/ Cf. "Of Alaska's 365 million acres, 272 million acres are in the public domain, and of these the natives claim 250 million acres..." Lear, "Northwest Passage to What?" in Saturday Review, November 1,1969,60.

9/ Rogers, "Party Politics of Protest Politics: Current Political Trends in Alaska," in the Polar Record, 14 (1969).

natives more readily as it expects that the sale of oil leases will bring from $500 million to $2 billion to the state treasury in bonus money.[10/]

The two Arctic voyages of the S.S. Manhattan reflect the technological and transportation problems posed by the discovery of oil. Rich as the resources are, they must be conveyed to their industrial and military users in the United States and elsewhere, and the rigours of the Alaskan climate as well as a Northwest Passage which is blocked by ice for much of the year present challenging problems.

The three modes of bringing the Alaskan oil to world markets that have so far been proposed are: (1) the building of an 800-mile long pipeline from Prudhoe Bay on the Arctic Ocean to the year-round port of Valdez on the Gulf of Alaska, with a fleet of tankers carrying the oil from Valdez to the West Coast;[11/] (2) the building by 1975 of six giant icebreaker tankers of at least 250,000 deadweight tons, of which the Manhattan is a smaller prototype,[12/] which tankers would convey the oil to the eastern seaboard through the Northwest Passage, and (3) the construction of an extensive pipeline system from Prudhoe Bay through the Yukon to Central Canada, with "feeder" lines serving American markets on the Pacific Coast, in the Midwest and ultimately in all 48 states.[13/]

10/ Cahn, "Alaskan Oil Dollars Could Relieve Widespread Poverty," in Monitor, September 10, 1969, 11.

11/ Monitor, September 8, 1969, 3.

12/ "Oil Haxards of the Frozen North," in the Geographical Magazine, August, 1969, 859.

13/ The Financial Post, July 11, 1970, 1.

The delay in the construction of the proposed Alaskan pipeline, coupled with mounting inflation, is steadily driving upward its estimated building cost. Originally, it was thought that the line could be built for $900 million, but later estimates have placed the cost at $1.3 to 1.5 billion, edging the cost of conveyance towards the lowest estimates of the value of oil production in the area, about $5 billion.[14/] It may be that the high cost of conveyance of the oil by pipeline could engender greater consideration of conveying the oil by tanker through the Northwest Passage. The economic feasibility of either the Alaskan or Canadian pipelines will depend, of course, on the richness of the actual oil deposits. Should the deposits justify some of the more optimistic forecasts, such a pipeline could be of great economic importance to Canada.

The Manhattan is the first commercial vessel to navigate through the Northwest Passage.[15/] At 115,000 tons, it is one of the largest ships ever built and the most powerful vessel in the U.S. merchant fleet.

14/ Monitor, May 14, 1970, 13.

15/ Other transits of the Northwest Passage are credited to Robert McCure (1854-1855); Amunsen's Gjoa, (1903-1906); the R.C.M.P. vessel St. Roch, (1940-42, and 1944); H.M.C.S. Labrador, (1954); U.S.C.G. Storis, Bramble and Spar, (1957); U.S. Seadragon (nuclear-powered submarine) (1960 and 1962); and the John A. Macdonald in, 1966. Transits in the vicinity of the North Pole, under Arctic ice, were made by U.S. Nautilus (August, 1958); U.S. Skate, (August, 1958 and March, 1959) U.S. Sargo (February, 1960); U.S. Seadragon and U.S. Skate (August, 1962); and the Soviet nuclear-powered submarine Leninsky Komsomol made a transit in the vicinity of the Pole in January, 1963. (The writer is grateful to Professor R.M. Bone for the above information).

the U.S. merchant fleet. It may be compared with the 85,000 tons of nuclear-powered aircraft carrier Enterprise, built one year before her in 1961, or with the 57,000 tons of the huge Second World War battle-ship Missouri. The vessel is roughly a half-scale prototype of a larger fleet the Humble Oil Company hopes to develop if it concludes that transit through the Northwest Passage is feasible for commercial purposes. In seinding the ship through the Arctic the American firm was relying on Canadian experience which had found, by a process of trial and error, that ore carriers could negotiate the ice-locked St. Lawrence in winter with only occasional help from icebreakers.16/ If the Manhattan could make the Passage without undue difficulty, her owners considered that larger vessels would find the route even easier.

Significant as the opening up of the northern sea route would be for development of the Arctic, and the transfer to their distant markets of its potentially wealthy mineral resources, a further consequence of the opening up of an ocean thoroughfare would be the reduction of the distance between Tokyo and New York by 3,320 miles, saving shippers both time and money.17/ If commercial shipping becomes feasible in the Arctic, Transport Minister Jamieson has predicted that Canada would be confronted with an estimated cost of $1 billion for navigational aids and increased icebreaking services. While the Minister foresaw no Canadian objections to the development

---

16/ Saturday Review, November 1, 1969, 64.

17/ Time, September 5, 1969, 67.

of an Arctic sea route, he emphasized that users of the route would have to assume a share of the expenditures involved in keeping it open. He added later that Canada would have "a real national interest" in developing permanent icebreaking capabilities to service such a route.[18/]

In its initial journey in 1969 the Manhattan was unable to cross the entire Archipelago in international waters. In being diverted to its alternative route through Prince of Wales Strait, in the vicinity of the Princess Royal Islands it was brought within Canadian territorial waters (and hence within Canadian jurisdiction) even by the rigid standards of the U.S. State Department.[19/]

During its second voyage in 1970, Captain A.W. Smith of the Manhattan considered that the problem of successful Arctic navigation was not necessarily one to be overcome by building larger vessels, but one to be dealt with by adequate support services. His attitude emphasized the need for international cooperation in the Passage, and the value of Canadian auxiliary vessels and related assistance. An associate from the Humble Oil Company accompanying Captain Smith, Stanley Haas, still foresaw the construction of a fleet of some 250,000 to 350,000 deadweight tons, with construction underway by 1973. Company officials on the vessel during its 1970 voyage emphasized the benefits of mutual cooperation. The Manhattan's owners offered to provide scientific data on the journey to the Canadian

---

18/ Saskatoon Star-Phoenix, September 27, 1969, 5, and November 10, 1969, 18.

19/ Time, October 10, 1969, 17, the Saskatoon Star-Phoenix, September 4, 1970, 5, and cf. The Tolten, (1946) P. 135.

government, and expressed gratitude for icebreaking, meteorological and other assistance provided by the government.

111 THE PROBLEM OF ARCTIC POLLUTION

Although the Manhattan was unsuccessful in traversing the Northwest Passage in 1969 and 1970, it did not return from its initial voyage unscathed. While proceeding through the turbulent Arctic seas and thick ice, an iceberg broke open a hole in the hull of the tanker big enough for a truck to drive into.[20/] The precision engineering which enabled the vessel to make the round trip to Prudhoe Bay, Alaska and back to New York in 79 days (as compared with the three years required by Roald Amundsen in 1903-1906) also enabled it to remain afloat despite its severe injury. While the voyage itself was unsuccessful, a major inadequacy in the vessel became apparent before it docked in its home port. It was found that the tankers 43,000 horsepower engines generated insufficient power to move her through heavy ice, which at times reached a thickness of forty feet. On several occasions it froze fast, and the accompanying Canadian icebreakers had to come to its assistance. The difficulties the Manhattan encountered suggested that future tankers should have heavier armament and greater power. While these technical requirements may be met by engineering ingenuity, the ability of supertankers to negotiate northern waters without mishap raises more substantial problems.

20/ Monitor, December 10, 1969, 6.

When the Manhattan returned home with a gaping hole in its hull, the consequences of a disastrous apillage of oil in Arctic waters were dramatically re-emphasized. There was a growing awareness of the Arctic pollution problem in Canada, and much pressure was exerted upon the government to do something about the problem. It was particularly discomfiting that the injury was sustained despite the special construction of the vessel to withstand rigorous Arctic conditions. Also ominous was the fact that the Manhattan was the prototype of an entire fleet of larger tankers which might display the same defect.

The pollution problem is intensified in the Arctic by the substantially slower rate of chemical change in polar waters. Oil which might be dissipated rapidly by evaporation in other climates could pollute Arctic waters almost indefinitely. The problem is especially distressing because existing technology to combat oil pollution is, as one oil company executive describes it, "primitive,"21/ One of the most effectice anti-pollution techniques yet devised, in fact, is merely spreading straw over the affected area and picking it up with pitchforks, as was done at Santa Barbara, California. With 180 tankers having a carrying capacity of 100,000 tons now in existence, and a further 310 being planned, the proportions of the danger are evident.

In recent years, some international regulation of the pollution menace has been achieved. There is, however, no centralized international authority with effective sanctions

---

21/ L.P. Haxby, manager for air and water conservation of the Shell Development Company, Monitor, January 9, 1970, 5.

for enforcement purposes, and what regulations there are tend to be piecemeal and sometimes of little effectiveness.

The London Convention of 1954 which resulted in the International Convention for the Prevention of Pollution of the Sea by Oil set up "prohibited zones" in territorial waters and harbours of contracting parties. The Convention calls for municipal legislation forbidding the discharge of "persistent" oils (such as crude oil or fuel oil) by ships registered in the countries of signatory states.[22/] While a significant advance, these legislative initiatives have depended upon the voluntary cooperation of states and apply only to certain designated areas of the sea adjacent to national coastlines, and to ships flying the flags of member states. It is manifest that in the age of the supertanker something of a more inclusive character, in terms of both the geographical area it covers and the ships obligated by it provisions, is required.

In Canada the Provinces have enacted most of the anti-pollution legislation,[23/] although the federal government has made regulations under the Canada Shipping Act relating to pollution in Canadian inland and territorial waters.[24/]

22/ See Colombos, op.cit., 374.

23/ See the summary of such legislation in Cooke, Pilon and Thompson, Water Pollution Control, A Digest of Legislation and Regulations in Force in Canada, 3rd ed., Montreal, 1967

24/ Part V11A of the Act enacts the provisions of the Fourteenth Schedule of the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, vide supra.

Pursuant to such regulations, it is prohibited to discharge oil from ships of any nationality which fouls the surface of the water; a mixture of 100 parts of oil to one million parts of the mixture is deemed to so foul the surface. There are, in addition, regulations prohibiting Canadian ships from discharging oil or oily mixtures outside Canadian waters in designated "prohibited" zones. Pursuant to the Convention mentioned above,[25] such zones have been established in the Adriatic, North Sea, adjacent to Australia and 100 miles outwards from the Atlantic coast of Canada. Although such a regime is a step in the right direction, it depends on universality, goodwill and reciprocity for its efficacy, and as it stands at present it is piecemeal. An international body will almost certainly have to be set up which can authoritatively police the use of the high seas to prevent pollution. A body of a supra-national character with effective sanctions could do much to ensure the purity of the world's oceans. In a world where anti-pollution measures are still established under unilateral auspices, however, and where there are auguries of an increasingly large fleet of supertankers in the Arctic and elsewhere, the Canadian government was confronted with the question of what it could do now to prevent pollution in Arctic.

IV THE LEGISLATION

Among the most important and influential statements issued on the problems of Arctic sovereignty and pollution before the government brought out its official policy in April, 1970,

---

25/ Vide supra, 111.

was the First Report of the Standing Committee on Indian Affairs and Northern Development, which was issued in December, 1969.[26]

In introducing the Report in Parliament,[27] Ian Watson, M.P., (Laprairie) explained that in the absence of an official request from the Manhattan for permission to navigate through the Northwest Passage, committee members considered "...a strong gesture was essential to meet what seemed to be a deliberate attempt by the United States government to skate around the sovereignty issue. A subcommittee of 10 members of the Standing Committee went north on September 3, 1969, fully aware of the significance of the gesture they were about to make."[28] The "gesture" was an unequivocally-worded message of welcome from the all-party delegation of parliamentarians to the crew of the Manhattan.

> Captain Roger Stewart
> S.S. Manhattan.
>
> Your daring voyage through the Canadian Arctic Archipelago will stir the imagination of people everywhere who are interested in Arctic Development.
>
> Bienvenue dans ces eaux Canadiennes. Welcome to Canadian Waters.
>
> We wish you God Speed. Bon Voyage.[29]

26/ Canada, Parliament, House of Commons, First Report (Arctic Sovereignty), The Standing Committee on Indian Affairs and Northern Development, 1969.

27/ House of Commons Debates, January 22, 1970, 2718 ff.

28/ Ibid., 2718-19.

29/ Vide supra, fn. 26 at 1. The Message was sent to the Manhattan by radio on September 5, 1969, as the vessel entered Lancaster Sound at the eastern fringe of the Archipelago.

Although there was a certain opera bouffe quality about the message (it was not passed between heads of state or between governments but sent by a Canadian parliamentary delegation acting on its own initiative to a private American-owned vessel) it expressed the deep concern shared by Canadians about national control over the Arctic. As a dramatic gesture unanimously supported by members of all parties on the committee, the message helped to crystallize Canadian public opinion behind strong governmental action declaratory of Canadian rights in the Arctic.

In its Report, the Committee welcomed the voyage of the Manhattan, but emphasized the dangers of oil pollution inherent in future trips by large tankers through the Arctic. The anticipated rapid developement of tanker traffic through the Archipelago would inevitably outpace the much slower process of arriving at an international agreement on adequate pollution controls. The ecology of the Arctic, which is especially vulnerable to oil pollution, could not be left open to such risks during protracted diplomatic negotiations preceding an agreement.

The Committee also stressed that a large distinction should be drawn between the Arctic Archipelago and the Pacific and other archipelagoes in temperate waters where international maritime trade routes had existed for centuries. The waters of the former Archipelago were ice-locked and traversable only by motorized vehicle for seven or eight months of the year, and because of its formidable ice and inhospitable climate no established maritime route had ever existed there.

While indicating the greater dangers involved in polluting Arctic waters, and emphasizing that there was no established maritime thoroughfare through the Arctic, the Committee nevertheless argued

that there should be a right of innocent passage "for ships of all nations" through Arctic waters. Such a right is legally and historically associated with territorial rather than internal waters,(although the Committee did not expressly state this) and there was perhaps an implication here that some concessions should be made to the larger maritime states which would resist any curtailment by Canada in Arctic waters of what they regarded as the "freedom of the seas". However, the Committee did emphasize that both surface and submarine[30/] vessels in the area should be subject to Canadian regulations.

In emphasizing the dangers of pollution, the Report mentioned the sinking, in August, 1969, of a Pan Arctic Ltd.[31/] oil barge which was not specially reinforced for operations in ice. The barge was being used in connection with company oil-drilling operations on Melville Island and it was never precisely ascertained where the barge sank. The Committee recommended that Pan-Arctic should rely more on ice-working cargo ships, rather than on their own transportation facilities. The government should, in addition, undertake a study of marine transportation in the high Arctic in all its aspects, including a study of "...the economic feasibility of building Canadian cargo ships with special capacities for ice manoeuvre and cargo unloading, in the light of the present availability by charter or otherwise of such ice-breaker cargo ships sailing under a number of foreign flags."[32/]

30/ In January, 1970, General Dynamics Corporation offered to build six 175,000 ton submarine tankers for oil companies with interests in the Prudhoe Bay area, see House of Commons Debates, January 22, 1970, 2719.

31/ Pan-Arctic Ltd. is a consortium financed 45 per cent by the Canadian government and owned 70 per cent by Canadians. The company has exploration rights to 44 million of the 70 million acres now being surveyed for oil in the Arctic.

32/ Vide supra, fn. 26, 5.

In conclusion, the Report recommended intensive study of pollution dangers in the Arctic, including a study of the physical properties of crude oil and other hydrocarbons in cold waters, "...the dynamics of their dispersion, and their persistence in water and under ice."[33/] Such a study, in its ecological aspects, would focus on the toxic effects of hydrocarbons on plant and animal life in an Arctic environment, and on methods of controlling oil spills and neutralizing pollutants.

The most arresting feature of the Report was the unanimous endorsement by an all-party Committee of an emphatically strong position on Canadian sovereignty over Arctic waters, and on the need for immediate, stringent, unilateral anti-pollution measures to preclude or to combat the pollution menace in the Arctic.

The federal government's policy and legislation on Arctic sovereignty, as enunciated in April, 1970,[34/] represented a position between that of the U.S. State Department, which desired unrestricted freedom of the seas in the Archipelago, beyond the historic three-mile limit, and the Committee's urgent recommendation that Canada should proclaim its sovereignty over all the archipelagic waters.

In introducing the legislation, the Minister of Indian Affairs and Northern Development said that the two Bills would promote Canada's four primary interests in the Arctic as defined by Prime Minister Trudeau: (1) the security of Canada; (2) the economic development of the North; (3) the preservation of the

---

33/ Ibid., 7.

34/ See, especially, House of Commons Debates, April 16, 1970, 5937.

ecological balance; and (4) the continued high stature of Canada in the international community.[35/]

The Arctic anti-pollution legislation[36/] creates a one-hundred mile wide anti-pollution zone around the circumference of the Archipelago and lays down safety-control zones within the larger area with varying safety standards for ships. The legislation appoints inspectors and imposes fines of up to $100,000 per day against owners whose ships dispose of waste in the prescribed area. Although the Act does not purport to assert Canadian sovereignty within archipelagic water, it is not inconceivable that, given general international acquiescence in such a unilateral assumption of jurisdiction, eventually Canadian sovereignty might be recognized over the whole area.

In introducing the legislation, Mr. Chretien spoke of the motives impelling the government to take unilateral action:

> Maritime law is evolving, but more slowly than we would wish in Canada. For centuries emphasis has been placed on the right of shipping to the use of the world's sea lanes without any regard to the effect this might have on adjacent coastal states. While this may have been practical before, now when millions of barrels of oil are afloat in tankers on the high seas on any given day the threat of pollution is real, and the interest of coastal states, as opposed to nations which have large commercial fleets, must be recognized. A state, and particularly those offering flags of convenience, cannot expect in the world community to continue these activities without regard to the interests of other nations.

35/ Ibid., loc.cit.

36/ The Arctic Waters Pollution Prevention Act, Statutes of Canada, 1970. Please see map at Table C opposite illustrating the anti-pollution limits under the legislation.

> At the World Shipping Conference in Brussels last year it was obvious that these states continue to expect to have absolute priorities for their particular requirements. It became clear to the government of Canada that unilateral action would have to be taken at this time if Canada was to protect its own urgent interests. That is why Canada is extending its jurisdiction for pollution control purposes 100 miles from the coast line in the case of commercial shipping, and more than that in the case of commercial exploitation of the continental shelf, where our environment may be threatened. It is doing this on the basis of its right and responsibility to protect the Canadian environment, both in its seas and on its shores, from the real threats of pollution.
>
> But let it be clear that we stand ready at any time to cooperate with the world community in the development of a regime for the prevention of pollution and the protection of the environment, particularly along the coastlines of the world. Canada, therefore, has decided to lead the way and to show by example what can and should be done.37/

In his remarks on the detailed provisions of the legislation, the Minister emphasized that specific safety control zones would be proclaimed from time to time by the Governor-in-Council. In order to enter a safety-control zone a vessel would have to comply with stipulations concerning its hull structure; navigational aids; qualifications of personnel, and time and route of passage. During certain seasons of the year, or when hazardous ice conditions prevailed, ships might be forbidden entirely from entering a zone. Although the thrust of the legislation is preventative rather than penal, should spillage occur absolute liability exists, and

---

37/ House of Commons Debates, April 16, 1970, 5939

a shipowner cannot escape by tendering evidence that he was not negligent. Shipowners may, in fact, be required to show evidence of financial responsibility adequate to cover the costs of clean-up and damage from pollution.[38/]

Companion legislation amended the Territorial Sea and Zones Act,[39/] by extending the territorial sea outwards from three to twelve miles, thus enabling the government to draw a number of fisheries closing lines across the mouth of the Gulf of St. Lawrence, across the Bay of Fundy and across Queen Charlotte Sound on the west coast. As Fisheries Minister Davis explained, such "fisheries closing lines" are an innovation in international law:

> Those of you who followed my announcement last year about the drawing of baselines on both our coasts will recall that we drew a series of straight baselines from headland to headland. We published maps of Canada's existing sea within these lines to down along the east coast of Nova Scotia, for example, and down the west coast of Vancouver Island. They enclosed literally hundreds of bays and inlets. They declared those bays and inlets not only to be exclusive fishing zones of Canada but also, because of the nature of our legislation of 1964, Canadian territory as well.
>
> Now, we are introducing another concept. It is the concept of fisheries closing lines. These closing lines will finally enclose large additional bodies of water such as the Bay of Fundy, the Gulf of St. Lawrence, and Queen Charlotte Sound on the west coast.

38/ Ibid., 5939-5940.

39/ S.C. 1964-65, c. 22; S.C. 1966-67, c. 25; the relevant amendment which alters section 3 (1) of the original legislation was passed on June 4, 1970.

> The idea of fisheries closing lines is a new one. It is new to our fisheries in Canada and it is new to the international fishery ... Baselines in our legislation apply to two things; they apply to territorial sea as well as to fishing zones of Canada. The fisheries closing lines concept, on the other hand, applies exclusively to fishing. It does not necessarily apply to territory. It applies to the protection of the living resources in the fishing waters of Canada. It does not apply to transportation, it does not apply to shipping as such, it does not apply to aircraft flying over the zone in question and it does not apply indeed to submarines passing under the surface of the water.40/

The Minister added that certain countries with historic or contractual fishing rights in areas to be closed off by fisheries closing lines would have to be dealt with on an individual basis in an effort to phase out such rights over a period of years. The Americans and French, especially, have longstanding treaty rights enabling their fishermen to fish in Canadian waters. The Treaty of Utrecht of 1713, conferring rights on France in Newfoundland waters, had resulted in the anomaly that French vessels could fish right up to the Newfoundland shore, whereas domestic legislation forbade Canadian vessels from doing so.

The Minister reiterated the Government's position that there would be a Canadian reservation to the acceptance of the compulsory jurisdiction of the World Court in the case of the Arctic pollution legislation, but not to the twelve-mile territorial limit or fisheries closing lines.41/

40/ House of Commons Debates, April 22, 1970, 6182

41/ Ibid., 6183

The American government which had expressed vigorous prior disapproval of a possible extension of Canadian sovereignty in the Arctic had been following development closely. In late March, 1970, Mr.Sharp told the House of Commons that the possibility of such an extension had already been discussed with U. Alexis Johnson of the American State Department during the latter's visit to Ottawa earlier that month.[42/]

In a firm statement, the United States government protested the legislation introduced both to establish Arctic pollution zones and a twelve-mile territorial limit:

> The bills seek to establish pollution zones in Arctic waters up to 100 miles from every point of Canadian territory above the 60th parallel. Within these zones Canada would assert the right to control all shipping, to prescribe standards of vessel construction, navigation and operation, and to prohibit, if Canada deemed it necessary, the free passage of vessels in those waters. Additionally, the legislation seeks to authorize the establishment of exclusive Canadian fisheries in the areas of the high seas beyond 12 miles, such as the Gulf of St. Lawrence and the Bay of Fundy, and a 12-mile territorial sea off Canada's coasts.
>
> 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.[43/]

The statement went on to express anxiety that the Canadian initiatives, if unopposed, might set precedents for "other unilateral infringements of the freedom of the seas" in other parts of the world. It urged that desirable pollution controls

---

42/ House of Commons Debates, March 25, 1970, 5464.

43/ House of Commons Debates, April 15, 1970, 5923

could be brought about in the international forum by voluntary agreement and cooperation. In the absence of such a multilateral approach, resort could be made voluntarily to the World Court, (even though Canada had made a reservation to the compulsory jurisdiction of the Court with reference to its Arctic pollution measure) to test the international legal validity of both Arctic pollution zones and the twelve-mile limit.44/

The statement clarified the American position on the unilateral extension of territorial waters:

> 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 straits.45/

It might be mentioned that, as the author of what is perhaps the most sweeping reservation made by any member-state to the World Court's jurisdiction, the United States is not in a favourable position to challenge the appropriateness of any Canadian reservation on Arctic pollution.46/

The Canadian note in reply to the American protest, which was handed to the United States government on April 16, 1970, rejected the assertion that there was no basis in international law for the proposed measures. International customary law, in fact, was an excrescence of state practice, a leading example of which was the Truman proclamation of 1945 asserting American jurisdiction over the adjacent continental shelf. The new Canadian initiatives represented a similar type of state practice which through time and repetition might become

---

44/ Ibid., 5923-24.

45/ Ibid., 5924.

46/ See, e.g., Larson, "The Facts, the Law, and the Connally Amendment," in (1961) Duke L.J. 74.

established as norms of international law. The United States itself, moreover, had unilaterally set up exclusive fishing zones in 1966. The Canadian note proceeded inductively to show that in a whole series of instances the United States had assumed jurisdiction beyond the three-mile limit, and did not in practice adhere to the standard which it was urging Canada to follow. Among other measures beyond the historic three-mile limit, the United States since 1935 had assumed customs jurisdiction as far out to sea as 62 miles, and had recently passed analogous pollution control legislation within twelve miles of its coastline. In cases like the preceding, both Canada and the United States had to determine for themselves how best to protect their vital interests, including in particular their national security.47/

> It is the further view of the Canadian government that a danger to the environment of a state constitutes a threat to its security. Thus the proposed Canadian waters pollution prevention legislation constitutes a lawful extension of a limited form of jurisdiction to meet particular dangers, and is of a different order from unilateral interferences with the freedom of the high seas such as, for example, the atomic tests carried out by the United States and other states which, however necessary they may be, have appropriated to their own use vast areas of the high seas and constituted grave perils to those who would wish to utilize such areas during the period of the test blast. The most recent example of such a test.....occurred in October, 1969, when the United States warned away shipping within a 50-mile radius of the test it was conducting at Amchitka Island. The proposed anti-pollution legislation, proposed fisheries protection legislation and the proposed 12-mile territorial sea constitute a threat to no state and a peril to no one.48/

47/ House of Commons Debates, April 17, 1970, 6027.

48/ Ibid., 6027.

When the exigencies of national security so dictate, in other words, a state may take measures proportionate to the danger to ensure that its environment is protected. It would appear that in this context the Canadian government was using the word "security" in its widest sense --- there was a vital national interest in preserving the environment since life itself, and all human operations, would be endangered should toxicity reach intolerable levels. Because of the uncertainty of the effects of pollution in the Arctic, and the immediacy of the danger, Canada could not await a multilateral convention on pollution.

While reaffirming the need for immediate unilateral action, the note repeated the government's willingness to collaborate with other states in reaching higher standards of navigation safety and environmental protection.

In the note, also, the Canadian government draws the highly important distinction between jurisdiction and sovereignty. Within its boundaries, a state may either choose or refrain from choosing to exercise jurisdiction; nevertheless, in political terms, it is sovereign of the whole area. Although this distinction was not explicitly made in the note, it is certainly implicit in passages like the following:

> With respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian. While Canada would be pleased to discuss with other states international standards of navigation safety and environmental protection to be applicable to the waters of the Arctic, the Canadian government cannot accept any suggestion that Canadian waters should be internationalized.[49/]

49/ Ibid., 6029

If the distinction between jurisdiction and sovereignty may be validly drawn, it would lend a certain coherence to successive government statements claiming "sovereignty" over Arctic waters;[50/] Canada might be sovereign of the whole Archipelago, but choose merely to legislate for part of it.

50/ For such a statement see, e.g., External Affairs Minister Sharp's detailed remarks on Arctic sovereignty in the Toronto, Globe and Mail, September 18, 1969, 7.

CHAPTER FIVE

EVALUATION AND CONCLUSIONS

Of the two major problems examined in the foregoing pages, it is suggested that the international legal status of the waters of the Arctic Archipelago is less settled than is the ownership of the islands. Despite sporadic and short-lived threats to Canadian sovereignty over the islands,[1/] there has never been an official claim by another state which placed Canadian ownership of them in doubt. The threats to Canadian title in the past have arisen from a feared clandestine "occupation" of the Archipelago adjacent to Greenland by Denmark, from Norwegian exploration in the same area, or from a subtle process of "americanizations" over the northern mainland which would have made it difficult for Canada to exercise sovereignty over the Archipelago.

Menacing as these dangers appeared at the time, their enduring effects were inconsequential. If one considers the entire century following Confederation, the single persistent claim, effectuated, at least in the last five decades, by a continuous display of governmental acts, has been the Canadian claim. It should be noted, in this connection, that the continuing American military presence in the North would have been impossible without prior Canadian consent, and is comparable to the Canadian presence in Colorado, which is a feature of the same NORAD defence system.

1/ Vide supra, 52-58.

1 THE PRESCRIPTION AND CONSOLIDATION DOCTRINES

If one applies either the test of "effective occupation" developed in international jurisprudence early in this century,[2] or the revised version of the test known as the "consolidation" doctrine,[3] Canadian sovereignty over the archipelagic islands is equally confirmed. Under the former doctrine, discovery and exploration predominantly by British explorers given rise to an inchoate title, perfected by longstanding, unopposed occupation and administration of the islands. Under the latter doctrine, one may invoke essentially the same governmental acts to satisfy its somewhat different requirements, except that the passage of time will not be regarded as the important element it constitutes in prescription.

Consolidation has been expounded with different nuances by various authorities, e.g. de Visscher, Jennings, Johnson and Auburn. They all build upon, however, the seminal decision of Judge de Visscher in the Norwegian Fisheries case, which seems to have propmted a critical reexamination of Huber's Award in the Palmas case, the locus classicus of the doctrine of effective

---

2/ Vide supra, 42-51.

3/ See, e.g., Jennings, The Acquisition of Territory in International Law, Manchester, 1963, 23-35 (cited hereinafter as Jennings); de Visscher, Theory and Reality in Public International Law, (tr. Corbett), Princeton, 1959, 200-203; Johnson, "Consolidation as a Root of Title in International Law," (1955) Camb. L.J. 215, and Auburn, "The White Desert, in (1970) 19 I.C.L.Q., 229 at 231-237.

occupation. The relevant part of de Visscher's judgment is as follows:

> Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of Foreign States. Since, moreover, these decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which should reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable against all States..."[4/]

As Jennings observes,[5/] the substitution of "consolidation" for "prescription" is not merely a terminological reform. When making good a "prescriptive" title in a disputed case, a claimant state endeavours to cite a large body of evidence in its own favour, as was done in the Palmas, Clipperton Island and Eastern Greenland cases. Such evidence may show that the claimant, to the knowledge of rival claimants, exercised undisputed authority over the contentious territory for a prolonged period of time. Evidence will be adduced concerning the operative extent of governmental acts, the character of the acts performed, the acquiescence therein and submission thereto of other states, the intervals between the acts and so on. If such evidence suffices, its cumulative effect will be to confer a "prescriptive" title upon the claimant. The consolidation doctrine differs, according to Jennings, in that official acts similar to those invoked to establish "prescription" are used

---

4/ I.C.J. Reports, 1951, at 130.

5/ Jennings, 25.

not merely as evidence of title, but as "...decisive ingredients in the process of creating title."[6/] In using the prescriptive test to demonstrate effective occupancy, there is a heavy emphasis on the effluxion of time; sufficient time must have elapsed to allow the state to manifest anumus dominendi over the disputed territory by positive acts, and perhaps to show that the international community or the chief actors in it affected by claimant's title, have acquiesced in it. In demanding such evidence of animus and acquiescence over a sufficient period of time, critics of the prescriptive theory charge that it unduly stresses the private law analogy of the acquisition of prescriptive title to land which is known in North America as "squatter's rights." And the private law analogies break down, of course, because human individuals and state entities, or the human community and the international community, are not identical.

By certain affirmative acts a state might so treat certain lands or waters that, without a prolonged passage of time, it effectively reduced them to its possession. User of territory alone, involving official acts like those invoked to show prescriptive title, might "in themselves have the effect of attaching a territory or an expanse of sea to a given State," in de Visscher's words.[7/] Once given the indispensable fact of possesion, the "interests" and "relations" of the claimant state may constitute "consolidating factors" of more significance than the effluxion of time as under the prescriptive theory based on private law analogies. Jessup has criticized the

---

6/ Jennings, 25.

7/ As quoted in Jennings, 25.

"inter-temporal" aspects of the prescriptive test in the Palmas case on the ground that it leads to indefiniteness.[8] One cannot say with absolute certainty who has title to disputed territory in case of controversy. Judge Huber asked not only that title be acquired, for instance by discovery, but that it be maintained according to the evolving norms of international law. Jessup indicated that, given such a test, there could never be confident assurance of a putative owner's title. By failing to satisfy novel requirements of developing international law, a title could be extinguished at any moment. Employing such a test, "Every state would constantly be under the necessity of examining its title to each portion of its territory."[9]

Consolidation, on the other hand, as Auburn indicates,[10] while eliminating the undesirable consequences of the inter-temporal law, would tend to encourage dubious claims. The example he gives is of the "consolidation" through energetic Soviet participation in Antarctic research of a claim arising from the Russian "sighting" of the Antarctic coast in the early nineteenth century.[11] Any basis of "possession" would serve as a basis for a claim through "consolidation," if temporal factors were of minimal importance.

8/ Jessup, "The Palmas Island Arbitration," (1928) 22 A.J.I.L. 735.

9/ Ibid., 740.

10/ Auburn, op.cit. fn. 3, supra,236-237.

11/ Ibid,, loc.cit.

Johnson contends that by employing the fresh concept of "consolidation" the older law may be reformulated on a more satisfactory basis:

> It is submitted that the process of "maintaining" or "manifesting" a title, to which reference has just been made, is in essence a process of "consolidation," different in degree perhaps, though certainly not in kind, from the "consolidation" by which a title may sometimes be acquired in the first place. If this submission be true, it may be possible, employing the notion of "consolidation" to present the law relating to title to territory on a new basis. Such a basis would stress the close relation between the acquisition and the maintenance of titles. It would avoid the ambiguities surrounding the present doctrine of acquisitive prescription.12/

In other words, there might be subsumed under the generic term "consolidation" the ostensibly different modes of acquiring territory discussed by Huber in the Palmas case, and by de Visscher in the Norwegian Fisheries case. The acquisition of title would, however, in either case be seen through the prism of "consolidation" rather than that of "prescription". From such a vantage point, "prescription" is merely the acquisition of title through "consolidation" over a somewhat longer period of time, presumably because the "interests" and relations of the claimant state are not persuasive enough to create or "consolidate" title more quickly.

The speculation that the purported conveyance of the archipelagic islands by Britain to Canada through the grants, and the reason for any ambiguities therein, are irrelevant.13/ Especially if one regards the last fifty years, there is a remarkably strong

---

12/ Johnson, op.cit. fn. 3, supra, 225.

13/ Vide supra, 10 ff.

body of evidence manifesting a virtually unopposed Canadian intention to exercise sovereignty over the Archipelago.[14/] There have, of course, been certain international incidents which could have developed, conceivably, into adverse claims by foreign powers to parts of the Archipelago. That no such serious claims developed, and that the incidents mentioned were brief and non-recurring may have arisen from a calculation on the part of the powers concerned that any such claims would be legally futile.

The extension of police, rescue, navigation and other services to the Archipelago, its exploration, administration and preparations by Canada for its defence, along with the application of game laws and a host of other domestic measures to it over a prolonged period of time would surely satisfy the prescriptive test of title. And, if one prefers what some jurists consider the amplified and corrected test represented by the "consolidation" doctrine, and equally good case could be made out for Canadian sovereignty. It should be stressed that in invoking either of the foregoing tests, it is the fact of possession which is of primary importance, rather than any documentary chain of title establishing succession. Any defects in the British Orders-in-Council of 1870 and 1880 would recede into insignificance in the face of the unchallenged possession by Canada of the Arctic islands in the ensuing years. The Orders -in-Council, at most, would constitute an alteration of ownership as between the United Kingdom and Canada. They are useful as evidencing a renunciation of title in the area in Canada's favour, but they still would not establish conclusively

---

14/ Vide supra, chapter three, passim.

Canada's rights to the islands in internatinal law. Such a right now rests on undisputed, longstanding possession, along with an intention to exercise sovereignty and official acts evincing such an intention with the acquiescence of the international community.

If one prefers the "consolidation" formula, the same positive acts of state will be relied on, but the passage of time will be minimized and Canadian "interests" and "relations" in the Archipelago will be emphasized. It can hardly be disputed that Canadian economic, political and military interested in the area are paramount and have been so for some time. In its relations to the rest of the world, Canada has consistently held itself out as the proprietor of the Archipelago, and the defence of Canada's sovereignty has long taxed Canadian officials.[15/] One of the few exceptions to this generalization, and an exception conspicuous because of its rarity, was the Canadian disinclination to make sovereignty over the Archipelago an issue in the recent negotiations concerning the possible inauguration of diplomatic relations with Communist China. In this case, of course, the Canadian attitude was conditioned by a reluctance to recognize officially Peking's sovereignty over Taiwan. It might have been considered, consequently, that the raising of the territorial sovereignty issue in one case would lead to its emergence in the other, and the stalemate of negotiations.

In establishing the validity of the Canadian claim under the consolidation doctrine one need not go back more than a few years. We are not dealing here with geographically remote entities

---

15/ Vide supra, 14-17.

like Palmas or Clipperton islands, but with a formation which is a natural geographical appurtenance to the Canadian mainland. Canadian interests in the area have been recognized by other states, and official acts, having regard to local circumstances, have adequately manifested or "consolidated" Canadian sovereignty. In some respects, indeed, the consolidation doctrine is even more propitious for Canada than is the prescriptive one. If one recalls that de Visscher originally elaborated the former doctrine in connection with the Norwegian claim to a relatively extensive fisheries zone,[16/] the consolidation doctrine could be used to support both the insular and acquatic claims now made by the Canadian government. One can draw, in this connection, a certain analogy between the Norwegian fisheries' zone and the Canadian anti-pollution zone. In both cases an extended zone was unilaterally procalimed to advance predominantly economic interests. It is true that the Canadian claim is not one with a long historical foundation, as was the Norwegian one, but time is not of the essence under the consolidation doctrine. In addition, Canada can aver that her anti-pollution zone represents a benefit to the whole Northern Hemisphere. Since many of the ocean currents of this Hemisphere originate in the Arctic,[17/] there is a very real danger that pollution occurring in Canadian arctic waters would rapidly be dispersed over wide areas of the world. Although there is a measure

---

16/ Vide supra, 127-128.

17/ See Baird, Chapter five.

of self-interest in the Canadian initiative, Canada can reasonably contend that in creating an anti-pollution zone it is acting in a fiduciary capacity for other states.

11 THE DEVELOPMENT OF NEW LEGAL NORMS

The twentieth century has been an era of innovation in international law. The evolution of contiguous fishing zones and maritime belts serving a wide variety of purposes has been one of the most pronounced characteristics of recent decades. President Truman's unilateral claim to proprietary rights in the Continental Shelf has already been mentioned.[18/] In this case, subsequent claims by other states have given rise to what was fast becoming a customary right, at least to subjacent mineral resources, in the Shelf. The American President's 1945 pronouncement, along with similar claims by other states, led to the Geneva Convention on the Continental Shelf, 1958 embodying what was initially an individual claim as a general doctrine of international law. If such a claim, based on individual economic advantages, is admissible, how much more persuasive is a claim which advances not merely one state's personal advantages, but those of a large number of other states who would suffer in common the consequences of Arctic pollution? The strength of the Canadian position in creating an anti-pollution belt is that in doing so it is promoting the interests of the world community in the absence of effective legal controls to prevent international nuisance.

18/ Vide supra, 66.

In the light of the durability of pollutants in northern waters,[19] it would be a dangerous and retrograde step if the new hundred-mile pollution zone were to be abolished.

It is understandable, accordingly, that Canada should make a reservation to the compulsory jurisdiction of the World Court in connection with the establishment of the zone. The large role that political policy plays in some decisions, and the influence of what might be described as the judges repreeenting western shipowning nations was apparent in the latest South-West African case,[20] where European judges voted en bloc against Liberia and Ethiopia. To subject the future environmental purity of northern waters to possible adverse political decision by the World Court was a risk that Canada could not take. It was unfortunate that a Canadian reservation had to be made. Given, however, the lacunae in present international law, the extended period that would be needed before an international agreement on the matter could be reached, and the imperative and instant need to prevent the pollution of hemispheric waters, there did not seem to be any suitable alternative. With the increasing international awareness and concern over this problem, it is very possible that such anti-pollution measures will become a widespread and accepted practice in the next few years.

Initiatives like the Canadian anti-pollution zone are difficult to argue against cogently. They are contrived not to further a purely selfish national interest, but to guard against a hazard which the increasing number of tanker oil spillages in recent years has dramatized. To advocate protracted international conferences or other dilatory procedures is really a refusal to

---

19/ Vide supra, 109.

20/ I.C.J. Reports, 1966.

confront the immediacy of the problem. To take decisive action on a unilateral basis, however, also presents problems. In acting as it has done, Canada has implicitly placed the priority of combatting pollution above that of unhampered navigation and this is bound to offend some of the great shipping nations of the world.

For a small or "middle" power like Canada to take such a novel initiative in an area where the short-term interests of major maritime powers will be adversely affected is risky. Canadian external relations have traditionally been depicted as a "triangle" in which, to the extent of its ability, Canada has attempted to maintain a degree of independence by creatively exploiting the tensions existing between the United States and Great Britain. Such a "balance" might be achieved, for example, through the attempted substitution of a policy of Empire or Commonwealth free trade for one of economic continentalism, if integration of the North American economy now makes such moves difficult, but formerly even the judicious suggestion of a shifting of markets might accomplish the abandonment of an undesirable policy by one of the larger powers against which it was directed.

It is probable that, if the new Canadian initiatives on the law of the sea are to be successful, a balancing of interests through adroit diplomacy will be necessary. It is very unlikely, however, that Canada could achieve anything tangible by economic realignments or pressures. From a realistic perspective, the states it would be contending against are simply too powerful economically, and themselves possess such resources for economic manoeuvre as to be almost unaffected by any Canadian pressures. The arrest of an American tanker in the new anti-pollution zone might be followed by the retaliatory raising of tariffs on Canadian primary products normally marketed in the United States. Or, in similar circumstances, the Soviets might decide to buy Australian

rather than Canadian wheat. It is highly doubtful whether, considering the relative power of the probable adversaries, Canadian economic retaliation after such incidents would have a major impact on either the United States or the Soviet Union.

Rather than the threat of economic sanctions, the stressing of mutual advantages inhering in the Canadian initiatives would be preferable. Where the purity of hemispheric waters is in jeopardy, surely it is in the interest of all states in northern latitudes to cooperate in the Canadian measures, and for Canada to cooperate in any reciprocal measures undertaken by other states. The large puncture in the hull of the S.S. Manhattan during its initial voyage, despite all the precautions taken, sufficiently emphasizes the danger.

It is also advantageous, at least at this stage of navigational progress, for the major maritime nations to be able to rely on Canadian navigational expertise and the assistance of Canadian meteorological and icebreaking services in negotiating the Northwest Passage. The provision by Canada of such services, for a reasonable fee, to all vessels meeting minimum safety standards set by the Department of Transport, should be an inducement to other states to comply with the Canadian regulations. In contrast with Soviet policy, it is not the policy of the Canadian government to exclude vessels from its arctic waters, but merely to ensure safe passage.

Canada might also indicate a mutuality of legal interest in its maritime claims both to the United States and to the Soviet Union. It is true that the initial United States reaction to the establishment of a twelve-mile belt of territorial waters was hostile, but a sober reconsideration of the issue might persuade the Americans of the reasonableness of the Canadian legislation.

The United States has for some time been striving to have Latin American nations limit their claims to off-shore waters to twelve miles; some states, such as Peru, Chile and Brazil, now claim a strip of territorial waters 200-miles in breadth.[21/] The Americans, however, emphasize that any general extension of a twelve-mile limit should be coupled with a multilateral convention guaranteeing free passage through narrow straits which would otherwise be classified as internal waters. The Canadian closing of the Archipelago through the creation of a twelve-mile belt while preserving rights of innocent passage for foreign vessels meets both criteria set by the United States. Given a multilateral convention, it would be hard to comprehend how the United States could object to the legislation. The Canadian action would be infinitely preferable to the closing of the Archipelago by a system of straight baselines, along with a claim to all of the waters so enclosed as "internal" (as was the case with the Philippines and Indonesia).[22/]

In addition to meeting the two chief conditions laid down by the United States for the extension of territorial waters, Canada can appeal to a mutuality of defence interests with its NATO ally. It can suggest that, as the country which can most persuasively substantiate its claim to the islands and waters of the Archipelago, it deserves American support in its maritime claims because of common defence interests. Shoudl the area come under the control of an unfriendly power, the strategiv consequences

---

21/ Vide supra, fn.3 at 101.

22/ Vide supra, 23-26.

would be most unpalatable to both the United States and Canada.

In this connection, and related to the extent of a possible Canadian claim, there is no necessary incompatibility between the new Canadian claims and the sector claim which Canada enunciated in 1925.[23/] The new claims merely extend existing territorial waters and create an anti-pollution zone; they do not relate to title to islands or polar ice which a sector claim would embrace. Accordingly, the new claims combined with possible title to polar ice within the Canadian "sector" would be strategically invaluable. In an atmosphere of international defence, the above considerations may lose some of their persuasive force, but in the present condition of international society they are still highly relevant.

In the case of the Soviet Union, there is an analogy between the respective "sector" claims of Canada and the Soviets,[24/] and as the chief Arctic nations such claims would be mutually supporting. It might even be suggested that as sovereigns of most of the coastline of the Arctic the two countries could be major participants in establishing a regional regime of international law applicable to Arctic waters. Such a regime would be predicated on the consideration that Arctic waters have unique characteristics and present extraordinarily difficult navigational problems; a regime sui generis of a regional character might therefore be required governing the use of such waters. If certain purported universal values of international law could not be adapted to Arctic conditions, a regional regime reflecting more appropriate values, such as the "sector" doctrine and seasonal claims to ice,

---

23/ Vide supra, 31.

24/ Vide supra, 36-40.

might be substituted for broader values more generally applicable.

In its diplomatic activities following its claims Canada should seek to impress upon other nations broad common areas of interest like some of those indicated above. A reciprocity of advantages might lead to the wider sanctioning of the Canadian initiatives and, eventually, to the development of new norms of international law.

Two important drawbacks to Canada's claims, perhaps, are (a) the novelty of the extensive anti-pollution zone in international law, and (b) Canada's refusal to accept the compulsory jurisdiction of the World Court in connection with its anti-pollution zone. While these handicaps are impediments of a serious nature to the full acceptability of the Canadian claims, the alternatives, as mentioned above, are so repugnant that the action taken appears to be the lesser evil.

It is to be hoped that with the dynamic evolution of new norms of international law, to meet the exigencies of the pollution crisis, Canada's recent initiatives will be understood sympathetically by other states and will contribute, along with similar initiatives by others, to the progressive development of international law.

The conservatism of legal systems dictates at times that novel departures must be made to solve urgent problems not resolvable by existing law. The development of customary law from a repetition of isolated practices and usages, after a trial period, may be rejected by the community and never attain the status of laws. Other practices, after a period in which their positive characteristics are observed and approved,

are sanctioned by the community and become "laws." A domestic measure regulating the law of the sea in the interest of combatting pollution may be likened to an incipient international custom. If such a measure is judiciously framed and is effective and beneficial in practice, when sanctioned and emulated by other states it gradually assumes the status of international customary law. It may be suggested that the Canadian anti-pollution legislation described above falls into such a category. In view of the international benefits which presumably will accrue from it, the prospects appear quite good that through time it will be generally endorsed.

LIST OF REFERENCES

Alexander, L.H., "Offshore Claims of the World", in Alexander, L.H., (ed.) The Law of the Sea, Ohio State U.P. 1967.

Allen, Ralph, "Will the Dewline cost Canada its Northland?" Maclean's Magazine, May 26, 1956, 16-17, 68-70.

Arctic Islands Documents, 1873-1880 file, Department of the Interior, R.G. 15; Series A-2; Vol. 5-6, (Public Archives of Canada, Ottawa).

Arctic Islands Reports on Sovereignty file, Department of the Interior, R.G. 15; Series A-2; Vol. 5-6 (P.A.C., Ottawa)

Arbitral Award in the Island of Palmas Case, United States and the Netherlands, April 4, 1928, (P.C.A.) see (1928) 22 A.J.I.L. 867.

Arbitral Award on the Subject of the Differences Relative to the Sovereignty over Clipperton Island, January 28, 1931, see (1932) 26 A.J.I.L. 390.

Auburn, F.M. "The White Desert," in (1970) 19 International and Comparative Law Quarterly, 231-256.

Baird, Patrick D., The Polar World., London, 1964.

Balch, T W., "The Artic and Antarctic Regions in the Law of Nations," in (1910) 4 American Journal of International Law, 265-275.

Beriault, Yvon, Les Problemes Politiques du Nord Canadien, University of Ottawa, 1942.

Boggs, S.W., "Delimitation of the Territorial Sea," in (1930) 24 American Journal of International Law, 541.

Breitfuss, L., "Territorial Division of the Arctic," in (1929) 8 Dalhousie Review, 456-470.

British North America Acts and Selected Statutes, 1867-1948, Ottawa, 1948.

Canada, Parliament, House of Commons, First Report, (Arctic Sovereignty), the Standing Committee on Indian Affairs and Northern Development, Ottawa, 1969.

The Canada Year Book, 1969, (Dominion Bureau of Statistics), Ottawa, 1969.

Castel, J.G., International Law Chiefly as Interpreted and Applied in Canada, Toronto, 1965.

Caswell, J.E., Arctic Frontiers, Norman, Oklahoma, 1956.

Civil Aeronautics Board v. Island Airlines, (1964) 235 F. Supp. 990.

Colombos, C. John, International Law of the Sea, 6th ed., London, 1967.

Coquia, Jorge R., "The Territorial Waters of Archipelagoes," (1962) 1 Philippine International Law Journal, 139-156.

Creighton, Donald, John A. Macdonald, the Old Chieftain, Toronto, 1955.

Convention on the Continental Shelf, 499 U.N. Treaty Series, 311.

Cooke, N.E., Pilon, J., and Thompson, K M., Water Pollution Control, A Digest of Legislation and Regulations in Force in Canada, 3rd ed., Montreal, 1967.

Decree of the Presidium of the Central Executive Committee, U.S.S.R., April 15, 1926, cited in 2 Whiteman, International Law, Washington, 1963, 1268.

de Visscher, Charles, Theory and Reality in Public International Law, (tr. P.E. Corbett), Princeton, 1959.

Dollot, Rene, "Le Droit International des Espaces Polaires," in (1949) 2 Recueil des Cours, Academie de Droit International, 117-200.

Evenson, Jens, "Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagoes," U.N. Conference on the Law of the Sea (U.N. Doc. No. A Conf. 19-8, 1960), 1 Official Records, 289-302.

Exploration and Occupation of the Northern Arctic Islands, file, Department of the Interior, R G. 15, A-2, Vol.1, (Public Archives of Canada, Ottawa).

Fairley, T.C., Sverdrup's Arctic Adventures, London, 1959.

Fenwick, Charles, International Law, 4th ed., New York, 1965.

Fleming, Archibald Lang, Archibald the Arctic, Toronto, 1965.

Hackworth, G.H., International Law, Washington, 1940, Vol.1.

Hayton, R.D., "Polar Problems and International Law," (1958) 52 American Journal of International Law, 746-765.

----------,"The Antarctic Settlement of 1959," (1960) 54 American Journal of International Law, 349-371.

Hudson's Bay Company, Charters, Statutes, Orders in Council etc. Relating to the Hudson's Bay Co., London, 1931.

Head, Ivan L., "Canadian Claims to Territorial Sovereignty in the Arctic Region," (1963) 9 McGill Law Journal, 200-226.

Hyde, C.C., "Acquisition of Sovereignty over Polar Areas," (1934) 19 Iowa Law Review, 286-294.

Inch, D., "An Examination of Canada's Claim to Sovereignty in the Arctic," (1962) 1 Manitoba Law School Journal, 31-53.

International Court of Justice, Fisheries Case, (United Kingdom v. Norway) Judgment of 18 December, 1951, Reports of Judgments, Advisory Opinions and Orders.

Jennings, R.Y., The Acquisition of Territory in International Law, Manchester, 1963.

Jessup, P.E., "The Palmas Island Arbitration," (1928) 22 American Journal of International Law, 735.

Johnson, D.H.N., "Consolidation as a Root of Title in International Law," (1955) Cambridge Law Journal, 215-225.

King, W.F., Report Upon the Title of Canada to the Islands North of the Mainland of Canada, Ottawa, 1905.

Lakhtine, W., "Rights over the Arctic," (1930) 24 American Journal of International Law, 703-717.

Lapenna, I., Conceptions Sovietiques de Droit International Publiques, Paris, 1954.

Larson, Arthur, "The Facts, the Law, and the Connally Amendment," (1961) Duke Law Journal, 74-119.

Lear, John, "Northwest Passage to What?" (1969) Saturday Review, 55-64.

Legal Status of Eastern Greenland, P.C.I.J., (1933) Series A/B, No. 53, 49.

Lindley, M.F., Backward Territory in International Law, New York, 1969, (originally published in 1926).

Masters, D.C., Canada in World Affairs, 1953-55, (C.I.I.A.) Toronto, 1959.

McDougal, Myres S., and Burke, The Public Order of the Oceans, New Haven, 1962.

Meron, Theodot, "Civil Jurisdiction of Canadian Courts over United States Military Personnel in Canada," (1957-58) 12 University of Toronto Law Journal, 67-78.

Morris, Margaret, "Boundary Problems Relating to Sovereignty in the Canadian Arctic," (1969) 6 Musk-Ox Journal, 32-58.

Mouton, M.W., The Continental Shelf, The Hague, 1952.

----------, "The International Regime of the Polar Regions," (1962) 111 Recueil des Cours, Academie de Droit International, 175-284.

Murchison, J.H., The Contiguous Air Space Zone in International Law, Ottawa, 1955.

Neatby, L.H., Conquest of the Last Frontier, Athens, Ohio., 1966.

"Oil Hazards of the Frozen North," in The Geographical Magazine, August, 1969, 859.

Oppenheim, L., International Law, H. Lauterpacht, (ed.), 8th ed., London, 1955, vol.1.

Pharand, Donat, "The Waters of the Canadian Arctic Islands," (1969) 3 Ottawa Law Review, 414-432.

----------, "Freedom of the Seas in the Arctic Ocean," (1969) 19 University of Toronto Law Journal, 210-233.

----------, "The Legal Status of Ice Shelves and Ice Islands in the Arctic," (1969) Les Cahiers de Droit, 461-475.

Rea, K.J., The Political Economy of the Canadian North, Toronto, 1968.

----------, "The Problem of Economic Development in the Canadian Arctic," in (1964) 71 Queen's Quarterly, 85-94

Riddell, W.A., Documents on Canadian Foreign Policy, 1917-1939, Toronto, 1962.

Rogers, G.W., "Party Politics and Protest Politics, Current Political Trends in Alaska," in (1969) 14 Polar Record,445-458.

Royal Canadian Mounted Police, "Canadian Sovereignty in the Arctic," mimeographed article, undated.

Sater, John E., The Arctic Basin (revised edition), Washington, 1969.

Shalowitz, A.L., Shore and Sea Boundaries, Washington, 1962, vol.1

Sissons, J.H., Judge of the Far North, Toronto, 1968.

remainder, was even more vague. The first usage of the term is uncertain, and its meaning is nowhere indicated with precision. As Dr. King remarks, its first usage in an authoritative document would appear to be in section 146 of the B.N.A. Act, and in that section there is no guidance as to its geographical co-ordinates. In more remote times, it may even have had a literary or poetical flavour, like "Cathay" or "the Indies", and carried with it, perhaps, an almost all-inclusive connotation.[17/] However that may be, the Imperial Order-in-Council of 1870 was manifestly unsatisfactory as a precise conveyance, and it was necessary to cure the imprecision by a further grant.

An Address to the Queen was prepared by the Canadian Parliament in 1878 seeking to resolve doubts about the extent of Canada's northern territories. The Address, praying for what amounted to a rectification of frontiers, included a precise description of known islands between Davis Strait and the 141st meridian of north longitude, defining the Alaskan-Canadian boundary, presumably to be incorporated in a definitive grant.[18/] Since the whole purpose of the second exercise was ostensibly to clarify the dimensions of Canadian sovereignty in the North, one can sympathize with Dr. King's perplexity[19/] that the Imperial Order-

---

17/ Cf. King at 4, where he mentions that in the minds of the Canadian delegates seeking a transfer of the North-western territories from Great Britain, the area included all unorganized territory to the west of Canada and Rupert's Land. Whether this would include the islands to the north of Canada is conjectural.

18/ King, 6.

19/ King, 5.

Smedal, O., Acquisition of Sovereignty over Polar Areas, Oslo, 1931.

Smith, G.W., "Sovereignty in the North; the Canadian Aspect of the International Problem," in Macdonald, R. St. J., ed., The Arctic Frontier, Toronto, 1966, 228-

----------, Canadian Sovereignty in the North: A Historical Outline of the Problem, (northern Coordination and Research Centre: Department of Northern Affairs and National Resources, Ottawa, 1963.

Schwarzenberger, Georg. A Manual of International Law, 4th ed. London, 1960, 2 vols.

The Tolten, (1946), P. 135.

United Nations, Pollution of the Sea by Oil, U.N. Doc. St. ECA-41, New York, 1961.

United Nations, Yearbook of the International Law Commission, New York, 1956, vol.2.

Wall, E.H., "The Polar Regions in International Law," (1947) 1 International Law Quarterly, 54-58.

Whiteman, M.M., International Law, Washington, 1963-. vols. 1-2.