Naval Operations in Arctic Waters

The Operational Legal Challenges of Naval Operations in Canada's Arctic Waters.

Office of the Judge Advocate General
Strategic Legal Paper Series
Issue 3

Office of the Judge Advocate General
Cabinet du Juge-avocat général

National Defence Défense nationale
Canada

National Defence   Défense nationale

A-LG-007-SLA/AF-003

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OFFICE OF THE JUDGE ADVOCATE GENERAL
STRATEGIC LEGAL PAPER SERIES
ISSUE 3

(BILINGUAL)

Issued on Authority of the Chief of the Defence Staff

OPI: JAG-DSLA **2008-06-18**

LIST OF EFFECTIVE PAGES

Insert latest changed pages and dispose of superseded pages in accordance with applicable orders.

NOTE

The portion of the text affected by the latest change is indicated by a black vertical line in the margin of the page. Changes to illustrations are indicated by miniature pointing hands or black vertical lines.

Dates of issue for original and changed pages are:

Original	0	2008-06-18	Ch	3	
Ch	1		Ch	4	
Ch	2		Ch	5	

Zero in Change No. column indicates an original page. Total number of pages in this publication is 47 consisting of the following:

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Contact Officer: JAG-DSLA

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I – INTRODUCTION

On the 28th of May, 2008 at Ilulissat, Greenland, the five Arctic Ocean coastal states – Canada, Denmark, Norway, the Russian Federation, and the United States – adopted and released a declaration concerning the diplomatic roadmap for the "orderly settlement of any possible overlapping claims" in the Arctic.[1] The Conference participants announced that they would remain committed to the "extensive international framework" known as the law of the sea.[2] That framework would provide "for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea."[3] A consequence of this commitment to the existing treaty is that the five Arctic Ocean coastal states see "no need to develop a new comprehensive international legal regime to govern the Arctic," and they propose to further their cooperation through "bilateral and multilateral agreements between or among relevant states."

The Ilulissat Declaration was hailed by some of the participants as signifying that the "race to the North Pole is cancelled," as the coastal states' valuable continental shelf claims would be determined in accordance with Article 76 of the *Convention*, rather than distributed as part of an international trust or the common heritage of mankind, as apparently had been hoped by some European States and other Arctic observers. The importance of the Declaration to Canadians lay in this rejection by the Arctic Ocean coastal states of any dramatic new legal regime to govern the Arctic, as had been put in place for the Antarctic.[4] Our rights to the waters and the seabed in the Arctic Ocean and the Arctic Archipelago will be determined in accordance with the provisions of the *Convention*.

These international legal rights will be increasingly important as the Government of Canada struggles with new political and legal conflicts provoked by climactic, economic and geopolitical change. For Canada, the accelerated rate of reduction of ice-cover on Arctic waters presents a serious security challenge to be met. The probability of significant Arctic Ocean commercial shipping and of renewed interest in the exploitation of Arctic energy resources has raised public concern about the consequential problems of the enforcement of Canadian pollution controls and fisheries regulations. Further, this increased commercial activity will take place in waters that have

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1 The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland 27-29 May, 2008, http://arctic-council.org/filearchive/Ilulissat-declaration.pdf.

2 There is no express reference in the Declaration to the 1982 *United Nations Convention on the Law of the Sea* [the *Convention* or UNCLOS]. This may be attributed to the fact that the United States has yet to ratify the *Convention*.

3 *Supra* note 1.

4 The Declaration was greeted with mixed reviews in Canada. Besides complaints that the Minister of Foreign Affairs rather than the Minister of Natural Resources Gary Lunn would have been a more appropriate national representative, most of the Canadian commentary was focused upon the advisability of the continued accommodation of the Arctic Council . The Arctic Council is an eight-nation coalition of northern states – Canada, Denmark (Greenland, Faroe Islands), Finland, Iceland, Norway, Sweden, the Russian Federation, the United States – and includes non-Arctic states, native organizations, and non-governmental organizations as observers. As observed by Randy Boswell in "Conference could mark start of Arctic power struggle" *Canwest News Service* (28 May 2008), online at www.dose.ca/news/story.html?id=d0135cd8-c15a-48a3-9579-0df5f8e185c1, comment was divided on the impact of the Declaration upon Canada:

"University of Calgary political scientist Rob Huebert said the five-country plan to manage the ocean's affairs means 'Arctic issues will be dealt with on an ad hoc, piecemeal, bilateral basis. The Arctic is much too complicated to deal with in this manner today." He said the coming problems require 'an Arctic Council with teeth, or each issue will deteriorate on its own.'

"But University of British Columbia political scientist Michael Byers praised the direction of the grouping he dubbed 'the Arctic Ocean 5.' The five-nation summit was a 'perfectly appropriate venue to discuss Law of the Sea issues as they relate to the Arctic Ocean seabed. Countries that do not border on the Arctic Ocean simply don't have the same interests or potential disputes with respect to those areas and potential resources."

for decades served as a covert and central theatre of strategic submarine operations. Perhaps paradoxically, the reduction of solid ice-cover will arguably make the Arctic Ocean and the waters of the Arctic Archipelago even more attractive to strategic nuclear submarine operations: vast and harsh, the Arctic Ocean is alternatively deep in the ocean basins and shallow above the continental shelf, with constantly moving ice that may be packed solid or rapidly melting. While these physical and hydrographic characteristics obviously affect the movement of submarines, it is the changing depths, salinity, and acoustic characteristics of the moving, grinding, and melting ice that provides natural cover for the maintenance of a submarine strategic deterrent.

Further, Canada's territorial interests in the Arctic islands and waters are already the subject of maritime and territorial boundary disputes, including disagreements with Denmark over title to Hans Island in the Nares Strait,[5] the maritime and continental shelf delimitation of the Lincoln Sea, and a similar dispute with the United States in the Beaufort Sea.[6] However, the most significant and well-known disputes have been provoked by the 1985 establishment by the Government of Canada of the straight baselines enclosing the waters of the Arctic Archipelago and their description as Canadian "historic internal waters." This assertion of "arctic sovereignty" has also been made in the face of claims by other states – argued by Canada to be premature – that the Northwest Passage through the waters of the Arctic Archipelago is an "international strait" in which foreign vessels can lawfully exercise the right of transit passage in accordance with the provisions of the UNCLOS and customary international law. In the past there had been little incentive to resolve these matters since the Northwest Passage has long existed more as a fable than serving as a practical sea line of communication. The prohibitive expense associated with the exploitation of Arctic oil and gas and commercial inaccessibility of the Arctic waters have dampened the enthusiasm of the Arctic Ocean coastal states to regularize their respective claims of jurisdiction. Further, while the two Cold War superpowers persisted in conducting frequent secret under-ice submarine operations in the Arctic Ocean and Archipelago, the demise of the Soviet Union shifted the question from forefront of public concern.

However, in addition to climate change, a number of other factors have simultaneously triggered global interest in Arctic waters and the seabed beneath, including: the volatility of global petroleum and gas markets and concern with the vulnerabilities of supplier infrastructure; the emerging commercial transportation opportunities of transiting through the Northwest Passage and to destinations in the Arctic Ocean; the emergence of developing economies and regional maritime powers seeking new resources and access to transportation infrastructure; and, the loosening and realignment of Canada's traditional military alliances.

Canada will have to adjust to these changing circumstances while reconciling some of its declarations and claims with the 1982 UNCLOS.[7] Canada signed the *Convention* on the 10th of December, 1982 and, while it entered into force with 60 ratifications on the 16th of November, 1994, it was not ratified by Canada until much later in 2003. The *Convention* introduced the concept of the "exclusive economic zone" to the existing maritime zonal regime, extended a portion of the regulatory jurisdiction of coastal states over more of their continental shelf, and confirmed traditional navigation rights such as innocent passage. It also established important new navigation rights such as transit passage and archipelagic sea lane passage. These new coastal zones and the new formulation of navigation rights altered the international legal framework to which Canada secured her title to the internal waters and territorial sea and her rightful exercise of rights over her exclusive economic zone and the continental shelf. During the negotiations of the *Convention*, Canada's regulatory and enforcement interests, like those of many other coastal States, were often weighed against the traditional "freedom of the seas" asserted by

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5 Hans Island is a small uninhabited island less than a mile in length that is located between Greenland and Ellesmere Island in the Nares Strait and is claimed by both Canada and Denmark. The *Canada/Denmark Maritime Boundary Delimitation Agreement* was signed December 17, 1973 delimiting the boundary waters and continental shelf between Ellesmere Island and Greenland. Given its small size and lack of resources, the two states had agreed at the time of the agreement to ignore the issue of title to Hans Island.

6 The 141st meridian has been considered the land boundary between Alaska and the Yukon Territory since 1825. However, given the increased oil exploration and drilling in the Beaufort Sea, the maritime and continental shelf delimitation has become an issue. Canada maintains that the relevant treaties and international law support an extension of the 141st meridian from land into the sea, while the U.S. argues on behalf of an equidistance line.

7 *United Nations Convention on the Law of the Sea*, available online at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

many maritime states.[8] The equilibrium struck in the *Convention*, including the securing of coastal state sovereignty and the sovereign rights to regulate certain matters, served to quiet the increasing maritime state concern about "creeping" and "thickening" jurisdiction and coastal states' worries about any buccaneering laissez-faire pillage of mankind's common heritage.[9]

The mere invocation of the words "Arctic sovereignty" has long prompted romantic notions and nationalist emotions among Canadians, but rarely active engagement. The 1985 Canadian establishment of straight baselines surrounding the Arctic Archipelago constituted an express assertion of sovereign rights and plenary jurisdiction over those remote and hostile waters, identical to those rights exercised over its land and water territory. However, the legal regime established and subsequently maintained by successive Canadian governments over the Arctic waters beyond its territorial sea reflected a more limited functional jurisdiction to prevent pollution and regulate the fisheries. As the only arm of the Government of Canada with the capability to operate effectively and persistently in these remote waters, it will naturally fall to the Canadian Forces to conduct naval operations and provide the necessary support to law enforcement. This paper will investigate the legal dissonance between Canada's domestic legislative regime in place over Arctic waters and Canada's international legal obligations under the *Convention*, and to consider how that will influence the conduct of naval operations.

After a necessary review of the physical and strategic characteristics – including qualities both commercial and military – of the Arctic region, this paper will provide a brief chronology of the Canadian legal claims over the Arctic waters. This history will provide a context for the analysis of Canada's claim of historic internal waters between the straight baselines surrounding the islands of the Arctic Archipelago and of the challenge of navigation rights being asserted through those waters. While the strength of the Canadian position will not be weighed, its legal nature and character will be subjected to legal analysis. Of particular relevance to this analysis will be the portions of the *Convention* which set out the rights and responsibilities of coastal states over adjacent waters and which describe the navigation rights of innocent passage and transit passage.

Finally, the paper will analyze the legal consequences of the claim of historic internal waters upon the Canadian Navy's support to law enforcement in the Arctic region and its military mission to protect Canadian sovereign rights. This analysis will discuss the influence of the Canadian legal position and, given that the Government of Canada has now made the decision to find the authority for its Arctic claims under the UNCLOS regime, the international law of the sea upon the distinctive legal bases for those missions. The sophistication demanded in the planning and execution of those tasks simultaneously will be considered, as well as any consequential legal constraints imposed on those operations.

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[8] 1958 *Convention on the High Seas*, Art. 2: "the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty…." Professor Donat Pharand observed that "not a single vote was cast against this consecration of the freedom of the seas at the Geneva Convention." Donat Pharand, "Freedom of the Seas in the Arctic Ocean" (1969) 19 U.T.L.J. 210 at 210. Elliot L. Richardson headed the American delegation to the Third Conference and concisely explained the dominant military element to the doctrine of the freedom of the seas: "Warships and aircraft had complete movement outside the territorial sea. Within the territorial seas, the movement of foreign warships and aircraft was governed by the right of 'innocent passage'. While surface warships had the right to transit without prior notification, the 'innocence' required that the transit not be prejudicial to the 'peace, good order, or security' of the coastal State. Submarines and aircraft were not given the freedom: innocent passage did not embrace the right of aircraft overflight or of submerged submarine transit." Elliot L. Richardson, "Power, Mobility, and the Law of the Sea" (1979-1980) 58 Foreign Affairs 902 at 905.

[9] Wayne S. Ball, "The Old Grey Mare, National Enclosure for the Ocean" (1996) 27 Ocean Development and International Law 103. Ball describes "creeping jurisdiction" to be the physical expansion of regulatory jurisdiction, and "thickening jurisdiction" to be the widening range of activities in prescribed zones subject to regulation.

II – THE CANADIAN ARCTIC

The dominant feature of the Canadian Arctic region is the Arctic Ocean. It may be described as the portion of the world ocean lying within the Arctic Circle (66° 32 2/3 ' N). It has a total area of approximately 14 million square kilometres and is bounded by Russia, Canada, the United States and Greenland. Continental shelf comprises slightly more than half of the ocean area.[10]

The points of entry to and egress from the Arctic Ocean are restricted to the Bering Strait, the Canadian Arctic Archipelagic waters and the Davis Strait, the Greenland/ Iceland/U.K. gap, and the Denmark and Baltic Straits. While there are numerous islands around the periphery, the Arctic Ocean has been described as a basin since its central waters are island-free and deep.[11] The Canadian Arctic Archipelago is made up of 73 major islands of more than 50 square-miles in area and approximately 18,114 smaller islands, and the Archipelago extends almost 1000 miles north from the mainland coast.

The Arctic Ocean is covered by approximately 5.2 million square kilometres of ice in the summer and 11.7 million square kilometres in the winter. There are two categories of ice-cover: pack ice – ice which has accumulated over many years – and winter (or annual) ice – which has formed over a single season. The pack ice has an average thickness between 3 and 3.5 metres and tends to have rougher upper and lower surfaces than does annual ice. These ice surfaces can vary in thickness from a few inches to nearly 200 feet.[12] A "lead" or "polynya" occurs where a tear or fissure in the pack ice has exposed open water.[13] Other tears and fissures can create vertical "sails" of ice above the water surface and "keels" below. The ice normally drifts in a clock-wise direction around the Arctic Ocean and its movement is influenced by the currents flowing in and out of the straits, as well as the wind.[14]

Surface travel is possible along the southern limits of the Arctic Ocean. The Northern Sea Route (or Northeast Passage) passes north of Russia through the straits between the large coastal islands and the Siberian mainland. The Northwest Passage north of Canada has an approximate length of 2,850 nautical miles and is made up of at least five proven routes of which two are suitable for navigation by surface vessels with a draft up to 20 m[15] and three are suitable for navigation by submerged submarines.[16]

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[10] The Arctic Ocean includes the Norwegian, Barents, Beaufort, Chukchi, East Siberian, Laptev, Greenland and Kara seas, Baffin Bay and the waters of the Canadian Arctic Archipelago (Queen Elizabeth Islands and Sverdrup Islands). The proportion of continental shelf to ocean surface area is significantly greater than in any other ocean.

[11] The dominant undersea feature in the Arctic Ocean is the Lomonosov Ridge which extends 1,700 km from the New Siberian Islands to Ellesmere Island. On the Pacific side of the ridge are two deep basins – the Markarov Deep and the Canada Deep – and on the Atlantic side are two more – the Eurasia Deep and the Fram Deep.

[12] Capt(N) T.M. Le Marchand, "Under Ice Operations", *U.S. Naval War College Review*, May-June 1985, 19-27, 21: "The unevenness of its thickness is caused by the continual tearing, grinding and compression of the 'raft' [of pack ice] as it is acted upon by the currents and landmasses."

[13] Robert M. Bone, *The Geography of the Canadian North: Issues and Challenges*, 2nd ed., (Oxford University Press, 2003) at 41; Marchand, *supra* note 12 at 21: Leads or polynyas can be several miles in length and several hundred yards in width. They occur year-round and occupy approximately 10% of the ice pack surface area. There has been a large polynya in northern Baffin Bay in Smith Sound for several decades called the "North Water".

[14] Peter Hayden, "The Strategic Importance of the Arctic: Understanding the Military Issues" (March 1987) *DND Strategic Issues Paper No. 1/87* at 5: Since none of the factors which influence the sea-ice drift, movement, coverage, and thickness are constant, under-ice activities are based upon prevailing conditions rather than upon predictions.

[15] Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge University Press, 1988) at 189-193. The first of the two main routes passes through the Prince of Wales Strait, the Parry Channel, Lancaster Sound, Baffin Bay and the Davis Strait, and the second route transits M'Clure Strait into Parry Channel, north of Prince of Wales Strait.

[16] The Nares Strait between Greenland and Ellesmere Island is the most direct route, the Parry Channel south of the Queen Elizabeth Islands, and finally, Jones Sound through the Cardigan Strait and the channels through the Sverdrup Islands, are all navigable by submerged nuclear submarine.

The eastern approaches to the Northwest Passage are dominated by icebergs calved from the glaciers on Northwestern Greenland, Ellesmere Island, and Devon Island which have drifted south towards the Canadian coast.[17] The Labrador Current carries them to the waters off Newfoundland. In the western approaches to the Passage in the Beaufort Sea, there is a first-year ice transition zone of 50 to 100 miles in width between pack ice and the coastal fast ice. This channel has been suitable for surface-vessel navigation from the end of June until October.

The unique physical characteristics of the Arctic Ocean – significant ice-cover, large supply of fresh water from the Eurasian and North American watersheds and restricted "chokepoints" – not only cause the Arctic Ocean to be highly susceptible to hydrographic "disruptions", but these may in turn trigger even greater changes in global ocean circulation and climate. For example, the cold Arctic waters flowing into the North Atlantic help to propel the Atlantic Conveyor – this oceanic heat pump sends cold deep water southward which is returned from the tropics as warm surface water known as the Gulfstream – and in its turn serves to moderate the climate of the North Atlantic region, and the Earth's climate generally. [18]

Because the physical processes supporting this oceanic heat pump – also known as "thermohaline circulation" - is not yet fully understood, the recent data concerning the rate of reduction of ice volume in the Arctic region has prompted alternate predictions of its effect upon the ice-cover in the Canadian Arctic. Recent data suggests that the Arctic Ocean ice-cover is losing 10% of its volume per decade, rather than the earlier estimates of 3% of its volume. Linear analysis of this data prompted a projection in 2004 by the U.S. Arctic Research Commission and International Arctic Science Committee that the Canadian Arctic will experience entire summer seasons of nearly ice-free conditions as early as 2050, but probably not before 2100.[19]

Two other recent studies have posited far more abrupt changes to the Arctic Ocean over the next decades once certain "tipping points" are reached. One study has proposed that the annual ice will experience a quick retreat over the next 30 to 50 years and another has suggested that the ice could experience an abrupt retreat over a period of ten years if a "tipping point" has been reached.[20]

While there may be disagreement about the pace of change, there is a scientific consensus that the Arctic Ocean will experience a significant reduction of ice cover over the coming decades. In the broader context of global climate change, there will be increased stress to energy supplies as a result of the uncertain climactic conditions and the adjustments required by the energy distribution and transportation systems. However, the most significant change will occur with the new shipping opportunities that may develop in the Arctic Ocean. While there is a

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[17] Hayden, *supra* note 14 at 6. Up to 50,000 individual icebergs are found off the Canadian coast each season. They can have drafts in excess of 100 m and pose significant navigational hazards to both submarines and surface vessels.

[18] Richard F. Pittenger and Robert B. Gagosian, "Global Warming Could Have a Chilling Effect on the Military" (October 2003) 33 Defense Horizons 2, The complex relationship between the oceans and the weather continues to be the subject of much scientific research.

[19] Arctic Marine Transport Workshop Report at 5, held at Scott Polar Research Institute, Cambridge University, United Kingdom, 28-30 September 2004. Available online at http://www.institutenorth.org/servet/content/report.html.

[20] According to Marika M. Holland, Cecelia M. Bitz, and Bruno Tremblay, "Future abrupt reductions in summer Arctic sea ice" (December 2006) 33 Geophysical Research Letters 1, the retreat of ice-cover is caused by relationships involving ice-thickness and salinity changes in the Arctic Conveyor to the Arctic Ocean and that when a "tipping point" in that relationship is reached, the annual ice may retreat quickly over the next 30 to 50 years. On the other hand, according to Pittenger and Gagosian, *supra* note 18 at 4-5 , the salinity changes in Northern waters caused by a breach in the Arctic halocline – the thin layer of sea ice and fresh water which prevents the rising warmer salt water from melting the bottom surface of the ice – may in turn disrupt the Ocean Conveyor and induce, over only a few years, cooler unsettled weather in the North Atlantic region that could persist for decades. This cooling would involve colder temperatures in Eastern North America and Western Europe, a stormier North Atlantic, and decreased ice cover in the Arctic Ocean.

disagreement about the immediate prospects of increased freedom of surface navigation in the Northwest Passage[21], the potential for more commercial uses and military operations in Arctic waters, including Canadian waters in the Beaufort Sea and Arctic Archipelago, will be significantly enhanced.[22]

The recent volatility of the global oil and gas markets has served to renew interest in Arctic offshore oil and gas exploration and drilling.[23] Further, the questions of transporting that oil and gas to established and emerging markets have prompted commercial and government investment in Arctic pipelines[24] and consideration of the use of the Northwest Passage for international tanker traffic.

These developments will more likely come to pass if the global demand for oil and gas continues to increase with the emergence of new consumer economies.[25] There is currently no excess capacity in the existing refining and transportation infrastructure and this in turn causes the entire oil and gas supply system to be extremely price-sensitive and responsive to any sudden restrictions to supply.[26] This lack of excess capacity also exposes the

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21 Franklyn Griffiths, “The Shipping News: Canada’s Arctic Sovereignty Not On Thinning Ice” 58 Int’l J. 257 at 263, has argued that the “sovereignty-on-thinning-ice thesis is built on untenable assumptions of relatively speedy and undifferentiated ice-cover reduction throughout the archipelago and indeed the Arctic region as a whole. It minimizes variation and relies on assumptions of uniformity in constructing grounds for international challenge to Canada’s jurisdiction.” Rob Huebert, on the other hand, has argued in “The Shipping News, Part II: How Canada’s Arctic Sovereignty is on Thinning Ice” 58 Int’l J. 295, that the longer seasons of ice-free sailing will increase international interest in both transits – because the potential savings are so attractive - and in destinations such as the port of Churchill. As observed by Canadian Foreign Minister Lawrence Cannon at the Centre for Strategic and International Studies: “Some experts predict that the entire Arctic could be ice free by 2013, others say that this will happen by 2050 …. Our own Canadian Ice Service, however, believes the various internal waterways known as the Northwest PASSAGE will not likely be a reliable commercial shipping route for decades owing to extreme ice variability.” Oliver Moore and Paul Koring, “Arctic losing thick sea ice, U.S. data show” *Globe and Mail* (7 April 2009) A8.

22 Lee Berthiaume, “Northwest Passage Closer to Reality” *Embassy* (17 January 2007) 1. The Russian and Manitoban governments are working together to develop air and maritime cargo routes across the Arctic Ocean.

23 Oran R. Young, “The Age of the Arctic” (Winter 1985-86) 61 Foreign Policy 169, also in David Larson, *Security Issues and the Law of the Sea* (University Press of America, 1994) at 171: It has been estimated that the Arctic region holds between 100 to 200 billion barrels of recoverable oil and approximately 2,000 trillion cubic feet of natural gas. Of that total of oil, it is estimated that there are approximately 50 billion barrels of oil in the North American Arctic. Todd Wilkinson, “Alaskan oil battle may shift offshore: Environmentalists warn of oil exploration in Beaufort Sea” *The Christian Science Monitor*, May 6, 2003: The potential of recoverable oil and natural gas in the Beaufort Sea have been estimated at 4 to 12 billion barrels and 13 to 63 trillion cubic feet respectively. Andy Hoffman, “Nautilus set to make ocean mining a reality” *Globe and Mail* (8 December 2006) B14. Besides the interest in fossil fuels, there have also been sizable investments in recent years in the Arctic mining of diamonds and minerals such as lead-zinc and poly-metallic sulfides from the seabed.

24 Claudia Cattaneo and Jon Harding, “Pipeline Plugged: Frustrated firms halt Mackenzie gas project” *National Post* (29 April 2005). John Ibbitson, “Alaska Pipeline Next On Agenda” *Globe and Mail* (25 February 2005).

25 Robert Samuelson, “A New Era for Oil” *Washington Post* (30 March 2005). Of the world’s total consumption of 84 million barrels per day (MMBD), America consumes the most at 21 MMBD, and China is now second at 6.4 MMBD. It is anticipated that Chinese demand could double by 2020. This projection is based upon the CSIS study by Anthony Cordesman, *The Changing Balance of US and Global Dependence on Middle Eastern Energy Exports,* (Center for Strategic and International Studies, revised March 20, 2005).

26 Dan Ackman, “The Coming Oil Crisis” *Forbes.com* (13 January 2005) at http://www.forbes.com/2005/01/10/cx_da_0110doomoil_print.html. As noted by Stephen Leeb, “There is no margin of error”, since currently, the world has almost no excess supply. The planet is operating at anywhere from 95% to 99% capacity and the only way that the system could respond is continued oil price increases. According to Cordesman, *supra* note 25 at 29, It has been calculated that for every one million barrels per day (1 MMBD) of oil disrupted, world oil prices could increase by $3-$5 per barrel.

complex and expensive oil and gas transportation infrastructure as a critical strategic vulnerability, and liable to targeting states and terrorists. Infrastructure destruction could cause grievous harm to both Canadian and global economic interests.[27]

While the *New York Times* has identified the Arctic waters and seabed as the arena of the next "Great Game" between global powers seeking to attain commercial or economic advantage[28], it should be recalled that beneath the surface of these same waters an intense Cold War submarine competition has been waged in what was generally regarded as a central theatre of naval operations.[29] The competitive jockeying inherent in a multi-polar world order may provide the impetus to revive the political imperative to maintain or deny a credible submarine strategic threat.

The geopolitical factors that contribute to the deployment of nuclear submarines into the Arctic Ocean and waters of the Arctic Archipelago include: the unique qualities of ice-covered and ice-infested waters and their impact upon anti-submarine warfare (ASW)[30]; the centrality of the Arctic Ocean in the Northern hemisphere; the "chokepoint" access to and egress from the Arctic Ocean and its consequential suitability as a defensive bastion[31]; the improvements to ballistic and cruise missile technology[32]; and, at least in the waters of the Canadian Archipelago, no indigenous defensive threat to be avoided.

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[27] Gail Luft and Anne Korin, "Terror's Next Target" (Winter 2004) Journal of International Security Affairs 95 at 97. Not only is oil a valuable target, but it is a "soft" one as well. Oil targets are so vulnerable that in 2002 and 2003, despite intensive counter-terror measures, oil terrorism has become a matter of routine.

Paul Parfomak, *Pipeline Security: An Overview of Federal Activities and Current Policy Issues*, Congressional Research Service Report for Congress, Updated February 5, 2004, RL3 1990. Pipelines serve as unique strategic targets since 40% of the world's oil supply flows through pipelines. See also Ian MacLeod, "Canadian Oil: Target of Terror: Al-Qaeda group calls for attacks as way to disrupt U.S. supply" *Ottawa Citizen* (14 February 2007) A1.

[28] Clifford Krauss, Steven Lee Myers, Andrew C. Revkin and Simon Romero, "As Polar Ice Turns To Water" *New York Times* (10 October 2005).

[29] Jon Bowermaster, 'The Last Front of the Cold War," (November 93) *Atlantic Monthly* 36. Gary Weir, "Virtual War in the Ice Jungle: 'We don't know how to do this'" 28 *The Journal of Strategic Studies* 411. As discussed by Weir, the nature of under-ice naval warfare was unique in that it was defined in terms of surveillance, detection, submerged capability and destructive potential. As he observed, "Control over the opponent became the operational objective and precise knowledge of him the means to that end."

[30] Tom Stefanick, *Strategic Antisubmarine Warfare and Naval Strategy* (Lexington Books, 1987) at 8-32; Le Marchand, *supra* note 12 at 22-25. The acoustic character of Arctic waters is the primary factor considered by any State in its decision to operate in this challenging marine environment. In relation to acoustics, water characteristics (salinity and temperature change), ice stress and fracture noise in the *marginal ice zone* – which is within 50 km of the edge of the ice-pack in both directions - between ice-covered and open-water areas, adverse prevailing weather, and limited biological noise beneath ice-cover. These all contribute to transmission, ambient noise, and noise attenuation characteristics which are quite variable within Arctic waters and are very different from those in open water.

[31] George Lindsey, "Strategic Stability in the Arctic" 241 Adelphi Papers 7. The Soviet Navy was the first to embrace the concept of Arctic bastion defence. Mike Perry, "Rights of Passage: Canadian Sovereignty and International Law in the Arctic" 74 U. Det. Mercy L. Rev. 657 at 658, citing Canadian Forces Northern Area Command Briefing, Department of National Defence, 1996: This strategic interest in operating in the Arctic waters has survived successor Russian governments. On the 25th of August 1995, the Russians launched two ICBMs from a Typhoon-class submarine from the waters between the North Pole and CFS Alert. Rear Admiral R.A. Golosov (ret.) provided the perspective of one Russian senior naval officer in "Opening Up the Arctic Region and Russia's Submarine Fleet" (April 2006) Military Thought at 179: "Generally speaking, some quarters are out to take advantage of Russia's temporary economic and military weakness in a clear effort to curtail Russia's presence in the Arctic region. Our "friends" are pursuing two strategic goals: first, undermine Russia's economy still further and second, open up the Arctic Ocean as a potential springboard for strikes at Russian territory involving nuclear-powered submarines carrying cruise and ballistic missiles in the event of a military conflict. It should also be borne in mind that under the terms of the START-2 Treaty ratified by Russia, this country has the right to deploy 50% of its strategic nuclear potential aboard nuclear-powered submarine missile-carriers. Most of them are incorporated into the Northern Fleet, and the zone of their operations is the Arctic region. Destroying them in the event of a war as a matter of priority is one of the main tasks of the U.S. Navy and NATO."

[32] Lindsey, *supra* note 31 at 22: Modern submarine-launched ballistic missiles such as the Russian SS-N-20 and -23 have ranges of 8,300 km. The areas covered by these ranges, if launched from Russia's Arctic coastal areas include all of North America, Western Europe, and China.

Indeed, it has been suggested that there are three types of submarine operations that might be conducted in the waters of the Canadian Arctic archipelago: transit between the Arctic Ocean basins and the North Atlantic; launch of cruise missiles; and surveillance or ASW patrol.[33] An illustration of the value of the Northwest Passage as a nuclear submarine transit route was provided in the summer of 1962 when the USS *Skate* sailed the 1000-nm Parry Channel in 2 ½ days.[34] Further, the development of ballistic missile defence systems has jeopardized the effectiveness of intercontinental and submarine-launched ballistic missiles. Instead, the "ground-hugging" flight profiles enjoyed by cruise missiles allows them to evade electronic defence systems and elevates their status as the preferred strategic weapon. However, their reduced ranges will force any nuclear cruise missile submarines targeting areas of southern Canada and northern U.S. to operate in close proximity to the mainland.[35] Finally, the command and control requirements of strategic missile submarines limit the possibilities for patrolling to areas where communications antennae can be raised. These areas include Lancaster and Smith Sounds, the Davis Strait, Amundsen Sound and the Gulf of Boothia in the summer season, and southern Davis Strait to Hudson Bay in the remainder of the year.[36]

The challenges presented by Arctic submarine operations serve to narrow any technical advantages in ASW enjoyed by front-rank navies in southern waters and may well entice more combatants to conduct polar operations than simply the Russian or NATO navies. However, the operational challenges of operating beneath the ice in Arctic waters must not be under-estimated. The piloting of large submarines with relatively brittle control surfaces and propulsion gear in shallow-draft waters, in proximity to deep-draft ice that is constantly moving, in water with ever-changing temperature and salinity levels affecting buoyancy, requires a sophisticated standard of practiced seamanship. In addition to the usual challenges of submarine operations, the requirement for forward-looking sonar capable of detecting ice keels and polynas, accurate depth sounding, precise inertial guidance systems, and reliable polar communications, all present substantial challenges to navies wishing to conduct polar operations.[37] Further, the predicted futures of a more unsettled climate and broadened areas of ice-infestation (rather than ice-covered) in the Arctic will most likely create a dramatically more difficult environment to conduct ASW operations, and entice even more navies to conduct Arctic operations.[38]

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[33] Peter Hayden, *The Strategic Importance of the Arctic: Understanding the Military Issues*, DND Strategic Issues Paper No. 1/87 (March 1987) 14.

[34] Waldo K. Lyon, "The Navigation of Arctic Polar Submarines" 37 Journal of Navigation 155 at 156. As noted by Rear-Admiral F.W. Crickard in "An Anti-Submarine Warfare Capability in the Arctic a National Requirement" (April 1987) *Canadian Defence Quarterly* 24 at 27. Further, in March 1977 the *Manchester Guardian* reported that Soviet submarines had successfully navigated the Robeson Channel between Ellesmere Island and Greenland.

[35] Haydon, *Strategic Importance*, Strategic Issues Paper, 12. The U.S. Navy Tomahawk and the Russian SS-NX-21 (3,000-km range) are two examples of submarine-launched cruise missiles (SLCM). Bernard Cole, *The Great Wall at Sea: China's Navy Enters the Twenty-First Century* (U.S. Naval Institute Press, 2001) at 106. The Chinese Peoples Liberation Army-Navy (PLAN) have been reported as developing long-range – more than 200-km - cruise missiles that will be capable of being launched from submerged submarines.

[36] See Haydon, *supra* note 35 at 16-17, for a discussion about the limited number of "choke-points" where submarine patrols could realistically be established. These would include the southern or northern ends of the channels in the Archipelago leading to the Arctic Basin. Alternatively, all routes could be controlled by positioning submarines in both the Lancaster and Smith Sounds or, as another option, in the Davis Strait.

[37] Alfred S. McLaren, *Unknown Waters: A First-Hand Account of the Historic Under-Ice Survey of the Siberian Continental Shelf By USS Queenfish (SSN-651)* (University of Alabama Press, 2008). Capt(N) McLaren's account of the 1970 Arctic Ocean voyage of the Sturgeon-class nuclear attack submarine presents a detailed account of the myriad of difficulties to be faced when conducting under-ice operations.

[38] Weir, *supra* note 29 at 425 notes that the ice recession will dramatically change the acoustic-detection equation and make the ASW surveillance problem more difficult. As Weir observes, "As the surveillance problem becomes more complex, the population of possibly hostile forces will likely increase given the attractiveness of the region as a route and center of virtually untapped natural resources."

To summarize, Arctic waters including the waters of the Arctic Archipelago will become increasingly attractive and accessible to commercial interests wishing to take advantage of polar transit routes or simply transporting resources such as oil and gas from expanded Arctic drilling sites to southern markets. However, it is a misreading of Canada's strategic quandary to argue that her Arctic maritime challenges can be met solely by law enforcement. It must not be overlooked that those same waters continue to possess the physical qualities that make them attractive to navies for the conduct strategic nuclear patrols. This attraction will force other States in their turn to respond by conducting strategic under-ice defensive ASW operations.[39]

These tandem strategic challenges present Canada with a complex operational environment in which to exercise its sovereign rights within its historic internal waters. The character of its legal position will directly influence the choice of the naval or marine security operation required to meet those challenges.

III – CANADA'S ARCTIC WATERS: SECTOR THEORY TO HISTORIC INTERNAL WATERS

By the middle of the 20th century, the Canadian claim to the Arctic lands and islands of the archipelago had become generally recognized by other Arctic states.[40] In addition, there was little protest to the Canadian claim that the waters of Hudson Bay and Hudson Strait were Canadian waters by "historic title in accordance with universally accepted international law doctrine applying to historic bays."[41]

However, Canada's claim to the Arctic waters between those islands and the right to control access to the straits – collectively known as the Northwest Passage – has never achieved the same level of international recognition. The original transfers of title from Great Britain to Canada made no mention of the Arctic waters in their descriptions, but instead focused upon the territory and islands.[42] The sector theory – that Canada could claim sovereignty between two lines of meridian north to the Pole – would be proposed to buttress those Arctic claims of title from 1907[43] until its quiet displacement in the early 1980's. Since the sector theory achieved limited

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[39] Cole, *supra* note 35 at 34: "PLAN units conducted its first Arctic expedition in the summer of 1999, engaging in oceanographic studies and sea-bottom research – both of which have operational implications for the PLAN ASW capability."

[40] V. Kenneth Johnson, "Canada's Title to the Arctic Islands" (1933) 14 Canadian Historical Review 24. Robert Reid, "The Canadian Claim to Sovereignty over the Waters of the Arctic" (1974) 12 Can. Y.B. Int'l L. 111 at 114. The arbitral decisions in the *Island of Palmas Case* (1928) 22 Am. J. Int'l L. 867 and the *Clipperton Island Case* (1932) 26 Am. J. Int'l L. 390, and decision of the Permanent Court of International Justice in the *Eastern Greenland Case*, (1933) Per. Ct. Int. Jus. Ser. A/B, No. 53, at 22 all confirmed that "the requisites of effective occupation depended upon the circumstances of the territory, and that settlement or local administration was not necessarily required for uninhabited territory."

[41] Ivan Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions" (1963) 9 McGill L. J. 200 at 219.

[42] The first Imperial Order in Council dated 23 June, 1870, reproduced in *Statutes of Canada, First Parliament, 35th Vict., 1872*, at *lxiii*, when the British transferred "all lands and Territories within Rupert's Land" that had been originally granted in 1870 to the Hudson's Bay Company. As a result of the public concern that this original grant was insufficient, on the 3rd of May, 1878, the Parliament of Canada adopted a joint address of both the Canadian House and Senate to the British Parliament requesting an acceptably complete description. Despite this Canadian entreaty the British government only agreed to declare in Imperial Order in Council, 31 July, 1880, reproduced in *Statutes of Canada, Fourth Parl., 44th Vict., Vols I-II, 1880-81, ix-x*, that: "… all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any of 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…."

[43] In 1907, Senator Pascal Poirier proposed a resolution before the Canadian Senate formally declaring that Canada would claim possession of the lands and islands "that are to be found in the waters between a line extending from the eastern extremity north, and another line from the western extremity north." (*Canadian Senate Debates*, 20 February, 1907, 271).

official government currency,[44] and lacked support among the other Arctic States,[45] the Canadian government hesitated to apply it to the waters and islands of the Arctic Archipelago,[46]and as a result it was denied any measure of general international acceptance.

In the interim, the long international consensus enjoyed by the law of the sea was being challenged by the rapidly expanding and competing national claims of adjacent coastal jurisdictions and territorial sea limits. The 1945 *Truman Proclamations*[47] had prompted "a rash of claims to very extensive territorial sea or fisheries jurisdictions, followed by a steady increase in the number of states claiming jurisdiction over their territorial seas or for fishing purposes up to a limit of twelve miles."[48] For Canada, the post-war years had seen a rapid expansion of foreign fishing off her Atlantic and Pacific coasts and the extension of fishery regulations to twelve miles was considered

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[44] In 1926 the Government of Canada established by Order in Council (*Canada Gazette*, 31 July 1926, 382) the Arctic Islands Preserve, which described the northern portion of the Preserve using sector terminology.

In addition, Lester Pearson, the Canadian Ambassador to Washington at the time, wrote in 1946 in an article published in *Foreign Affairs*: "A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland but the islands and frozen sea north of the mainland between the meridians of its east and west boundaries, extending to the North Pole." Lester B. Pearson, "Canada Looks Down North" (July 1946) 24 Foreign Affairs 638.

[45] Reid, *supra* note 40 at 116. Denmark, Norway, and the United States have consistently denied the application of the sector theory doctrine to the Arctic region. The Soviet Union issued a decree in 1926 claiming all the lands discovered and yet to be discovered in its sector, but had not applied the sector theory to the ice or waters beyond her territorial limits of 12 miles.

[46] In 1956 the Minister of Northern Affairs and Natural Resources, Jean Lesage, stated to the House of Commons (1956 *Debates*, House of Commons, Canada, vol. 7, 6955):

"We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic Islands. There is no doubt about it and there are no difficulties concerning it . . . 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."

On the 10th of March 1969, Prime Minister Trudeau responded to a question from John Diefenbaker in the House of Commons (*House of Commons Debates*, Vol. VI, 1969, 6396), that:

"I believe the sector theory applies to the seabed and the shelf. It 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."

However, later in the same Parliament on the 15th of May, 1969, the Prime Minister made the following statement concerning Canadian sovereignty in the Arctic, referring to an earlier statement in 1958 by the then minister of northern affairs:

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

The Prime Minister continued, observing that it was known that not all countries would accept the view that the waters between the islands of the archipelago are internal waters over which Canada has full sovereignty, and concluded that "the law of the sea is a complex subject which, as can be understood, may give rise to differences of opinion."

[47] Official Documents, 40 Am. J. Int'l L. Sup 45 (1946). On 28 September, 1945 American President Truman issued *Presidential Proclamation 2667* on the *Continental Shelf* and *Presidential Proclamation 2668* on the *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*.

[48] A.E. Gotlieb, "The Canadian Contribution to the Concept of a Fishing Zone in International Law" (1964) 2 Can. Y.B. Int'l L. 55 at 59.

a government priority. In addition, the 1951 International Court of Justice decision in the *Anglo-Norwegian Fisheries Case*[49] had generated interest in the drawing of straight baselines around the Canadian coastlines.[50]

That the primary negotiating objective of the Government of Canada was to obtain further international authority over the regulation of its coastal fisheries was reflected in its negotiations during the first two Law of the Sea Conferences. At the First Conference on the Law of the Sea in February 1958, Canada had intended to seek agreement on the extension of national jurisdiction over coastal fisheries to twelve miles. Mindful of her own requirements to maintain global trade, Canada had little enthusiasm for the establishment of a twelve-mile territorial sea, as it wished to avoid the "undesirable consequences for air and sea navigation" and sought to limit the twelve-mile jurisdiction to fisheries regulation and enforcement.[51] However in the end, the results of the First Conference were the four 1958 *Conventions* and one *Optional Protocol* that did not set out any prescribed limit for a territorial sea or contiguous zone.[52]

The Second Conference on the Law of the Sea in 1960 was called "for the purpose of considering further the questions of the breadth of the territorial sea and fishing limits".[53] The Canadian and American delegations jointly proposed a six-mile territorial sea and a further six-mile exclusive fishing zone subject to a ten-year phasing out period for the fishing operations of those countries which had fished regularly in the outer zone during the previous five years.

In the end result however, no agreement was reached on either the breadth of either the territorial sea or of the fishing zone. The Government of Canada, after a period of consultation with its allies and like-minded states, acted unilaterally in passing in July of 1964 the *Territorial Sea and Fishing Zones Act*[54] establishing both a 3-mile territorial sea and a 12-mile exclusive fisheries zone. This legislation also authorized – for the first time in Canadian waters - a straight baseline regime: regulations were issued in 1967 establishing straight baselines on areas of the Atlantic coast and, in 1969, they were issued for the Pacific coast.[55]

The 1968 election of the Trudeau government augured a new direction in Canadian foreign policy – "unilateralism" was the watchword - with emphasis upon the protection of Canadian national self-interest, rather

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49 *Anglo-Norwegian Fisheries Case (Fisheries Case)*, [1951] I.C.J. Rep. 116.

50 Gotlieb, *supra* note 48 at 62: "The Court's decision and its application to Canada were often discussed in parliament, and demands made that the government declare its position with regard to the status of specific bodies of water off her coasts."

51 For a review of the Canadian position during the negotiations, see Gotlieb, *supra* note 48 at 64. For the American perspective, see Arthur H. Dean, "Freedom of the Seas" (1958-1959) 37 *Foreign Affairs* 83 and Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight For Freedom of the Seas" (1960) 54 Am. J. Int'l L. 751.

52 *Convention on the Continental Shelf*, entered into force on 10 June 1964, U.N. Treaty Series, vol.499, p.311; *Convention on Fishing and Conservation of the Living Resources of the High Seas*, entered into force on 20 March 1966, U.N. Treaty Series, vol. 559, p.285; *Convention on the High Seas,* entered into force on 30 September 1962, U.N. Treaty Series, vol. 450, p.11, p.82; *Convention on the Territorial Sea and the Contiguous Zone*, entered into force on 10 September 1964, U.N. Treaty Series, vol. 516, p.205; *Optional Protocol of Signature concerning the Compulsory Settlement of Disputes*, entered into force on 30 September 1962, U.N. Treaty Series, vol. 450, p.169.

53 Off. Rec. of 6th Committee, 13th session, at 161. As noted by Gotlieb, *supra* note 48 at 64, the 1960 Conference was convened by General Assembly resolution 1307 (XIII).

54 S.C. 1964, c. 22. Section 3 provided for the 3-nm territorial sea and section 4 provided for the fishing zones.

55 Order-in-Council PC 1967-2025, 26 October 1967 established the straight baselines on the Atlantic coast, and Order-in-Council PC 1969-1109, 29 May 1969 established them on the Pacific coast. J. Bruce McKinnon, "Arctic Baselines: A Litore Usque Ad Litus" (1987) 66 Canadian Bar Review 790 at 797. According to Mr. McKinnon, because the only references to baselines before 1964 were to "normal" baselines following the low water mark on the coast, application of s. 5(3) of the *Territorial Sea and Fishing Zone Act* left a high seas corridor through the Northwest Passage until Canada increased the width of her territorial sea to twelve miles in 1970.

than broader continental or internationalist interests.[56] At the same time, the wreck of the oil tanker *Torrey Canyon* off the Cornish coast in 1967[57] and the demonstration transits of the SS *Manhattan* in 1969 and 1970 through the Northwest Passage had galvanized Canadian public and parliamentary concern about the risks of oil pollution and, in particular, the risk of oil pollution in the waters of the Arctic.[58]

The Canadian Government's response to these events represented a critical departure from its long-standing oceans policies. On the diplomatic front, Canada withdrew from the compulsory jurisdiction of the International Court of Justice in relation to questions of Canada's Arctic claims.[59] In Parliament, the Government amended the *Territorial Sea and Fishing Zones Act*[60] – extending the territorial sea to 12 nautical miles – and enacted the *Arctic Waters Pollution Prevention Act*[61] – extending a pollution enforcement zone into "arctic waters" 100 nautical miles from the low-water mark adjacent to the Arctic Islands to the east and the 141st meridian to the west. The United

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[56] Ivan L. Head, "Foreign Policy of the New Canada" (1971-1972)50 Foreign Affairs 237. The *Foreign Policy for Canadians*, Canada Department of External Affairs was released in 1969 and hailed as a departure from the traditional "helpful fixer" role. The policies were to "accord with our national needs and resources, with our ability to discharge Canada's legitimate responsibilities in world affairs".

[57] In March of 1967 the *Torrey Canyon* – a tanker sailing under Liberian flag and carrying approximately 120,000 tons of crude oil from Kuwait – grounded on the Seven Stones Reef between Lands End and the Scilly Isles. The RAF and RN bombed the "supertanker" in an abortive effort to burn off the oil. The oil slick contaminated 70 miles of Cornish coast and thousands of seabirds were killed as a result of both the oil and the detergent used to disperse the slick.

[58] In the summers of 1969 and 1970, the SS *Manhattan* conducted demonstration transits between the new Alaskan Prudhoe Bay oil fields and the east coast of the United States. During the 1969 transit there was a Canadian government official on board the *Manhattan* – RCN Capt(N) T.C. Pullen – and the Canadian Coast Guard Icebreaker *J.A. Macdonald* accompanied the transit. During the 1970 transit, the *Manhattan* took a route different from the first and was again accompanied by the *J.A. Macdonald*. Kenneth C. Eyre, "Forty Years of Military Activity in the Canadian North, 1947-87" 40:4 *Arctic* 292 at 296, described the Canadian public response to the transits as near-hysteria.

[59] Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, reprinted in 9 *I.L.M*. 598 (1970). Mitchell Sharp, then Canadian Minister for External Affairs, admitted that Canada was "not prepared to litigate with other states on vital issues concerning which the law is either inadequate, non-existent or irrelevant to the kind of situation Canada faces, as in the case of the Arctic." Canada, House of Commons, *Debates*, Vol. 6, at 5952 (April 16, 1970).

See also Allan Gotlieb and Charles Dalfen, "National Jurisdiction and International Responsibility" [1973] 67 Amer. J. Int'l L. 229 at 235: The authors stated that this withdrawal from the compulsory jurisdiction of the I.C.J. was, from the standpoint of Canada's approach to international law, "the most decisive act in the whole Canadian story over the past two decades...." They further suggested the reason for the withdrawal was that this "action made it possible for the Canadian Government to avoid the necessity of seeking compromise resolutions or agreements. It was now free to act in the absence of agreement; it became free resolutely to pursue stringent and more absolute concepts of international responsibility when its national self-interest was affected and to implement these concepts unilaterally in the absence of agreement."

[60] *Act to Amend the Territorial Sea and Fishing Zones Act*, c. 68, 1969-70 S.C. 1243 (1970) (Can.).

[61] *Act to Prevent Pollution of Areas of the Arctic Waters Adjacent to the Mainland and Islands of the Canadian Arctic* (*Arctic Waters Pollution Prevention Act* (AWPPA)*)*, c. 47, 1969-70 S.C. 653 (1970)(Can.). The Act received Royal Assent on June 26, 1970 and was proclaimed in force on August 12, 1972. The AWPPA prohibited the deposit of "waste" in Arctic waters; allowed the Governor in Council to prescribe "shipping safety control zones" in any area of the Arctic waters, make regulations relating to navigation in the zones and prohibit entry into the zone if it didn't meet the prescribed regulations. Regulation SOR/72-253 was issued in July 1972 and required all ships traveling through the shipping control zone to submit evidence of financial responsibility. Regulation SOR 72-303 designated 16 shipping control zones, which were established according to seasonal ice conditions throughout the Archipelago within 100 nm of the coastlines (normal baselines). The AWPPA is not only still in force, but proposals are presently in train to extend its application. In August 2007 Prime Minister Stephen Harper announced the introduction of new legislation extending the pollution prevention zone in arctic waters from 100 to 200 nm, extending the NORDREG reporting zone to 200 nm, and introducing a mandatory ship reporting system . Bill C-3, An *Act to amend the Arctic Waters Pollution Prevention Act* (S.C. 2009, ch. 11) received Royal Assent on the 11th of June 2009 but has not yet been brought into force.

States government immediately protested the extension of the territorial sea and the new enforcement zone as illegal under international law[62] and Canada replied "that the unilateral act was taken in order to protect the environment until such time as the international community agreed to act cooperatively and set new and necessary standards of international conduct."[63]

In taking these unilateral actions the Government of Canada served notice that it was merely pursuing the functional enforcement powers - or limited sovereignty – necessary to achieve "a specific and vital purpose" such as pollution prevention.[64] A popular interpretation for some in Canada was that it represented the Government's rejection of the "traditional" law of the sea in favour of a more modern approach. J.A. Beesley, the Legal Advisor/Director General of the Bureau of Legal and Consular Affairs for the Department of External Affairs expressed this view in a contemporary article:

> "The traditional law of the sea in general is oriented towards the concept of unfettered freedom of navigation on the high seas and thus favours flag-state jurisdiction while seeking to limit the jurisdiction of coastal states. As a result this essentially laissez-faire system is inadequate in its provisions for the prevention and control of marine pollution. Those provisions, as they are found in various conventions, do not properly recognize the paramount need for environmental preservation and do not strike a proper balance between the interests of the flag states in unfettered rights of navigation and the fundamental interest of the coastal states in the integrity of their shores. Flag-state jurisdiction does not carry with it, for instance, the logical consequence of flag-state responsibility for damage to the environment. The whole system is particularly inadequate, as the principle on which it rests is particularly irrelevant, to the special situation pertaining to the Arctic."[65]

While this functional approach would continue to achieve a degree of international legal acceptance, it could neither serve as a legal nor political substitute for absolute sovereignty. As observed in a February 27, 1973 letter from the Legal Bureau of the Department of External Affairs:

> "…the Arctic Waters Pollution legislation does not make and does not require an assertion of sovereignty. The legislation is related to pollution control in Arctic waters only. It represents a lawful extension of a limited form of

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62 Department of State Statement on Government of Canada's Bills on Limits of the Territorial Sea, Fisheries and Pollution, U.S. Department of State Press Release No. 121, April 15, 1970, reprinted in (1970) 9 I.L.M. 605. On April 17, 1970 the Canadian Secretary of State for External Affairs tabled in the House of Commons a Response to the American Statement, also reprinted in (1970) 9 I.L.M. 607.

63 Head, *supra* note 56 at 242. See also Michael M'Gonigle, "Unilateralism and International Law: The Arctic Waters Pollution Prevention Act" (1976) 34 U. Toronto Fac. L. Rev. 180, for a contemporaneous Canadian view of the purported benefits of the approach.

64 House of Commons, *Debates*, April 16, 1970, 5951. The AWPPA was introduced April 16, 1970 by the Secretary of State for External Affairs, the Hon. Mitchell Sharp, who described for the House what was meant by the "functional approach": "The Arctic waters bill represents a constructive and functional approach to environmental preservation. It asserts only the limited jurisdiction required to achieve a specific and vital purpose. It separates a limited pollution control jurisdiction from the total bundle of jurisdictions which together constitutes sovereignty. In this it resembles in some degree the approach which Canada was among the first to adopt with respect to jurisdiction over the exploitation and conservation of fishery resources." J.A. Beesley later distinguished between the "functional approach" and "sovereignty" in "The Law of the Sea conference: factors behind Canada's stance" (July/August 1972) *International Perspectives* 28 at 33: ". . . whereby states assert over various kinds of "contiguous zones" only that amount and that kind of jurisdiction necessary to meet the particular problem in question. When Canada has acted unilaterally, it has refrained as much as possible from asserting total sovereignty and instead has asserted just the sovereignty necessary to fulfill the particular functions required. Sovereignty comprises a whole bundle of jurisdictions – that is to say, everything from criminal law, customs law, fishing regulations and anti-pollution control to security measures."

65 J.A. Beesley, "Rights and Responsibilities of Arctic Coastal States: The Canadian View" 3 J. Mar. L. & Com. 1 at 7. On the other hand, the Canadian initiative drew almost immediate critical comment from interested American legal academics. See Richard Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea" (1970-1971) 69 Mich. L. Rev. 1, and Louis Henkin, "Arctic Anti-Pollution: Does Canada Make – or Break – International Law" (1971) 65 Am. J. Int.l L. 131.

> jurisdiction which was required to ensure the preservation of the Arctic environment, having regard to the unique nature and particular vulnerability of this environment, the disastrous consequences which could flow from its pollution or degradation, and the especially severe risks involved in the navigation of Arctic waters."[66]

In addition to the new legislation and to the withdrawal from the compulsory jurisdiction of the I.C.J., the Government of Canada prepared to engage in the negotiations in preparation for the Third Conference of the Law of the Sea which was to commence in the summer of 1974. While there were a number of important issues on the Conference's agenda that interested many coastal and maritime states around the globe – including regulation of anadromous species (salmon) and the passage regime through international straits – "observers concluded that acceptance of the Arctic waters regime was a dominant objective in Canada's UNCLOS policies."[67] This objective was sought by openly pursuing the "functional approach"[68] in seeking international agreement on Canada's right to impose national pollution regulations in Arctic waters and to "refrain from making a commitment on the straits issue until the question of special provisions for Arctic waters was resolved."[69] In hindsight one may observe that this diplomatic embrace of the functional approach precluded the championing of wider questions of absolute sovereignty, including that of Arctic sovereignty.

The agenda and course of negotiations ultimately obliged Canada in 1976 to find a compromise with the United States. While Canada was able to secure a provision authorizing non-prejudicial national standards to "ice-covered areas," in return Canada acquiesced to American proposals on the transit passage regime for international straits.[70] Hailed in Canada as a success, the "Arctic exception" survived the remaining 6 years of treaty negotiations and was included as Article 234 in the final draft of the *Convention* adopted in December of 1982. The provision stated:

> "Article 234
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> Ice-covered areas
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> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climactic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."

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66 "Canadian Practice in International Law during 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1974) 12 Can. Y.B. Int'l L. 272 at 283. Mr. L.H.J. Legault, Head, Law of the Sea Section, Legal Operations Division, Department of External Affairs also wrote a similar caveat in "The Freedom of the Seas: A License to Pollute?" (1971) 21 U.T.L.J. 211 at 219:

"Although Canada has always regarded the waters of the Arctic archipelago as Canadian waters, it should be emphasized that the Arctic waters pollution legislation is in no way based on and in no way represents an assertion of sovereignty over the waters concerned. It represents rather a functional exercise of jurisdiction in response to an objective concrete need, and it is based on scientific and ecological considerations rather than territorial imperatives. Thus the issues raised by this legislation concern not sovereignty but the right of the coastal state to take action to protect itself against a grave threat to its environment."

67 D.M. McRae, "Negotiation of Article 234" in Franklyn Griffiths, ed., *Politics of the Northwest Passage* (McGill-Queen's University Press, 1987) 104; D.M. McRae and D.J. Goundrey, "Environmental Jurisdiction in Arctic Waters: The Extent of Article 234" (1982) 16 U. Brit. Colum. L. Rev. 197 at 210-215.

68 Beesley, *supra* note 63 at 33: "What is the particular policy being pursued by Canada on the many unresolved Law of the Sea issues? The idea basic to a Canadian approach – unilateral, bilateral and multilateral – to all of the issues mentioned is "functionalism"."

69 McRae, *supra* note 67 at 106.

70 *Ibid.*, at 109.

The provision was not situated in the portion of the *Convention* that dealt with the international straits regime, and as a result it has been argued by commentators in Canada that, "ergo the international straits regime is not applicable to the Northwest Passage."[71] However, it is more accurate to simply state that regardless of whether the adjacent waters are considered to be an international strait or not, if they are ice-covered for most of the year the coastal State can adopt and enforce the more restrictive laws and regulations for the prevention, reduction and control of marine pollution.[72]

In addition to the extension of pollution control in Arctic waters, in 1978 the Government of Canada prescribed a Fishing Zone in the area of the Arctic Ocean adjacent to the coastline and islands of the Canadian Arctic and extending "200 nautical miles from the nearest point on the baseline from which the territorial sea of Canada is measured in the Beaufort Sea, the Arctic Ocean and the Lincoln Sea, but does not include any areas of the internal waters or territorial sea of Canada."[73]

It should be recalled that the Third Convention negotiations were not the only ongoing matters related to maritime sovereign rights involving Canada and the United States. For example, in 1977 the Canadian Government had adopted a 200-mile exclusive fishing zone in the Atlantic Ocean which relied upon straight baselines.[74] In addition, in 1981 the International Court of Justice (I.C.J.) began hearing the *Gulf of Maine Case*[75] to resolve the outstanding maritime and continental shelf delimitation question between the two countries on the Atlantic coast. The I.C.J. considered substantial evidence and complex legal arguments in order to determine "the criteria that it regards as the most equitable for the task to be performed" and "the method or combination of practical methods whose application will best permit their concrete implementation."[76] The Court rejected the equitable criteria proposed by both parties and instead recognized the primacy of the actual physical geography.[77] In relation to the most contentious segment of the delimitation in the vicinity of the Georges Bank, the Court accepted Canadian arguments to reject the American assertion of "historic rights" and instead adopted the essence of "equidistance – special circumstances" test from Article 6(2) of the 1958 *Territorial Sea Convention*.[78] While Canada would not be

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[71] *Ibid.*, at 110.

[72] McRae and Goundrey, *supra* note 67 at 221, notes that the requirement that the laws and regulations "have due regard to navigation" in the exclusive economic zone should not be interpreted as allowing the coastal States greater power to regulate and control marine pollution in its EEZ than in its territorial sea: "Accordingly, it must be assumed that in enacting laws and regulations for the prevention, reduction, and control of marine pollution in ice-covered areas the coastal state would be unable to exceed the power it has to enact such laws and regulations in respect of the territorial sea. Thus, the coastal state would not be able to impose requirements on foreign ships having the effect of impairing or denying the right of innocent passage, or to discriminate against ships carrying cargo to and from any state."

[73] *Fishing Zones of Canada (Zone 6) Order*, (1978) C.R.C. Vol XVIII, c. 1549, 13747.

[74] SOR/77-173, *Canada Gazette* Part II, Vol. 111, No. 5, at 652 (9 March, 1977).

[75] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Gulf of Maine Case)* [1984] ICJ Rep. 246. This decision established the legal criteria for drawing a single ocean boundary delimiting both the water column and the continental shelf sea bed. Ted McDorman, Phillip Saunder and David VanderZwaag, "The Gulf of Maine boundary: Dropping anchor or setting a course?" (April 1985) Marine Policy 90.

[76] *Ibid., Gulf of Maine case* at 312, para 156.

[77] Majority judgment, para 194, as cited in McDorman, *supra* note 75 at 96.

[78] According to McDorman, *supra* note 75 at 98, that:

"[H]aving determined the line utilizing equitable criteria the chamber was left to test whether the result was equitable. In making this determination the chamber referred to the evidence presented regarding economic and human geography, indicating the importance of the area, particularly Georges Bank, to the parties. These political and economic considerations, which encompassed fishing activities, hydrocarbon exploration, scientific research and defence were not seen as 'legal' considerations and hence were not considered as equitable criteria."

bound by either its arguments before the I.C.J. or to accept the Court's diminishment of the legal force of "historic rights" as determinative in the Arctic context, there was a clear erosion of the general principle in international law to respect "historic rights" in maritime delimitation claims.

In the summer of 1985 the U.S. State Department informed representatives from Canada's Department of External Affairs that the U.S. Coast Guard icebreaker *Polar Sea* would be transiting the Northwest Passage in July and August.[79] While the Canadian Government did not admit that the voyage of the *Polar Sea* threatened Canadian Arctic "sovereignty", on the 10th of September, 1985 the Minister of Foreign Affairs, Joe Clark, made what would become the last significant formal Government of Canada statement in relation to the nature of its claims over the waters of the Arctic Archipelago. Clark declared that the Government of Canada would "exercise full sovereignty in and on the waters of the Arctic Archipelago and this applies to the airspace above as well."[80] He indicated that this sovereignty would be secured by a number of legislative, regulatory, and operational initiatives. The most significant of these was the immediate issuance of an Order-in-Council establishing straight baselines to come into effect on January 1, 1986 around the perimeter of the Arctic Archipelago to "define the outer limit of Canada's historic internal waters" and the extension of Canada's territorial waters 12 nautical miles seaward of those baselines.[81] The Government intended to seek the early adoption of the *Canadian Laws Offshore Application Act* to enable the application of Canadian civil and criminal laws in these offshore areas for the first time. Further, the Government expressed its intention to enter talks with the U.S. to secure an agreement on co-operation in Arctic waters and to immediately withdraw the reservation to the compulsory jurisdiction to the I.C.J. by a letter to the Secretary-General of the United Nations.[82] Finally, the Government announced its intention to increase aircraft surveillance and naval activity in the eastern Arctic and to construct a Polar Class 8 icebreaker.

The Government was clear that its claim would be complete: Canada would assert "full sovereignty" over the waters of the Arctic Archipelago. The Minister of Foreign Affairs, Joe Clark, was just as explicit in declaring that Canada's claim was far more extensive than mere functional sovereign rights:

> "The exercise of functional jurisdiction in Arctic waters is essential to Canadian interests. But it can never serve as a substitute for the exercise of Canada's full sovereignty over the waters of the Arctic Archipelago. Only full sovereignty protects the full range of Canada's interests. This full sovereignty is vital to Canada's security. It is vital to Canada's Inuit people. And it is vital even to Canada's nationhood."[83]

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[79] Adam Singer, "Testing the Northwest Passage" *Alberta Report* (12 August, 1985) 26; Christoper Kirkey, "Smoothing Troubled Waters: the 1988 Canada-United States Arctic Co-Operation Agreement" (1994-1995) 50 Int'l J. 401 at 403; Ted McDorman, "In the Wake of the Polar Sea" (October 1986) *Marine Policy* 243 at 243. While two Canadian Coast Guard officers served on board during the transit, the U.S. was seen to have deliberately avoided seeking Canadian permission for the transit.

[80] Canada, House of Commons, *Debates*, Vol. 5, at 6463 (September 10, 1985).

[81] *Territorial Sea Geographical Co-Ordinates (Area 7) Order* (P.C. 1985-2739, 10 September 1985).

[82] *Acceptance of I.C.J. Compulsory Jurisdiction With Regard to Disputes Arising Out Of Jurisdictional Claims*, September 10, 1985, 24 *I.L.M.* (1985) 1729.

[83] *Supra* note 80.

While the American Government protested the Canadian claims in 1985 and 1986[84], the announcement of the initiatives was well-received by many in Canada[85] and the straight baselines were proclaimed. However, despite these temporary displays of enthusiasm, the remaining initiatives were neither enacted nor introduced as described by Mr. Clark. The Polar Class 8 icebreaker was never built and the increased surveillance quickly reduced to one or two flights per year. The Canadian Government enforcement presence in the Arctic was allowed to dissipate once more.

IV – CANADA'S ARCTIC WATERS: DEVELOPMENTS IN CANADA'S OCEANS LAW SINCE 1985

Despite these many setbacks associated with the 1985 declaration by the Canadian Foreign Minister, the *Canada-U.S. Arctic Co-Operation Agreement*[86] was finally signed on the 11th of January, 1988. Article 3 of the agreement provided that "the Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada." However, any direct support for Canada's claim based upon this "Icebreaker Agreement" was undercut by Article 4 of the *Agreement*:

> "Nothing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties."

At the same time as it was trying to regularize its maritime Arctic claims, the Government of Canada was enacting and amending its full array of maritime laws in order to keep pace with international legal developments. Despite its debut in 1985, the *Canadian Laws Offshore Application Act*[87] was not entered into force until the 4th of February, 1991. Significantly, this *Act* provided statutory definitions of "internal waters" and "territorial seas". In 1996 both the *Canadian Laws Offshore Application Act* and the *Territorial Sea and Fishing Zones Act* were repealed and replaced by the *Oceans Act*[88] in a general update of the legislative framework for the exercise of Canadian maritime sovereignty, including in Arctic waters.

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84 National Claims to Maritime Jurisdictions, 8th Rev., *Limits in the Seas No. 36*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, May 25, 2000.

85 Donald R. Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment" (1993) 26 Cornell Int'l L. J. 331 at 337: "By the proclamation of straight baselines around the Arctic archipelago, Canada had in one swift action made all of the waters that fell within the baselines "internal waters" of Canada over which it had complete sovereignty and jurisdiction. The measures which accompanied the proclamation of the baselines were also designed to ensure that the Canadian action was not hollow and that it would be supported by positive evidence of Canadian sovereignty and jurisdiction over the waters." See also D.M. Johnson, "The Northwest Passage Revisited" (2002) 33 Ocean Development & Int'l L. 145 at 158.

86 *Agreement Between the Government of Canada and the Government of the United States of America on Arctic Co-Operation*, 11 January 1988, Canada Treaty Series, No. 29, 2 (1988).

87 *An Act To Apply Federal Laws and Provincial Laws To Offshore Areas and To Amend Certain Acts In Consequence Thereof*, S.C. 1990, c. 44. First introduced in April 1986, the Bill died on the order paper and was not re-introduced until October of 1989, and received royal assent in December, 1990. As observed by Ross Hornby, "The Canadian Laws Offshore Application Act: The Legislative Incorporation of Rights over the Continental Shelf" (1991) 29 Can. Y.B. Int'l L. 355 at 359, the Act was primarily concerned with the Canadian continental shelf, but given the complexity of the maritime zones, adjusted the application of federal and provincial law according to the difference in legal status: "Thus, laws are applied without qualification to the internal waters and territorial sea, where Canada possesses full territorial sovereignty, subject only to certain navigational rights of other States in the territorial sea."

88 *Oceans Act*, S.C. 1996, c. 31, s. 2; S.C. 1993, c. 28, s. 78; S.C. 1998, c. 15, s. 35; S.C. 2002, c. 7, s. 223. Sections 54 and 55 repealed the *Canadian Laws Offshore Application Act* and the *Territorial Sea and Fishing Zones Act* respectively.

Sections 25(a)(i) of the *Oceans Act* provided for the Governor in Council to make regulations prescribing geographical coordinates of points for the determination of the straight baselines determined under s. 5(2) of the Act.[89] Importantly, sections 6 to 8 described “internal waters”:

> “Internal waters of Canada
>
> 6. The internal waters of Canada consist of the waters on the landward side of the baselines of the territorial sea of Canada.
>
> Part of Canada
>
> 7. For greater certainty, the internal waters of Canada and the territorial sea of Canada form part of Canada.
>
> Rights of Her Majesty
>
> 8.(1) For greater certainty, in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada.
>
> (2) Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.”[90]

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[89] Section 5 of the *Oceans Act* is concerned with the determination of the baselines:

“5.(1) Subject to subsections (2) and (3), the baseline is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island.

Geographical coordinates of points

(2) In respect of any area for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(*a*)(i) and subject to any exceptions in the regulations for

(*a*) the use of the low-water line along the coast between given points, and

(*b*) the use of the low-water lines of low-tide elevations that are situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island, the baselines are straight lines interpreted as geodesics joining the consecutive geographical coordinates of the points so prescribed....”

Section 25(*a*)(i) provides the authority for making certain regulations:

“25. The Governor in Council may, on the recommendation of the Minister of Foreign Affairs, make regulations

(a) prescribing geographical coordinates of points from which

(i) baselines may be determined under subsection 5(2) as straight lines interpreted as geodesics, ...”

[90] The *Interpretation Act* also provides assistance in determining the extent of the sovereignty exercised in the maritime zones. Section 35 defines “internal waters” as:

“(*a*) in relation to Canada, means the internal waters of Canada as determined under the Oceans Act and includes the airspace above and the bed and subsoil below those waters, and

(*b*) in relation to any other state, means the waters on the landward side of the baselines of the territorial sea of the other state;”

Further, section 8 provides for the territorial operation of Acts of Parliament:

“Territorial operation

8. (1) Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment.”

While the *Territorial Sea Geographical Coordinates (Area 7) Order (SOR/85-872)* establishing the straight baselines around the Archipelago had originally been made under the predecessor *Territorial Sea and Fishing Zones Act,* it remained in force after the old Act's repeal as it was deemed to have been made under the new legislation.[91]

In relation to the enforcement of fishing regulations the *Oceans Act* also provided for the establishment of "exclusive economic zones"[92] and the legislative authority for the "fishing zones"[93] adjacent to the coast of

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[91] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 1. Section 44(g) provides:

"Repeal and substitution

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefore,

...

(*g*) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead;...."

This rule of interpretation also applied to the *Fishing Zones of Canada (Zone 6) Order* enacted pursuant to the *Territorial Sea and Fishing Zones Act* which had extended a fishing zone 200 nm seaward of the Arctic baselines.

[92] *Oceans Act*, ss.14 and 15:

"Exclusive Economic Zone

Sovereign rights and jurisdiction of Canada

14. Canada has

(a) sovereign rights in the exclusive economic zone of Canada for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the exclusive economic zone of Canada, such as the production of energy from the water, currents and winds;

(b) jurisdiction in the exclusive economic zone of Canada with regard to

(i) the establishment and use of artificial islands, installations and structures,

(ii) marine scientific research, and

(iii) the protection and preservation of the marine environment; and

(c) other rights and duties in the exclusive economic zone of Canada provided for under international law.

Rights of Her Majesty

15.(1) For greater certainty, any rights of Canada in the seabed and subsoil of the exclusive economic zone of Canada and their resources are vested in Her majesty in right of Canada."

[93] *Oceans Act*, *supra* note 88, section 16. Further, section 25(b) of the *Oceans Act* provided for the Governor in Council, on the recommendation of the Minister of Foreign Affairs, to make regulations "prescribing areas of the sea adjacent to the coast of Canada as fishing zones of Canada."

Canada. The *Coastal Fisheries Protection Act*[94] is enforced within those fishing zones. Further, Section 22(4) of the *Oceans Act* provides that the jurisdiction and powers of courts with respect to offences under federal law are determined pursuant to sections 477.3, 481.1 and 481.2 of the *Criminal Code of Canada*.[95]

A separate unique zone was established under Canadian law for pollution enforcement in Arctic waters. Section 3(1) of the *Arctic Waters Pollution Prevention Act* (AWPPA) provides for its application in "arctic waters", which are defined in sections 2 and 3(2) as including all the waters, except "inland waters", adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by the 60th parallel north, the 141st meridian west, the equidistance line between the islands of the Canadian Arctic and Greenland, and a line measured seaward from the nearest land a distance of one hundred nautical miles.[96] While the term "inland waters" is not defined in this the AWPPA[97], it may be assumed that they correspond to "internal waters" described in *Territorial Sea Geographical Co-Ordinates (Area 7) Order* (Privy Council 1985-2739).

Sections 11 through 13 of the AWPPA provide for: the establishment of shipping safety control zones in the arctic waters; the regulation of navigation within those zones, including the design, manning and type of cargo carried on the ships; and enforcement of navigation regulations in these Shipping Safety Control Zones. In 1978, pursuant to the AWPPA, the Canadian Government had issued the *Shipping Safety Control Zones Order*[98] establishing the limits of shipping safety control zones in the Arctic. Sections 562.15 and 562.16 of the *Canada Shipping Act* provides for the issuance of regulations respecting the information required to be provided for traffic clearance and the establishment of Vessel Traffic Services in the AWPPA shipping safety control zones, respectively. The authority for the application of these regulations in Arctic waters are the *NORDREG*[99]. Despite the natural inference one may draw from the acronym, these are not regulations, but instead are published as

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94 *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33.

95 Section 477.3(1) is concerned with the enforcement powers (arrest, entry, search or seizure) and section 477.3(2) authorizes any justice or judge in Canada to authorize those enforcement powers related to an offence:

"(a) committed in or on the territorial sea of Canada or any area of the sea that forms part of the internal waters of Canada, or

(b) referred to in section 477.1 [offence under federal law, within the meaning of s.2 of the *Oceans Act*] in the same manner as if the offence had been committed in that territorial division."

Oceans Act, section 2: ""federal laws" includes Acts of Parliament, regulations as defined in section 2 of the Interpretation Act and any other rules of law within the jurisdiction of Parliament, but does not include ordinances within the meaning of the *Northwest Territories Act* or the *Yukon Act* or, after section 3 of the *Nunavut Act* comes into force, laws made by the Legislature for Nunavut or continued by section 29 of that Act."

96 The meaning of "arctic waters" is provided in sections 2 and 3 of the *Arctic Waters Pollution Prevention Act*.

97 "Inland waters of Canada" are defined in section 2 of the *Canada Shipping Act,* R.S.C. 1985, c. S-9 to mean "all the rivers, lakes and other navigable fresh waters within Canada, and includes the St. Lawrence River as far seaward as a straight line drawn

(*a*) from Cap des Rosiers to West Point Anticosti Island, and

(*b*) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west;"

98 *Order Prescribing Certain Areas Of The Arctic Waters As Shipping Safety Control Zones* (Shipping Safety Control Zones Order), found at http://www.tc.gc.ca/acts-regulations/includes/printable_version.asp?lang=en.

99 www.ccg-gcc.gc.ca/eng/MCTS/Vtr_Arctic_Canada.

Notice to Mariner No. 6[100] as an instruction or direction issued under the statutory authority of section 562.13 of the *Canada Shipping Act*. However, the *NORDREG* explicitly notes that "participation is voluntary" and therefore, the reporting requirements cannot be enforced.

As noted earlier, the *Oceans Act* provides the legislative framework for the establishment of the Canadian EEZ, even in circumstances where the geographical coordinates have not been issued by regulation.[101] Indeed, an anomalous situation is created because Canada has not yet issued a regulation or order in council setting out the geographical coordinates of the outer limits of the Arctic Ocean exclusive economic zone which might conflict with territorial sea, EEZ or other zones declared by another state or the outer limit of the EEZ, continental margin, or continental shelf of Canada.[102]

In summary, by the application of the *Oceans Act,* the *Territorial Sea Geographical Coordinates (Area 7) Order (SOR/85-872)*, and the *Interpretation Act*, the waters within the straight baselines around the islands of the Canadian Arctic Archipelago are internal waters and subject to the full breadth of Canadian laws. Further, by application of the *Oceans Act,* a 200-nm exclusive economic zone was authorized to be established around the Arctic Archipelago. The application of the *Oceans Act* and the *Fishing Zones of Canada (Zone 6) Order* together established the fishing zone in Arctic waters 200 nm seaward of the baselines in which the *Coastal Fisheries Protection Act* is to be enforced. Finally, by the application of the *Arctic Waters Pollution Prevention Act*, the

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[100] *Notice to Mariner* No. 6 is published as a Radio Aid to Marine Navigation (found at www.notmar.gc.ca/eng/services/2009-annual/section-a/notice-6.pdf).

[101] *Oceans Act*, *supra* note 88, s.13:

"Exclusive economic zone of Canada

13.(1) The exclusive economic zone of Canada consists of an area of the sea beyond and adjacent to the territorial sea of Canada that has as its inner limit the outer limit of the territorial sea of Canada and as its outer limit

(a) subject to paragraph (*b*), the line every point of which is at a distance of 200 nautical miles from the nearest point of the baselines of the territorial sea of Canada; or

(b) in respect of a portion of the exclusive economic zone of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(*a*)(iii), lines determined from the geographical coordinates of points so prescribed.

Determination of the outer limit of the exclusive economic zone of Canada

(2) For greater certainty, paragraph (1)(*a*) applies regardless of whether regulations are made pursuant to subparagraph 25(*a*)(iv) prescribing geographical coordinates of points from which the outer limit of the exclusive economic zone of Canada may be determined."

[102] *Ibid.*, s.25(*a*) (iii) and (iv):

"25. The Governor in Council may, on the recommendations of the Minister of Foreign Affairs, make recommendations

….

(iii) in respect of a portion of the exclusive economic zone of Canada or the Continental shelf of Canada prescribed in the regulations, an outer limit line may be determined, where, in the opinion of the Governor in Council, a portion of the exclusive economic zone of Canada or the continental shelf of Canada determined in accordance with paragraph 13(1)(a) or 17(1)(a) or (b) would conflict with the territorial sea of another state or other area of the sea in which another state has sovereign rights or would be unreasonably close to the coast of another state or is otherwise inappropriate, and

(iv) the outer limit of the exclusive economic zone of Canada or the outer edge of the continental margin or the outer limit of the continental shelf of Canada may be determined; and…"

Shipping Safety Control Zones Order, the *Shipping Act* and the *NORDREG*, the pollution regulations may be enforced in the Shipping Safety Control Zones in Arctic waters 100 nm seaward of the baselines when voluntarily notified by the vessel entering those zones.

V – THE CANADIAN ARCTIC WATERS AND UNCLOS

On the 7th of November 2003, the Government of Canada ratified the *United Nations Convention on the Law of the Sea*. The delay in Canada's ratification was reported to be caused by the course of negotiations with the European Union over fisheries regulations.[103] At ratification, Canada also filed a *Statement* notifying the United Nations that it would not accept the compulsory dispute resolution procedures for questions involving sea boundary delimitations or disputes involving historic bays, military activities, law enforcement activities in regard to the exercise of sovereign rights, or disputes involving the Security Council.[104]

Article 2 of the *Convention* speaks directly to the legal status of a coastal state's territorial sea, super-adjacent airspace, and the "sovereignty" to be exercised in those areas:

> "Article 2 – Legal status of the territorial sea, of the airspace over the territorial sea and of its bed and subsoil
>
> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

Article 5 describes "normal baselines" as the low-water line along the coast, but Article 7 provides an extensive definition of "straight baselines" and prescribes their appropriate use. Three of the six sub-articles would be considered as directly applicable:

> "Article 7 – Straight baselines
>
> 1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.....
>
> 2. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
>
> …
>
> 4. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which is clearly evidenced by long usage."

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[103] Drew Fagan, "After two decades, Canada will ink Law of the Sea treaty" *Globe and Mail* (4 November 2003).

[104] *Canadian Statement filed at Ratification*, 7 November 2003, available online at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

The islands and waters of the Arctic Archipelago do not easily fall within legal description found in Article 7(1) of the *Convention,* and therefore may not support the straight baselines established by the *Territorial Sea Geographical Coordinates (Area 7) Order.*[105] However, in the alternative, reliance has been placed upon the language of the treaty Preamble that "matters not regulated by this *Convention* continue to be governed by the rules and principles of general international law." It has been argued by Canadian commentators that in relation to the Arctic Archipelago, reference can be made to the test proposed by the I.C.J. in the *Fisheries Case* where the Court approved the straight baselines along the northern Norwegian coastline.[106] In that case the "skjaergaard" was very broken along its whole length, constantly opening out into indentations which penetrated great distances, and made up of mountainous small and large islands which have their large and small bays and shallow banks which constitute fishing grounds.[107] In the majority decision, the Court agreed that the application of a "geometrical construction" – straight baselines - was justified "[w]here a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the baseline becomes independent of the low-water mark . . . ."[108]

There is an additional provision that relates to the Canadian application of straight baselines in the Arctic. Article 8(1) confers the status of "internal waters" to the waters on the landward side of the baselines. Article 8(2), however, provides for an exception to that status:

> "8(2) Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this *Convention* shall exist in those waters."

The effect of this sub-article upon Canada's Arctic claim is that if prior to 1985 – the date of issue of the Privy Council Order in Council *Territorial Sea Geographical Co-Ordinates (Area 7) Order* – the waters of the Arctic Archipelago were "considered" to be Canadian internal waters, no right of innocent passage through them would exist. The question of the application of this provision of the *Convention* is significant because the exercise of the right of innocent passage through all or a portion of the waters of the Arctic Archipelago would be manifestly inconsistent with the Canadian government's claim that the same area was made up of "internal waters".

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[105] J.B. McKinnon, "Arctic Baselines: A Litore Usque ad Litus" (1987) 66 Can. Bar Rev. 790 at 803: "The northern mainland coast of Canada is deeply indented, but this fact would justify using straight baselines only along the coast . . . [I]t seems difficult to describe the islands of the Arctic archipelago as a "fringe of islands" in the "immediate vicinity" of the coast. The islands extend almost 1,000 miles north from the mainland. Moreover, the northern group of islands is separated by a wide body of water from the southern group. Thus, even if the southern group could be treated as a fringe of islands in the immediate vicinity of the mainland, it would be more difficult to include the northern group despite the existence of a few small islands in Barrow Strait linking the two groups of islands." In addition, John Byrne, "Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago, (1970) 28 U. Toronto Fac. L. R., 1 at 9-10 does not believe the Arctic archipelago constitutes a "fringe". On the other hand Donat Pharand, "The Role of International Law for Peace and Security" *The Arctic: Choices for Security and Peace*, 1989, 108 made reference to the physical survey conducted by the American Natural Geographic Society which concluded that the Arctic islands are an archipelago of the Canadian continental shelf.

[106] *Fisheries Case (United Kingdom v. Norway),* [1951] I.C.J Rep. 115. In 1935 the Norwegian government passed a royal decree using straight baselines to delimit fisheries zones and strictly enforced the regulations against British trawlers, arresting and condemning a considerable number. The U.K. government then instituted the case before the Court. Donat Pharand, *Canada's Arctic Waters in International Law*, (Cambridge University Press, 1988) at 132, wrote that "[c]onsequently, if the rules for Archipelagoes found in the Convention are too narrow to fit precisely a particular Archipelago, resort may be had to customary law. It might prove necessary to do this in appraising the applicability of the straight baseline system to the Canadian Arctic Archipelago."

[107] *Fisheries Case*, *supra* note 106 at 127: "The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea."

[108] *Ibid.* at 128.

The effect of Canada's ratification of UNCLOS in 2003 was to bring Article 8(2) to bear on the issue. A fair reading of the provision appears to support the position that Canada's claim of historic internal waters rests upon an exception to UNCLOS.[109] The question of whether Canada's claim of "historic internal waters" is "exceptional" under international law is not merely relevant to the unlikely event that Canada allows its claim to be drawn into litigation. For example, the conduct of naval operations would also be influenced if the Canadian claim was not accepted by other States or believed to be unfounded.

The Government of Canada's ratification also secured the national responsibility to respect the navigation rights enumerated in the *Convention,* including the "right of innocent passage" and the "right of transit passage". Any naval enforcement of the Canadian Arctic claim must therefore be conducted in a manner which respects important international legal rights.

VI – MARITIME NAVIGATION RIGHTS AND CANADA'S ARCTIC WATERS

In response to the apparent pressures of "creeping" and "thickening" jurisdiction in offshore waters and the threats posed by this to sea lines of communication, the United States government formally established its Freedom of Navigation Program during the Carter administration in 1979. It was designed to bring international attention to the navigation provisions of UNCLOS and to support assertions of maritime navigation rights.[110] These rights have been widely recognized as belonging to two distinct categories: *movement rights* which embrace the notion of 'mobility' and include such legal rights as transit passage through straits used for international navigation, innocent passage in territorial seas and archipelagic waters, archipelagic sea lanes passage, and high seas freedoms of navigation and overflight"; and *operational rights* which include such activities as task force maneuvering, anchoring, maritime intelligence collection and surveillance, military exercises, ordnance testing and firing, and hydrographic and military surveys.[111] While the *movement rights* were expressly set out in the text

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[109] The question of whether Canada's straight baseline claims constituted an exceptional claim was discussed in academic commentary that was published before Canada's ratification of UNCLOS in 2003. For example, Donat Pharand, "Canada's Sovereignty Over the Northwest Passage", (1989) 10 Mich. J. Int'l L. 653 at 657, conceded that there "appears to be a general consensus that the onus of establishing the existence of an historic title to maritime areas rests with the coastal State making such a claim" and described the claim asserted by the coastal State as an "exceptional claim." Further, Suzanne Lalonde, "Increased Traffic through Canadian Arctic Waters: Canada's State of Readiness" (2004) 38 R.J.T. 49 at 84, conceded that foreign vessels enjoy the right of innocent passage through the waters that Canada has enclosed with straight baselines.

[110] United States Oceans Policy, Statement by the President, March 10, 1983, Weekly Compilation of Presidential Documents 19 (1983, as cited in George Galdorisi, "The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea?" (1996) 27 Ocean Development and International Law 399 at 401:

> "The United States will accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States . . . . It has been the United States policy to exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the 1982 Law of the Sea Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."

[111] Pirtle, *Military Uses of Ocean Space*, 8.

of the *Convention*, the *operational rights* had not been on the agenda for negotiations.[112] Indeed as observed by Churchill and Lowe, "the United Nations Conferences on the Law of the Sea consciously avoided negotiation of the rules applicable to military operations on the seas."[113]

The freedoms of the seas reflect a strategic imperative which is held dear by many of the world's established and emerging powers. Elliot Richardson, who headed the U.S. delegation to the Third Conference, described the scope of the freedom of the seas in light of the development of the concept of the exclusive economic zone:

> "[I]n giving coastal States sovereign rights over the living and non-living resources of a 200-mile 'exclusive economic zone,' the text preserves for other States 'the freedom of navigation and overflight' and 'other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of the ships, aircraft and submarine cables and pipelines . . . .' In the group which negotiated this language it was understood that the freedoms in question, both within and beyond 200 miles, must be qualitatively and quantitatively the same as the traditional high seas freedoms recognized by international law: they must be qualitatively the same in the sense that the included uses of the sea must embrace a range no less complete – and allow for the future uses no less inclusive – than traditional high-seas freedoms."[114]

The freedoms of the high seas[115] are correctly considered to be broad and are firmly supported by many maritime States.[116] The only explicit restriction on activities on the high seas are that they are to be conducted "with due regard" for the rights of other States.[117] Of course, it may be further assumed that they are conducted in conformity with Art. 2(4) of the United Nations *Charter*. While the *Convention* reserves the high seas for "peaceful purposes",[118] maritime States have long argued that the formulation of language invites the observation that the

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[112] Giulio Pontecorvo, "A Note: Military Uses of the Ocean and the Law of the Sea Conference", Giulio Pontecorvo, ed., *The New Order of the Oceans: The Advent of a Managed Environment*, (1986) 60, cited in Pirtle, *Military Uses of the Ocean*, 9.

"The Third United Nations Conference on the Law of the Sea (UNCLOS III) was constrained, he observes, "by the military concerns of the two superpowers," which meant that "[w]hile there was no conspiracy of silence, in the drafting of the treaty articles the military concerns of the USSR and the United States were largely accepted by the negotiators. Thus the treaty defined the nonmilitary problems and issues."

[113] R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3d, Melland Schill Studies in International Law, 1999, 421. As noted by Pirtle, *Military Uses of Ocean Space*, 9:

"Consequently, and despite the fact that the security interests of the maritime powers are barely one half-step removed from every word, line, and article in the non-seabed-mining parts of the Convention, military issues were either treated superficially or neglected altogether in UNCLOS III.

"Neglect" in this instance was intentional rather than accidental. It was the deliberate and hard-won product of a unified strategic policy by the United States, the Soviet Union, and their allies. Much of the Convention, therefore, was written in invisible ink."

[114] Elliot L. Richardson, "Power, Mobility and the Law of the Sea" (1979-1980) 58 *Foreign Aff*. 902 at 916.

[115] UNCLOS, Article 87.

[116] In addition to the United States, Russia continues to be supportive of freedom of navigation rights and is resistant to the expanding jurisdictional claims by coastal States. As was observed in 1983, Bryan Ranft and Geoffrey Till, *The Sea in Soviet Strategy*, U.S. Naval Institute Press, 1984, 54: "Because of its geographical position Russia has been particularly concerned with establishing and if possible, increasing rights of freedom of passage through international straits. Her specific aim has been to gain acceptance for a special straits regime which would give a greater degree of freedom of transit than through territorial seas." While during the UNCLOS negotiations the Chinese delegation – when China believed it would be a net exporter of oil – identified strongly with coastal States interests. .However, in the early 1990's it became clear that China would be forced to import most of its oil and gas supplies, according to Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Martinus Nijhoff Publishers, 2005) 49, and it now "attaches great importance to the safety and unimpededness of the international water lanes in the South China Sea."

[117] UNCLOS, Article 87(2).

[118] UNCLOS, Article 88.

provision does not prohibit all activities conducted by military forces. This interpretation appears to complement Article 95 of the *Convention* which grants warships on the high seas complete immunity from the jurisdiction of any State other than the flag State.[119]

The law of the sea has long made accommodation for the exercise of the movement right of innocent passage. "Innocent passage" – a traditional right established in the nineteenth century customary law of the sea and described in detail in Section 3 of Part II of the *Convention* in Articles 17 through 32 – is normally available to ships passing through a coastal state's territorial sea.[120] In accordance with Article 18(2) the "passage" must be "continuous and expeditious."[121] In addition, while Article 19(1) confirms that "the passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal State", Article 19(2) goes on to list a number of ways in which that passage could be objectively considered as prejudicial.[122] Significantly for naval operations

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[119] UNCLOS, Article 95.

[120] There is a substantial body of law to support the description of "innocent passage" as a "right in the strict sense, the sovereignty of the coastal state is qualified by a correlative duty not to prevent foreign vessels from the normal exercise of that right." Donat Pharand, "Innocent Passage in the Arctic" (1968) 6 Can. Y.B. Int'l L. 3 at 5.

[121] UNCLOS, Article 18.

[122] UNCLOS, Article 19:

"Article 19 – Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

    (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

    (b) any exercise or practice with weapons of any kind;

    (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

    (d) any act of propaganda aimed at affecting the defence or security of the coastal State;

    (e) the launching, landing or taking on board of any aircraft;

    (f) the launching, landing or taking on board of any military device;

    (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

    (h) any act of willful and serious pollution contrary to this Convention;

    (i) any fishing activities;

    (j) the carrying out of research or survey activities;

    (k) any act aimed at interfering with any systems of communication or any other facilities or any other facilities or installations of the coastal State;

    (l) any other activity not having a direct bearing on passage."

in Arctic waters, the *Convention* specifies that "in the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag."[123]

The *Convention* also provides international legal authority for the coastal State to exercise some regulatory control upon ships exercising the right of innocent passage through the territorial sea. The extent of the coastal State's authority, however, is restricted to matters of navigation, conservation of living resources of the sea, fisheries protection, pollution control, research and hydrographic surveys, and prevention of infringement of the customs, fiscal, immigration or sanitary laws of the coastal State.[124] On the other hand, the coastal States are prohibited from regulating "the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."[125] The *Convention* also provides the authority to establish sea lanes and traffic separation schemes[126] and, notably, it places special obligations upon "foreign nuclear-powered ships and ships carrying nuclear …substances".[127] Articles 24 and 25 of the *Convention* prescribe the limits of the authorities of the coastal States to regulate and enforce their laws and regulations on foreign ships conducting innocent passage. Article 24 imposes the duty upon coastal States "not to hamper the innocent passage of foreign ships." A further duty on coastal States in this regard is to not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage", or to "discriminate in form or fact against ships of any State or against ships carrying to, from or on behalf of any State."[128]

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[123] UNCLOS, Article 20.

[124] UNCLOS, Article 21(1). Also, UNCLOS, Article 27 – applicable to merchant ships and government ships operated for commercial purposes – sets out the limited circumstances in which a coastal State can exercise criminal jurisdiction on board a foreign ships passing through a State's territorial sea . These circumstances include:

"(a) if the consequences of the crime extend to the coastal State;

(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances."

[125] UNCLOS, Article 21(2).

[126] UNCLOS, Article 22.

[127] UNCLOS, Article 23.

[128] UNCLOS, Article 24 :

"Article 24 - Duties of the coastal State

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention, the coastal State shall not :

    (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

    (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea."

Article 25 of the *Convention* provides the authority for the exercise of the right of protection of the coastal State. First, it allows a coastal State to take "the necessary steps in its territorial sea to prevent passage which is not innocent." Second, where ships are "proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject." Finally, the *Convention* allows coastal States, without discrimination, to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."[129]

A recurring question in the past has been whether warships could exercise "innocent passage" at all. The issue was addressed by the International Court of Justice in the *Corfu Channel Case* where the court stated:

> "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace." [130]

While the *Convention* does not explicitly preclude warships[131] from exercising the right of innocent passage, it does provide lawful authority for the coastal State to impose a heavy regulatory burden upon a warship's passage and the *Convention* only allows the warship to exercise the passage under a continual threat of expulsion from the territorial sea.[132] Finally, responsibility for any loss or damage suffered by the coastal State as a result of a

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[129] UNCLOS, Article 25:

"Article 25 – Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published."

[130] [1949] I.C.J. Rep. 27, at 28. Donat Pharand, "Soviet Union Warns United States Against Use of Northeast Passage" (1968) 62 Am. J. Int'l L. 927. In August 1967, the U.S. Government advised the U.S.S.R. that two 169-ft Coast Guard icebreakers, the *Edisto* and the *Eastwind*, were circumnavigating the Arctic Ocean and that ice conditions were forcing them to transit through the Vilkitsky Straits, south of Severnaya Zemla in order to complete their passage. This transit would have taken the two icebreakers through waters claimed by the Soviets as constituting their territorial waters. The U.S. believed that the two ships could properly exercise the right of innocent passage and the U.S.S.R. took the contrary position. In the end the American vessels did not attempt the passage.

[131] UNCLOS, Article 29 defines "warship" to be "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."

[132] UNCLOS, Article 30:

"Article 30 - Non-compliance by warships with the laws and regulations of the coastal State.

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."

passage undertaken in violation of the coastal States' laws and regulations, as well as of the *Convention* and international law, is explicitly placed upon the flag State of the warship or "other government ship".[133]

A question remains about the lawfulness of any coastal States' demands for prior approval or notification before consenting to the innocent passage of a foreign warship through its territorial sea. While there is no express requirement for prior notification to be found in the actual provisions of the *Convention* [134], it would be fair to observe that the range of lawful activity that may be conducted by a foreign warship exercising innocent passage is quite narrow. While Article 32 of the *Convention* expresses the sentiment of the traditional state immunity afforded warships and other government vessels, [135] the practical effect of the application of the national security suspension found in Article 25 combined with Articles 30 and 31, is to trim the lawful authority of a warship to enter a territorial sea without notification.

The exercise of "transit passage" through an international strait allows for the "continuous and expeditious transit of the strait between one part of the high seas or an economic zone and another part of the high sea or economic zone."[136] The transiting vessel or aircraft shall:

"(a) proceed without delay through and over the strait;

(b) refrain from the threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) comply with other relevant provisions of this Part."[137]

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[133] UNCLOS, Article 31:

"Article 31 - Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law."

[134] *Joint Statement of the Rules of International Law Governing Innocent Passage*, signed at Jackson Hole, Wyoming, on September 23, 1989, 28 I.L.M. 1444. The Soviet Union and United States attempted to establish customary practice otherwise when they issued the Joint Statement of Rules of International Law Governing Innocent Passage (the Jackson Hole agreement) in 1989.

[135] UNCLOS, Art. 32:

"Article 32 - Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."

[136] UNCLOS, Article 38. The *Convention's* expansion of the territorial sea to 12 nm had threatened the high seas corridor in 116 of the world's straits.

[137] UNCLOS, Article 39.

The lawful exercise of "transit passage" through an international strait is a significant navigation right secured by the maritime states in the provisions of the *Convention* that imposes far less onerous restrictions than those placed upon ships exercising "innocent passage." For example, while "innocent passage" and "transit passage" must be similarly exercised in a "continuous and expeditious" manner, while vessels exercising "transit passage" are afforded the additional qualifier that they must only "proceed without delay". The obligations upon the activities of vessels imposed by sub-articles 39(b) and (c) leave ample authority for many naval activities, including submerged transit by submarines, the conduct of air operations, and military exercises that do not threaten the "sovereignty, territorial integrity, or political independence of States bordering the Strait."

The exercise of transit passage is not without restrictions: foreign ships conducting transit passage may not carry out marine scientific research or hydrographic surveys without the prior authorization of the bordering States[138] and those bordering States may designate sea lanes and traffic separation schemes in the straits where necessary to promote the safe passage of ships and imposes the obligation upon ships in transit to respect the applicable sea lanes and traffic separation schemes.[139] However, generally speaking, the scope of coastal State regulation of and enforcement over ships exercising their right of transit passage is narrower than the broad powers afforded coastal States over the exercise of innocent passage.

It is noteworthy that Article 42(1) of the *Convention* restricts the authority of bordering States to enact laws and regulations affecting the rights of vessels transiting international straits to matters relating to:

> "(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
>
> (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations, regarding the discharge of oil, oily wastes and other noxious substances in the strait;
>
> (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
>
> (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits."

Sub-article 42(2) requires that the coastal State's laws and regulations "not discriminate in form or in fact among foreign ships" and prohibits their application from having "the practical effect of denying, hampering or impairing the right of transit passage." While Sub-article 42(4) requires foreign ships exercising the right of transit passage to comply with such laws and regulations, Sub-article 42(5) imposes international responsibility for loss or damage suffered by a bordering State upon the flag State or State of registry of a vessel entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of Part III (Straits Used For International Navigation, Articles 34 - 43) of the *Convention*. Article 43 provides the international legal authority for States bordering a strait and the user States to cooperate in the establishment and maintenance of the navigational and safety aids in the strait and for the prevention, reduction and control of pollution from ships. Article 44 sets out the duties of States bordering straits – in a manner similar to Sub-articles 42(2) and 42(3) – that they shall not hamper strait passage and they must give publicity to dangers to navigation or overflight within the strait.

Finally, there is no provision authorizing the suspension of "transit passage" as there is in Sub-article 25(3) in relation ships exercising the right of "innocent passage" through a territorial sea.[140] In sum, there may be issues associated with the reconciliation of the Government of Canada's expectations of a high degree of regulatory control exercised over shipping transiting its historic internal waters with the lawful exercise of "transit passage".

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[138] UNCLOS, Article 40.

[139] UNCLOS, Article 41.

[140] UNCLOS, Article 44.

"International straits" are defined in article 37 to be "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[141] As previously noted, Canada has long denied that the Northwest Passage could be properly considered to be an "international strait" in accordance with the term presently defined in the *Convention*. Article 37 of the *Convention* imposes two criteria upon any characterization of a strait as an "international strait": first, a geographic criterion that the straits are "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone"; and second, a functional criterion that the straits "are used for international navigation." In relation to the geographic criterion, the Northwest Passage connects the Arctic Ocean in the west with the Davis Strait in the east and therefore satisfies the objective test. In relation to the functional test, however, there is dispute. Relying upon the judicial decision in the *Corfu Channel Case* – and the extensive international civilian and naval maritime traffic which had used the Corfu Channel – as an authority, Professor Pharand argued "that there has to be some appreciable degree of actual use over a period of time". He noted the limited number of commercial and foreign military transits of the Northwest Passage that have actually occurred and judged that the Passage could not be characterized as an "international strait".[142]

Article 35(a) of the *Convention* provides that nothing in Part III of the *Convention* (Straits Used For International Navigation) affects "any areas of internal waters within a strait…." While this portion of the provision appears to preclude the exercise of the right of transit passage through a coastal State's internal waters, the sub-article goes on to provide an important exception to this rule "where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such; . . . ."[143]

This operative phrase in Article 35(a) is similarly worded to that in Article 8(2) – related to the right of innocent passage through internal waters - and similarly imposes upon the coastal State the burden of asserting its exceptional claim of "historic internal waters". It is important to consider that in the case of the Northwest Passage, any failure to meet this burden would legitimize the exercise of the right of transit passage – *vice* mere

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[141] UNCLOS, Article 37.

[142] Pharand, *supra* note 109 at 669-670: "It is clear from the above review that by no stretch of the imagination could the Northwest Passage be classified as an international strait. Those who maintain that the Passage may be so classified obviously confuse *actual use* with *potential use*." W. Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking" (1980) 74 Am. J. Int'l L. 48 at 66, provided a critical view about the clarity of the provision: "From its inception, the use criterion has been unclear. Can the use requirement be fulfilled by the potential utility of a strait for international navigation without regard to the intensity of use, as the International Court suggested in the Corfu Channel case, or is some level of use actually required to fulfill this condition? The words "used for" in both the 1958 and 1977 versions would suggest a legislative overruling of the Corfu judgment. If that is the case, then future decision may establish some threshold of use higher than episodic transit in order for straits to retain their Article 37 character."

[143] UNCLOS, Article 35 :

"Article 35 – Scope of this Part

Nothing in this Part affects:

(a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing internal waters areas which had not previously been considered as such;

(b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or

(c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

innocent passage[144] - by foreign civilian and naval vessels, since a saving provision in the *Convention* limiting the passage to "innocent passage" would not apply in this circumstance.[145] Therefore, as with Canada's claim of "historic internal waters" between the straight baselines, Canada's assertion that the Northwest Passage is not an international strait constitutes another *exception* to the standard case under the *Convention* and Canada similarly bears the burden of supporting its claim of "historic internal waters."[146]

VII – ENFORCEMENT OF SOVEREIGNTY AND ASSISTANCE TO LAW ENFORCEMENT: EXTENDING THE REACH BEYOND THE GRASP

In accordance with Canadian law, the Canadian Forces may be authorized to conduct two different types of activities in the waters of the Canadian Archipelago and beyond: first, military operations to preserve political sovereignty and territorial integrity; and second, support to civilian authorities including the provision of assistance to law enforcement. The legal basis for each of these is distinct from the other and imposes very different legal constraints on the conduct of CF operations.

The Navy has the standing authority to patrol and exercise in international waters (exclusive economic zone and high seas) and within its own national waters (internal waters and territorial sea) as established through custom and practice. On the other hand, military taskings such as visit and search operations require direction from the Government of Canada. While many international maritime interdiction operations have relied upon a variety of specific legal authorities, including United Nations Security Council resolutions pursuant to Chapter VII

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144 Donat Pharand, "Canada's Sovereignty over the Newly Enclosed Arctic Waters" (1987) 25 Can. Y.B. Int'l L. 325 at 329 observed that the right of innocent passage was not permitted through waters enclosed by straight baselines where there had been no prior historic title to those waters by customary international law. Professor Pharand noted that while the right of innocent passage would in fact apply in accordance with the 1958 *Territorial Sea Convention*, Canada was not a party to that treaty.

145 UNCLOS, Article 45:

"SECTION 3. INNOCENT PASSAGE

Article 45 - Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation :

   (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or

   (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits."

UNCLOS, Article 38(1) states:

"Article 38

Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."

146 J.B. McKinnon, *supra* note 105 at 810. The conclusion that the Canadian claim that the strait is enclosed by the straight baselines is an exceptional claim is supported by some evidence of state practice. Chile used straight baselines to enclose the waters around some of its islands in the Straits of Magellan (only 3-nm wide at its narrowest) and Denmark enclosed islands on its east coast which effectively block access to the Baltic Sea. However, neither state chose to enclose the waters in the international strait with their claimed baselines.

of the United Nations *Charter* and Article 110 of UNCLOS[147] as the legal bases for these actions, Canadian naval operations in support of Canadian territorial and maritime sovereignty would rely upon the principles of inviolability of territorial integrity and the right of national self-defence to legitimize action.[148]

As distinct from operations in support of law enforcement, it must be recognized that vessels fired upon have a *prima facie* argument to justify firing back in their own self-defence. With both sides claiming to exercise the right of self-defence, the question for the Canadian Navy protecting Arctic maritime sovereignty is reduced – as in so many other questions of *jus ad bellum* – to whether their actions can be justified as an act of self-defence against an "armed attack".[149]

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[147] UNCLOS, Article 110:

"Article 110

Right of Visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

   (a) the ship is engaged in piracy;

   (b) the ship is engaged in the slave trade;

   (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109;

   (d) the ship is without nationality; or

   (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."

[148] D.P. O'Connell, *The Influence of Law on Sea Power* (Manchester University Press, 1975) 54. Professor O'Connell observed that, "As a practical guideline naval planning staffs should take it for granted that the employment of force, as distinct from its manifestation – or of violence, as distinct from intimidation, if one likes – will be regarded as overstepping the boundaries of the legitimate, except when resorted to in self-defence."

[149] See also *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003] ICJ <http//www.icj-cij org> 1 May 2004, (Oil Platforms Case) where the Court rejected the American claim that an Iranian missile attack upon the US-flagged ship *Sea Isle City* near Kuwait and the mine-strike by the warship *Samuel B. Roberts* did not constitute an "armed attack" upon the United States sufficient to trigger a use of force in self-defence. However, there was some support in the decision for acceptance of the "cumulative effect" approach to determining whether a state suffered an "armed attack". Further , it should be acknowledged that an alternative international legal analysis based upon the reasoning of the International Court of Justice in the *Nicaragua Case* [1986] I.C.J. Rep. 14, has been suggested by commentators such as Dale Stephens, "The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations," (1998-1999) 29 *Cal. W. Int'l L.J*. 283-311, 298. He proposed justifying the limited use of naval force based upon the Court's analysis of "proportionate countermeasures."

It is at this juncture that the exceptional nature of the Canadian claim of "historic internal waters" will exert its strongest influence on the course of operations. The political direction of the Canadian warships defending Canadian Arctic waters from incursion must take the nature and strength of the position – that it does not rest upon a *prima facie* case, but rather relies upon an unlitigated exception - into account before providing instructions on the use of force. As noted above, both belligerents may believe in the righteousness of their cause and of the legitimacy of the use of force in self-defence. As has happened in every instance of the use of force by Canada in the past, the legal basis for the Government of Canada's direction for the use of force will be scrutinized and evaluated publicly by official and private critics. Further, while the issue of Canadian maritime delimitation may never be formally litigated before the I.C.J. or other international tribunal, the use of naval force may itself provoke domestic or international litigation. Courts may then be provided an opportunity to render a judgment on Canada's satisfaction of the burden imposed by the *Convention*, despite the language in the Statement filed at Canada's ratification in 2003.

An illustration of the complex legal issues associated with the use of force may be drawn by considering the possible responses available to the Government of Canada upon the discovery of a submerged foreign submarine transiting the channels of the Arctic Archipelago. Once detected within the territorial sea or internal waters claimed by Canada, a threshold question for the Canadian Navy would be the legal basis for any belligerent response. There is no literal guidance available in the *Convention* or commentaries to provide the authority to use force against submerged contacts in internal waters. It may be attractive to conclude that the submerged submarine's non-consensual passage through of a State's internal waters is such an egregious breach sovereignty – a warship entering a port normally requires diplomatic clearance - as to automatically justify the use of force in self-defence. However, the dearth of precedent may also be explained by recalling that normal and straight baselines have generally been located in waters in which submerged submarines or warships have difficulty navigating.

Reference may be made to the related issue of the lawful response to the detection of a submerged submarine's passage through a territorial sea. Despite Professor D.P. O'Connell's pithy observation that the "law relating to submerged contacts is itself so malleable as to be dangerous to both sides,"[150] he subscribed to the view that while coastal States are entitled to exercise the right of self-defence in the face of an armed attack, the targeting analysis conducted in relation to the submerged submarine should determine whether in the circumstances its presence constitutes an "armed attack." If the coastal State makes that determination, it must apply the principles of proportionality and necessity to assist in determining the force of the response. Professor O'Connell proposed consideration of a number of factors in assessing the innocence of a submerged submarine's passage through a territorial seas to include the reasonableness of the use of the territorial sea for transit purposes, which may be in ratio with its extent, the weather conditions at the time, the political climate and, most important, the actual track taken by the submarine.[151] Other factors that might also be considered in the present context could include the state of ice-cover, the likely flag of the submarine, and the proximity and spatial relationships of other vessels.

Consideration must also be given to an intermediate step in the escalation of force used against a submarine incursion. If the defender attacks the covert character of the submarine operations it tears away one of the boat's most essential operational qualities. For example, in 2004 the Japanese Maritime Self-Defence Force (JMSDF) detected a Chinese People's Liberation Army Navy (PLAN) Han-class SSN (attack submarine) transiting the Ishigaki Strait at the southwestern edge of Japan's Sakishima island chain. These waters are claimed by Japan as part of its territorial sea. As soon as the boat entered the Japanese waters the Japanese patrol aircraft switched from passive acoustic to active radar tracking. This not only provide the Japanese with a more accurate fix on the Chinese submarine, but it served as an explicit warning signal to the boat. When the Chinese submarine continued its transit, ignoring the warning, the Japanese aggressively tracked the Han for two days with P-3C maritime patrol and AWACs aircraft, ASW-destroyers and SH-60 helicopters well into international waters.[152]

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[150] O'Connell, *supra* note 148 at 142.

[151] *Ibid.*, at 143.

[152] Peter A. Dutton, "International Law and the November 2004 'Han Incident'", 162-181, *China's Future Nuclear Submarine Force*, ed. Andrew S. Ericson, Lyle J. Goldstein, William S. Murray, and Andrew R. Wilson, Naval Institute Press, 2007.

The increase in commercial maritime traffic in the Arctic waters and the waters claimed by Canada to be "historic internal waters" will undoubtedly strain the enforcement capabilities of the Government of Canada and any CF assistance to law enforcement sought to ease that strain. The most likely process used to obtain the necessary authority to provide that assistance would be in accordance with section 273.6(2) of the *National Defence Act*.[153] This provision preserves the customary role of the CF as the "force of last resort" and requires the CF to act only in support of Canadian peace officers, such as members of the RCMP, fishery enforcement officers, and pollution prevention officers.

In turn, this means that the activities of the Canadian Navy are restricted to the provision of assistance to the respective peace officers in the exercise of their lawful functions. For example, the fishery enforcement officers can be supported in their enforcement activities up to 200 nm seaward of the Arctic straight baselines and the pollution prevention officers up to 100 nm seaward of those same baselines. While in the past it has been accepted that the RCMP may only be supported in their conduct of counter-terrorism investigations on foreign-flagged vessels within the territorial sea and landward of the baselines, recent evolution of international law has provided a significant number of exceptions to strict reliance upon the 12-nm limit of the Canadian territorial sea that have been incorporated into Canadian law.[154]

The question of the propriety of the enforcement of the pollution regulations in the Arctic waters shipping safety control zones might present difficult threshold issues for the Canadian Navy. The international legal authorities for the enforcement of pollution regulations in the 100-nm pollution prevention zone may be found in either

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[153] *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.6(2):

"273.6(2) The Governor in Council, or the Minister on the request of the Minister of Public Safety and Emergency Preparedness or any other Minister, may issue directions authorizing the Canadian Forces to provide assistance in respect of any law enforcement matter if the Governor in Council or the Minister, as the case may be, considers that

(a) the assistance is in the public interest; and

(b) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces."

[154] The exceptions include: (1) offences committed outside of Canadian national waters involving a Canadian-flagged vessel (s. 477.1(c) Criminal Code of Canada (C.C.C.)); (2) offences committed outside of Canada in the course of hot pursuit (s. 477.2(d) C.C.C.); (3) offences committed outside the territory of any State by a Canadian citizen (s. 477.1(e) C.C.C.); conspiracy offences where an individual outside of Canada conspires with anyone to commit an offence in Canada (s. 465(4) C.C.C.); offences occurring in the EEZ in relation to the exploring, exploiting, conserving or managing a natural resource and is committed by a Canadian citizen or permanent resident (s. 477.1(a) C.C.C.); offences committed on or under a marine installation attached to the continental shelf (s. 477.1(b) C.C.C.) offence in which someone unlawfully exercises control over a ship or fixed platform (s. 7(2.1) and s. 78.1 C.C.C.); offences against "internationally protected persons" where committed on a Canadian flagged vessel or the person is a Canadian citizen or found in Canada after the offence (s. 7(3) C.C.C.); hostage taking (s. 7(3.1) C.C.C.); piracy (s. 74 C.C.C.); piratical acts in relation to a Canadian ship (s. 75 C.C.C.); offences in relation to nuclear material (s. 7(3.2) and s. 7(3.3) C.C.C.); offences in relation to torture (s. 7(3.7) and s. 269.1 C.C.c.); offences in relation to terrorism or financing of terrorism (s. 7(3.73), s. 7(3.74), s. 7(3.75), s. 83.01 and s.83.02 C.C.C.); offences by federal employees (s. 7(4) C.C.C.); sexual offences against children committed outside Canada by a Canadian citizen or permanent resident (s. 7(4.1) C.C.C.); and offences under the *Crimes Against Humanity and War Crimes Act*.

Article 56[155] and Article 234 of UNCLOS authorizing coastal States like Canada to adopt and enforce "non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone." While the AWPPA and its Regulations[156] indeed regulate the "prevention, reduction and control of marine pollution from vessels", there are provisions which extend much further and regulate the conduct of shipping in the Arctic. For example, there are provisions purporting to regulate ship construction standards, machinery and navigational equipment, manning of the ship, type of cargo carried, quantities of fuel, water and other supplies, and the navigational documents on board.[157] Any Government of Canada attempts to enforce these regulations in "Arctic waters" - section 15(4) of the AWPPA grants a pollution prevention officer the power to board a ship in the shipping safety control zone, conduct an inspection, order the ship outside the zone or to anchor in a place selected by him[158] - may meet resistance if other interested States hold alternative interpretations of the application of Article 234.

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[155] UNCLOS, Art. 56:

"Article56 – Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research;
   (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI."

[156] *Arctic Shipping Pollution Prevention Regulations* (C.R.C., c. 353).

[157] AWPPA, section 12.

[158] AWPPA, section 15(4): "Powers in relation to ships

(4) A pollution prevention officer may

(*a*) board any ship that is within a shipping safety control zone and conduct such inspections thereof as will enable the officer to determine whether the ship complies with standards prescribed by any regulations made under section 12 that are applicable to it within that shipping safety control zone;

(b) order any ship that is in or near a shipping safety control zone to proceed outside the zone in such manner as the officer may direct, to remain outside the zone or to anchor in a place selected by the officer, if (i) the officer suspects, on reasonable grounds, that the ship fails to comply with standards prescribed by any regulations made under section 12 that are or would be applicable to it within that shipping safety control zone, (ii) the ship is within the shipping safety control zone or is about to enter the zone in contravention of a regulation made under paragraph 12(1)(*b*) or (*c*), or (iii) the officer is satisfied, by reason of weather, visibility, ice or sea conditions, the condition of the ship or its equipment or the nature or condition of its cargo, that such an order is justified in the interests of safety; and

(c) where the officer is informed that a substantial quantity of waste has been deposited in the arctic waters or has entered the arctic waters or where, on reasonable grounds, the officer is satisfied that a grave and imminent danger of a substantial deposit of waste in the arctic waters exists, (i) order all ships within a specified area of the arctic waters to report their positions to the officer, and (ii) order any ship to take part in the clean-up of the waste or in any action to control or contain the waste."

Besides the waters of the Northwest Passage, the question of Canadian control over vessels sailing in other Canadian Arctic internal waters may also present significant challenges. The Canadian government must assert a similar level of control over foreign vessels sailing in the waters of the Arctic Archipelago as that asserted in the southern internal waters. This level of control would include the exercise of the exclusive territorial jurisdiction of Canadian courts and might well exceed that expected by foreign-flagged vessels exercising innocent passage through those same waters, in accordance with Article 8(2) of the *Convention*. Further, if the vessel is transiting the Northwest Passage, it may well be intending to exercise its right of transit passage in accordance with Article 35(a) of the *Convention*. As previously observed, there are many differences between innocent passage and transit passage. Two of the most significant differences are that ships conducting transit passage are not required to give notice to Canadian authorities, and transit passage is not subject to suspension by the Canadian government for security concerns. This wide disparity of expectations between the transiting vessels and the Canadian domestic authorities charged with enforcing Canadian law may well create difficult enforcement scenarios.

Only limited authority for enforcement of coastal State regulations over foreign-flagged vessels can be found in international law. The question of the lawful use of force in the execution of law enforcement functions such as search and arrest does not receive direct attention in UNCLOS. In UNCLOS Part III (Straits Used for International Navigation) the coastal State bordering an international strait may regulate ships exercising transit passage through an international strait in relation to safety of navigation, pollution prevention, with respect to fishing, and in relation to customs, fiscal, immigration, or sanitary laws.[159] Enforcement of these regulations over foreign vessels is restricted to violations of the coastal states laws and regulations pertaining to the safety of navigation or prevention of pollution. However, it should be noted that in order for the coastal state to enforce the navigation or pollution-prevention regulation within the international strait, the breach would have to be of such gravity as

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[159] UNCLOS:

Article 42 Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

   (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;

   (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

   (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

   (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

causing or threatening to cause major damage to the marine environment of the straits.[160] Otherwise, the coastal State may only require the foreign vessel to give certain identification information necessary to establish whether a violation has occurred.[161]

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[160] UNCLOS :.

Article 233 Safeguards with respect to straits used for international navigation
Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.

Also see :

Article 30 Non-compliance by warships with the laws and regulations of the coastal State
If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Article 31 Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes
The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Article 32 Immunities of warships and other government ships operated for non-commercial purposes
With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

[161] UNCLOS,:

Article 220 Enforcement by coastal States

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3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

When enforcing the *Fisheries Regulations* in the Fisheries Zone, Section 8.1 of the *Coastal Fisheries Protection Act* provides that:

> "8.1 A protection officer may, in the manner and the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel, if the protection officer
>
> (a) is proceeding lawfully to arrest the master or other person in command of the vessel; and
>
> (b) believes on reasonable grounds that force is necessary for the purpose of arresting that master or other person."

However, there are currently no regulations in force supporting fisheries enforcement of this type in Arctic waters.

The AWPPA creates a number of offences (sections 18-22) including the depositing of waste in Arctic waters, failure to make a report to a pollution prevention officer, failure to provide the Governor in Council with evidence of financial responsibility or the plans and specifications of the vessel, and navigating within a shipping safety control zone with a ship that does not comply with the prescribed standards.

However, these pollution prevention offences are exclusively summary conviction matters and therefore do not include powers of arrest pursuant to the *Criminal Code*. Section 15(4) of the AWPPA provides for the pollution prevention officer's enforcement powers pursuant to the Act, but these are limited to the powers to board, inspect, and order a vessel out of a shipping control zone or to remain outside of a zone. No powers in relation to a use of force are specified in the AWPPA. In summary, the current legislative regime in place in Canada's Arctic waters does not support arrests or use of force, except pursuant to the limited application of the *Criminal Code.*

Operations by Canadian warships in support of law enforcement activities outside of Canadian national waters – in the Arctic waters pollution prevention zone or fisheries protection zone beyond Canadian territorial waters – must be conducted with special care. Despite the "functional jurisdiction" exercised by Canadian law enforcement, they are also regarded as international waters in which foreign warships can themselves lawfully conduct operations. As observed by Professor Ken Booth, the exclusive economic zone is a zone *sui generis* "since it is neither high sea nor territorial sea as normally understood."[162] While the AWPPA and UNCLOS may afford jurisdiction to enforce the pollution prevention regulations, it simultaneously remains ocean space in which foreign warships may conduct operations unmolested. Any use of Canadian warships to support law enforcement activities in these zones must be measured against the possibility of inadvertent escalation of risk by operating in the same ocean space as foreign warships escorting commercial vessels in their legitimate exercise of freedom of the seas.

Finally, the various outer limits of the enforcement zones including the straight baselines, the 12-nm territorial sea, the 100-nm pollution prevention zone and the 200-nm fisheries zone will be regarded by all participants as significant boundaries that will greatly influence operations. These nominal boundaries serve the dual roles of precisely marking the extent of enforcement jurisdictions and also as boundaries of politically charged

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7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

8. The provisions of paragraphs 3, 4, 5, 6and 7 also apply in respect of national laws and regulations adopted pursuant to article 211, paragraph 6.

[162] Ken Booth, *Law, Force and Diplomacy at Sea*, (George Allen & Unwin, 1985) 43. Booth named these "psycho-legal boundaries" in recognition of the psychological character of naval diplomacy.

sensitivities.[163] Such boundaries influence the perceptions of all vessels involved because of their legal significance. In the case of the 200-nm fisheries zone boundary, for example, as long as the Canadian warship remains landward of the fisheries zone outer limit, it could be easily argued that it is only operating in support of law enforcement. Crossing that boundary introduces ambiguity about its intentions since, beyond the 200-nm limit, it may only lawfully conduct military operations in self-defence. Obviously, the complex overlap of regulatory jurisdictions seaward of the straight baselines will influence the manner in which the Canadian Navy conducts its operations.

VIII – CONCLUSION

During the summer of 2008 after the Ilulissat Declaration committing Canada and four other Arctic Ocean coastal states to the UNCLOS legal regime in order to settle the outstanding maritime and seabed delimitation disputes, the price of oil soared to record highs. The prospect of Canadians being able to manage the exploitation of the petroleum and gas resources in the Arctic was seen as increasingly viable and beneficial. Indeed, that fortune had smiled upon Canada with its strategic location was confirmed by the July release of the United States Geological Survey which had evaluated the "undiscovered technically recoverable resources" of all areas north of the Arctic Circle. The *Circum-Arctic Resource Appraisal*[164] found that the Arctic may contain up to 90 billion barrels of oil and 1,670 trillion cubic feet of natural gas. Not only were areas of the Beaufort Sea and north of Siberia confirmed as probable areas of interest, but the waters and seabed of the Arctic Archipelago known as the Sverdup Basin were also identified.

The agreement between the five Arctic Ocean coastal states to rely upon UNCLOS was intended to prevent the competing claims over the waters and seabed in the Arctic from degenerating into open conflict. However, it should not be assumed that the consequences of these delimitations are not grave or that important national interests are not seen to be at stake. The rising price of gasoline and future restrictions on its availability will not just serve to limit automobile lifestyle decisions in North America, but the impact of rising transportation and fertilizer costs were also affecting the price and availability of food, and the evidence of the seriousness of those concerns could be seen in incidents of civil unrest in India, Europe and Asia.

The Government of Canada has rested its title to the waters and seabed of its Arctic territory upon the 1985 declaration that the waters within the straight baselines are Canada's "historic internal waters." Canada's Arctic waters regulatory scheme has established a framework of fishing and pollution control zones extending seaward from the straight baselines surrounding the archipelago. The Government of Canada relies upon UNCLOS treaty rights that extend the authority to exercise functional sovereignty over these zones.

The straight baselines themselves have not been tested before any international court or tribunal. Indeed there have been some suggestions that Canada adjust its legal basis to arguably more legally secure foundations.[165] The strength of that legal basis is seen to be important because the unique Arctic geography, the impending climactic changes that will fundamentally alter the maritime operating environment, and the geopolitical

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[163] Ken Booth, "Naval Strategy and the Spread of Psycho-Legal Boundaries at Sea" (1982-1983), 38 Int'l J., 373 at 384-385. "Naval diplomacy, therefore, is a test of nerve rather than force, with naval powers seeking to achieve their objectives by demonstrating a willingness to embark upon risky actions which could develop a momentum of their own; they might escalate out of control. Coercive naval diplomacy rocks the diplomatic boat; it creates an unpredictability which is fraught with the danger of war. By so doing warships charge the diplomatic atmosphere in ways which the naval power hopes will be politically exploitable."

[164] *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, U.S. Department of the Interior, U.S. Geological Survey, U.S.G.S Fact Sheet 2008-3049. See also Jad Mouawad, "Oil Survey Says Arctic Has Riches," The New York Times, July 24, 2008,

[165] Pharand, *supra* note 15 at 140-146. The Navy will also have to be sensitive to any changes to the legal basis for the claims. For example, Professor Pharand has suggested an alternative legal basis for Canada's claim to the waters of the Arctic Archipelago in the place of "historic internal waters." He has proposed that "consolidation of title" – history is invoked "only as a complementary and subsidiary basis, to solidify or consolidate the title resulting from the claim" - of straight baselines.

challenges – the increased commercial attention and enduring military attractiveness of strategic submarine operations - that may be emerging in the Arctic Ocean, will all place a stress upon Canada's legal foundations of sovereignty over the Arctic waters.

The Canadian Navy will have to confront the operational challenges of protecting Canadian sovereignty in the Arctic waters while simultaneously providing any necessary assistance to law enforcement authorities attempting to enforce the full spectrum of Canadian law in the waters of the Arctic Archipelago and the pollution and fisheries regulations in the zones beyond. The contested nature of the Canadian maritime claims will present the Navy with overlapping jurisdictions and operational imperatives that will require delicate balance.

It is vital that the Navy maintain a clear understanding of the physical characteristics of the region, the policy basis for Arctic maritime operations, and finally the legal bases for both operations and the claim being supported by those operations in order to properly fulfill its obligations to serve Canada.