

## Forty Years of Canadian Sovereignty Assertion in the Arctic, 1947-87

N.D. BANKES<sup>1</sup>

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**ABSTRACT.** Threats or objections to Canadian claims to sovereignty and to the exercise of sovereign rights by Canada in the Arctic in the 40 years since World War II have come from the United States. In the immediate postwar era Canadian sovereignty over minor areas of the Arctic Islands was not unchallengeable. Canadian concerns focused on the desire of the United States to establish weather stations in the Arctic with or without Canadian support. By the early 1950s, and with bilateral agreements with the United States on the DEW Line and BMEWS, Canadian terrestrial sovereignty was beyond question. Canadian maritime claims continued to be contested during the balance of the period. These claims have taken the form of functional jurisdiction over pollution, an historic title to the waters of the archipelago and the rejection of an "international" status for the waters of the Northwest Passage. Canadian maritime claims in the Arctic have not been consistently formulated or consistently pursued by the Canadian government during the period due to an evolving international law of the sea and American objections. The Canadian position on functional jurisdiction over pollution has been vindicated by the Law of the Sea Convention, but there continue to be significant doubts as to the status of the archipelagic waters.

**Key words:** international law, sovereignty, historic title, functional jurisdiction, international straits

**RÉSUMÉ.** Au cours des 40 ans qui ont suivi la Deuxième Guerre mondiale, les États-Unis ont été à les instigateurs de menaces et d'objections envers le Canada quand celui-ci a déclaré ses droits à la souveraineté dans l'Arctique, ou quand il a voulu les y exercer. Juste après la guerre, la souveraineté du Canada sur des régions peu importantes de l'archipel Arctique était loin d'être confirmée. Les Canadiens s'inquiétaient surtout de l'intention des États-Unis d'installer des stations météorologiques dans l'Arctique avec ou sans leur accord. Au début des années 50, les accords bi-latéraux du réseau DEW (Réseau d'alerte avancé) et du système BMEWS (Système d'alerte avancé pour les missiles balistiques) entre Canada et États-Unis, venaient confirmer la souveraineté territoriale du Canada. Les droits à la souveraineté maritime continuèrent cependant d'être remis en question pendant le reste de cette époque. Leur affirmation s'est manifestée sous la forme d'une juridiction administrative sur la pollution, d'un titre historique pour les eaux de l'Archipel, et du rejet du statut d'eaux "internationales" pour le passage du Nord-Ouest. Les droits à la souveraineté maritime du Canada dans l'Arctique n'ont pas été formulés ou exercés avec cohérence par le gouvernement canadien à cause de l'évolution des lois maritimes internationales et des objections américaines pendant cette période. La position canadienne concernant la juridiction administrative sur la pollution a été justifiée par la Convention du droit de la mer, mais de grands doutes subsistent quant au statut des eaux de l'archipel.

**Mots clés:** loi internationale, souveraineté, titre historique, juridiction administrative, détroits internationaux

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### INTRODUCTION

This paper might have been subtitled "The enemy within," for during the last 40 years the greatest practical threat to Canadian aspirations in the Arctic has been posed, curiously enough, by its formidable ally to the south, the United States of America. The issues have changed during these years but U.S. defence policy has continued to depend upon relatively free access to the Canadian Arctic, both lands and waters. Implicit in this policy has been the threat that while Canadian cooperation is expected and appreciated, it might not always be strictly or legally necessary. Thus in 1947 there was the possibility that the United States might establish weather stations in unexplored parts of the High Arctic, while in 1985 the United States maintained that the U.S. CGS *Polar Sea* had the right to navigate the Northwest Passage without the consent of Canada. The United States takes a similar view of the transit rights of its nuclear-powered submarines. But, make no mistake, the issues have changed, and the concerns of Canada in the Arctic, as illustrated by the voyages of the SS *Manhattan* and the U.S. CGS *Polar Sea*, have become maritime concerns rather than terrestrial concerns. Nobody would suggest in 1987 that Canada's sovereignty over the arctic mainland and archipelago was in any way open to question, but the precise nature of Canada's sovereign rights over the archipelagic waters is still a matter of heated debate and the cause of significant differences of opinion between these two North American powers.

By contrast, Canada's relations with its other arctic neighbour, Denmark, concerning Greenland, have been marked by a high degree of international cooperation and agreements on a conti-

mental shelf boundary, environmental protection and fisheries. There have, with one minor exception, been no overt disagreements with Denmark during this period over Canada's arctic claims (Smith, 1952; Canadian Practice, 1981). Relations have not always been rosy, however, for the Greenlanders were firmly opposed to the Arctic Pilot Project in the 1980s and Denmark has never supported a sector theory of sovereignty.

One can also observe a fair degree of congruency between Canadian and Soviet arctic marine policies (Butler, 1971, 1978). Both Canada and the Soviet Union have claimed special status for their northern straits: the Northeast Passage and the Northwest Passage. Implicitly the Soviet Union is also a supporter of sector claims in the Arctic. As a result the Soviet Union has tended to be supportive of Canadian claims for special status for arctic waters. There may have been missions by Soviet submarines into Canadian arctic waters, but Canada's sovereignty assertions have never been openly or consistently challenged by the Soviet Union.

This paper is intended as a survey of Canadian sovereignty assertion in the Arctic over the last 40 years. The term sovereignty assertion has been given a broad interpretation here. It is recognized that the term sovereignty generally connotes exclusive powers over a defined portion of the globe (Island of Palmas Case, 1928; Brownlie, 1979; Triggs, 1986; Shaw, 1986). Sovereignty, as viewed in this sense, will extend to the terrestrial portions of a state, its internal waters and, subject to the right of innocent passage, its territorial seas. Used in this strict sense the paper would be confined to Canada's claims to sovereignty over terrestrial areas and its claim that the waters of the Arctic Archipelago should be treated as historic internal

<sup>1</sup>Faculty of Law, University of Calgary, 2500 University Drive N.W., Calgary, Alberta, Canada T2N 1N4  
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waters. We could also deal in this context with the status of the Northwest Passage and the argument that, even if the passage is not constituted by internal waters, it is at the very least at certain points entirely within the territorial sea of Canada.

However, rather than limit the scope of the paper in this manner, the term sovereignty assertion has also been used to embrace the more limited claims to functional jurisdiction (some of which are referred to as sovereign rights in the Third Law of the Sea Convention (UNCLOS III, 1982) over submarine and arctic marine areas that have been made by Canada during this period. The classic example of this type of claim is the Arctic Waters Pollution Prevention Act (Government of Canada, 1970a). It is *not* suggested here that these elements of functional jurisdiction constitute territorial sovereignty, and it is recognized that the validity of claims of this nature depends, among other things, upon the recognized sovereignty of the littoral state. But nevertheless, these claims to jurisdiction are claims made at the expense of the alternative jurisdiction of international authorities such as the International Maritime Organization and of flag states. As such they merit treatment in this paper.

The test of "sovereignty" adopted in this paper is that of "effective occupation" as qualified in two particulars. First, the test has to be interpreted taking into account the nature of the territory involved and its degree of habitability (Eastern Greenland Case, 1933). Second, at least with respect to land, any application of the test should bear in mind the relativity of the concepts of sovereignty and title in international law. Generally, all that a state has to do is to prove a *better* title than that claimed by another state.

Although the context for applying the test of effective occupation will vary, international tribunals have generally looked to such things as: settlement, enactment and implementation of legislation, exercise of criminal jurisdiction over foreign nationals, grants of concessions to and taxing of foreign nationals, surveys and mapping activities that evidence a claim and the establishment of licensing systems for activities such as fishing, whaling and sealing (Triggs, 1986).

It should be apparent from an application of these criteria that with the exception of the immediate postwar period (discussed below), Canada's sovereignty over its *terrestrial* areas has been unimpeachable throughout the period. There is, in addition, a continuing dispute with Denmark over the sovereignty to Hans Island in Nares Strait between Greenland and Ellesmere Island. Different considerations, however, apply to sovereignty claims (in the strict sense) over marine areas. With respect to marine areas, an international adjudicator is likely to insist upon a test of absolute title, rather than a relatively better title. The adjudicator will, in effect, be deciding whether waters should be subject to the territorial sovereignty of the coastal state, or whether they should be subject to the typical international marine regime, which balances the rights of a coastal state against those of the world community. A coastal state therefore faces a much stiffer test if it wishes to establish exclusive sovereignty over marine areas (Blum, 1965). In effect, a coastal state has to establish *international acquiescence* in order to validate an historic title claim. Nevertheless, the unusual geographical, historical and climatic features of the Arctic Archipelago do not preclude this type of claim (Blum, 1965; Johnston, 1934).

Finally, it should be emphasized that in considering Canada's "sovereignty assertion" and objections thereto, we have lim-

ited ourselves to what might be described as "legal" objections. This paper does not accept, for example, the rather loose allegation that Canada's arctic sovereignty is less real because of a supposed inability to defend itself from a Soviet attack.

#### BACKGROUND

In order to maintain some general perspective we shall review the legal and historical context for Canadian claims during the 40-year period under review.

In 1947, Canada, like other arctic states, was just emerging from World War II, a war that had seen a very high level of cooperation between the United States and Canada. Large numbers of U.S. citizens had been posted to the Canadian Arctic and cooperation between the allies took three main forms. These were the Norman Wells Oil Development and Canol Pipeline, the Northwest Staging Route and Alaska Highway to protect Alaska and Project Crimson in the Eastern Arctic. The latter involved the construction of airfields at such places as Coral Harbour and Frobisher Bay (Diubaldo, 1981). All three ventures involved heavy U.S. investments of capital and labour in the Canadian Arctic and led to Canadian sovereignty concerns during the war.

The next two decades saw a polarization of world affairs between NATO countries and the Soviet bloc. The Arctic grew in importance, along with increasing awareness of its strategic location. This led directly to the construction and operation of U.S.-Canadian weather stations in the late 1940s, followed by the DEW Line in the late 1950s to protect against a Soviet bomber attack. East-West conflicts continued to come to the fore in the Arctic in the second half of the period in two contexts: first, the capabilities of Soviet nuclear submarines to pass undetected through Canadian arctic waters, thereby avoiding the GIUK (Greenland, Iceland, United Kingdom) gap, and second, the ability of allied forces to detect hostile plane and missile attacks across the Arctic Ocean. The DEW Line declined in importance with the perception that the major threat to North American security would come from intercontinental missiles rather than bombers.

The post-World War II era has also seen a marked expansion in the maritime claims of all coastal states. This has led to conflict between major maritime powers, such as the United States, and coastal powers, such as Canada. The maritime powers have tried to restrict the attempts of coastal states to extend their jurisdiction in ways that might interfere with the freedom of navigation. It is this policy goal that, in large part, has fueled U.S. opposition to various Canadian maritime claims in the Arctic. In general, the extended functional claims of the coastal states have been vindicated by developments in international law and the Third United Nations Convention on the Law of the Sea, 1982 (UNCLOS III, 1982). Hence the claims of coastal states to a 12-mile territorial sea, a continental shelf and a 200-mile exclusive economic zone have all been accepted. Nevertheless, Canadian claims in the North have still occasioned vociferous U.S. objections, particularly to sector claims, the internal status of the Northwest Passage, the Arctic Waters Pollution Prevention Act and the status of the archipelagic waters as historic internal waters.

The remainder of the paper is organized in two parts. The first is a review of sovereign claims over terrestrial areas in the Canadian Arctic and deals with problems raised by U.S.-Canadian weather stations and the DEW Line. The second and

more important part of the paper looks at Canada's maritime claims and addresses those matters listed above that have proven so contentious to the United States.

#### SOVEREIGNTY OVER THE ARCTIC MAINLAND AND ARCHIPELAGO

Canadian sovereignty in all territories in the Canadian sector is unchallenged but not unchallengeable. — H.H. Wrong, Associate Under-Secretary of State, External Affairs, 24 June 1946. [Government of Canada, 1977:1570.]

#### Background

Canada obtained a transfer of the Hudson Bay territories in 1870, and in 1880 the Arctic Islands Order in Council received the consent of Her Majesty. The imprecisely worded Order in Council transferred to Canada "all British territories and possessions in North America, not already included within the Dominion of Canada and all Islands adjacent to any such Territories or Possessions . . ." (Government of Canada, 1948:169). There was nothing in this transfer to support Canada's claims to sovereignty vis-à-vis the United States or the European powers, and it was left to Captain Bernier's voyages in the CGS *Arctic* and those of other government-sponsored expeditions to consolidate Canada's title (Smith, 1980). By 1947 it could be assumed that Canada's title had been perfected to most of the arctic islands. However there were some minor surprises and some important government concerns in the immediate postwar era. As to surprises, in 1948 and 1949 new territories were discovered in Foxe Basin: Prince Charles Island, Air Force Island and Foley Island (Polar Record, 1951; Arctic, 1948, 1949). The concerns were more serious.

#### Arctic Weather Stations

In 1946 the United States, reviving a stillborn proposal of 1942 (Smith, 1980), proposed the construction of several weather stations in the Arctic Archipelago, which would be either established and operated by the United States or alternatively on a cooperative basis with Canada (Government of Canada, 1977). At about the same time the Department of External Affairs obtained a copy of a report prepared by a U.S. Air Coordinating Committee. The report suggested that, notwithstanding Canada's sector claims (discussed below), U.S. Army reconnaissance flights be conducted in the sector west of Greenland to discover if "islands exist which might be claimed by the United States" with a view to the establishment of a weather station (Government of Canada, 1977:1546). Not surprisingly, this threat of unilateral action led to major concerns within the Canadian government.

The United States was anxious to press ahead with its proposed development of the stations, while the Canadian government had mixed feelings. On the one hand, Canada appreciated the United States' concerns and foresaw "the overall requirements of continental security and defence" (Government of Canada, 1977:1558). If the request were not acceded to, there was the risk of unilateral action by the United States as foreshadowed in the leaked memorandum. But on the other hand, there were several drawbacks to proceeding. First, the request could only be granted on terms that would protect Canadian sovereignty and yet would not expose Canada to similar requests from other nations. Second, in the interests of regional defence, Canada might be forced to commit money and scarce manpower considerably beyond what might be necessary

"from the standpoint of Canadian defence alone" (Government of Canada, 1977:1559).

Canada succeeded in postponing the U.S. requests during 1946, the question being eventually considered in December of that year as part of the overall issue of postwar cooperation between the two powers. The result was an agreement announced on 4 March 1947 by C.D. Howe in the House of Commons to establish *joint* weather stations at Resolute, Eureka Sound, Mould Bay, Isachsen and Alert (Wiktor, 1982). Cooperation was to be on Canadian terms and Howe, then the Minister of Reconstruction and Supply, was able to state, somewhat disingenuously, that:

The United States has therefore undertaken to assist Canada in the establishment and operation of these northern stations which will, of course, be under the control of the Canadian government which will supply the officers in charge. [Hansard, 1947(2):990.]

Thus ended what was the last potential legal threat to Canadian sovereignty over its arctic *lands*. In practice, U.S. support, especially shipping, was essential for the establishment and resupply of the weather stations, and it was not until 1954 that Canada assumed sole responsibility for supplying these stations (Polar Record, 1956) and not until 1972 that the United States completely withdrew its personnel (Polar Record, 1972).

#### The DEW Line Stations

If there were any residual doubts about U.S. territorial ambitions in the Canadian Arctic after this time, they were put to rest by the terms of the agreements to establish the DEW Line stations in the Canadian Arctic. The DEW Line, the farthest north of three radar lines, was designed to protect the United States from a Soviet bomber attack over the Pole. It was primarily of benefit to the United States, but the arrangement was entered into in the name and spirit of continental defence.

The exchange of notes evidencing the agreement provided that the location of the DEW Line sites was to be subject to the agreement of Canadian authorities (Government of Canada, 1955). Nothing in the agreement was to "derogate from the application of Canadian Law," including customs and immigration procedures, although relief might be granted in appropriate circumstances. The costs of construction and operation were to be the responsibility of the United States, although Canada was to be entitled to assume the operation and manning of the installations in the future if it wished. Port and airstrip facilities constructed for the DEW Line stations were to be available for Canadian use.

The DEW Line agreement was followed by a subsequent agreement in 1959 on the Ballistic Missile Early Warning System (BMEWS) (Government of Canada, 1959). This agreement was modelled on the DEW Line agreement. The importance of these agreements should not be overestimated in the context of sovereignty, since Canada's terrestrial claims were probably beyond question by this time. The agreements merely served to reinforce that conclusion. They did not contain an explicit recognition of Canadian sovereignty throughout the Arctic, but the continuing cooperation shown by these and other arrangements "constituted at least *de facto* recognition, of a sort which could not be reasonably interpreted as other than complete and permanent" (Smith, 1980:18). The same comment can be made about the 1985 Canada-U.S. Agreement providing for the new cost-shared North Warning System. Although the

agreement was heralded by Hon. Eric Nielsen, Minister of National Defence, as strengthening and assuring Canadian sovereignty (Hansard, 1985), in truth that territorial sovereignty was not threatened at all, except perhaps by the continued spectre of a Soviet attack. It is only Canada's maritime claims, and then only their form, that can in any sense be said to be threatened by U.S. policies at present.

#### CANADIAN MARITIME CLAIMS

Canadian maritime claims in the Arctic during this period have taken three forms. First, there are the claims to functional jurisdiction typified by the Arctic Waters Pollution Prevention Act. Second, there are claims that Canada has full sovereignty over the archipelagic waters, based on any one of a number of different theories. Third, there are the claims that the Northwest Passage is not an international strait. Each class of claim represents a type of "sovereignty assertion" and will be dealt with separately.

##### *Functional Jurisdiction Claims*

On 8 April 1970, following the voyages of the SS *Manhattan* through the Northwest Passage, the Canadian government introduced the Arctic Waters Pollution Prevention Act in the House of Commons. The bill purported to establish a 100-nautical-mile pollution prevention zone in arctic waters within which Canada would control shipping, prescribe standards of vessel construction, navigation and operation and, if necessary, prohibit passage. At the same time Canada proposed to extend its territorial sea from 3 to 12 nautical miles, a move that could have a significant effect on transit through the Northwest Passage. There could be no doubt about the United States' trenchant reaction to these claims: "International law provides no basis for these proposed unilateral extensions of jurisdiction on the *high seas*, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction" (United States Department of State, 1970:605). The Canadian initiative, argued the United States, was an unacceptable interference with the jurisdiction of the flag state. If these waters were all "high seas," the exercise of jurisdiction was indeed unusual, but, as we shall see, part of the Canadian claim was that a portion of these waters were not high seas. In any event, it was certainly not a claim to absolute territorial sovereignty throughout the 100-mile zone.

Canada attempted to justify the legislation on several grounds but at the same time abrogated its acceptance of the compulsory jurisdiction of the International Court of Justice. It thereby precluded the possibility that the United States might unilaterally refer the dispute to that court. Canada's main argument in support of the legislation was based on the failure of multilateral initiatives through the International Maritime Consultative Organization to achieve an acceptable degree of pollution control. This, it was said, made it necessary for coastal states to act in "self-defence" to protect their coastlines (Government of Canada, 1970b). Canada also claimed that it was fulfilling environmental protection responsibilities, which it owed to the international community, and that it was ridiculous to talk about "freedom of the high seas" when the area was frozen for much of the year and the inhabitants (the Inuit) used the ice much as they would land (Pharand, 1984; VanderZwaag and Pharand, 1983).

The issue having been joined, the Canadian government set about vindicating its position in the multilateral context of the

Third United Nations Conference on the Law of the Sea. To further its contentions, Canada tabled a provision for what became Part XII of the Convention: Protection and Preservation of the Marine Environment (McRae and Goundrey, 1982). As adopted at Montego Bay in 1982, Article 234, "ice-covered areas," reads as follows:

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 climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence. [UNCLOS III, 1982.]

This article, introduced and championed by the Canadian delegation and acquiesced to by the U.S. government, has been analyzed elsewhere (McRae and Goundrey, 1982). It has in *large part*, if not completely, legitimized the Canadian legislation. In one particular the article has clearly strengthened Canada's hand, for it permits the application of marine pollution legislation throughout the 200-nautical-mile exclusive economic zone rather than the 100-mile arctic zone claimed by Canada. However, the convention, although signed in 1982, has yet to enter into force. The article is therefore not binding as a matter of conventional law and can only be looked to as a crystallization or codification of customary international law.

To complete this review of functional initiatives, mention should be made of Canada's claim to an extended fisheries zone. In 1977 Canada claimed a 200-mile exclusive fisheries zone. Whatever objections might have been made at the time must now be taken to be without merit, for the concept of a 200-mile exclusive economic zone embracing fishing rights is now part of international law.

The Arctic Waters Pollution Prevention Act (AWPPA) was a bold initiative — a claim to an extensive functional jurisdiction that set the law journals and international lawyers "a-twitter" for several years. But how did it relate to more extensive claims of sovereignty over the archipelagic waters? The problem can perhaps best be considered in light of Article 234. That article accords a coastal state certain rights in the exclusive economic zone, which is an area beyond the territorial sea and internal waters of a coastal state. Within its internal waters, a coastal state has no need of Article 234, for these are subject to the exclusive sovereignty of the coastal state. What then is the status of the archipelagic waters?

Canada was pursuing an arctic maritime policy using two quite separate approaches. The policy was one of maximization of control over shipping activities in archipelagic waters. This could be attained by a claim of functional jurisdiction over pollution control, but this approach did have disadvantages. For example, a coastal state relying upon Article 234 might not have the power to suspend navigation or to charge for icebreaker escorts. Furthermore, the coastal state could only rely upon Article 234 for those areas covered by ice "for most of the year."

The alternative and more radical approach is to endeavour to establish that the archipelagic waters are internal waters subject to the exclusive sovereignty of the coastal state and therefore not

subject to a right of innocent passage. This approach, although perhaps not made fully explicit by Canadian authorities until the 1970s, can be traced back to the early part of the century and has made fitful appearances from time to time in the intervening decades.

#### *Canadian Internal Waters*

It has always been difficult to identify the precise quality of Canadian maritime claims in the Arctic. The difficulty begins with the notorious sector claim suggested by Senator Poirier in 1907 in the Senate. He stated *inter alia*:

A country whose possessions to-day goes up to the Arctic regions, will have a right . . . to all the lands that are found in the waters between a line extending from its eastern extremity north and another line extending from the western extremity north. . . . From 141 to 60 degrees west we are on Canadian territory. [Hansard, 1907:271.]

Hence was born, unofficially, the Canadian sector claim, and although it seems to have formed the basis of Captain Bernier's arctic claims for Canada, it has since had a rocky history. It has never been accepted by the United States or international lawyers as a basis for acquiring territory (Smith, 1966). Nevertheless, official maps, published with the imprimatur of the Department of Energy, Mines and Resources, Canada, still show an international boundary claim along the 141st and 60th degrees of longitude.

In its inception the claim was a claim to lands within the sector and was not a claim to waters or ice, but this has not always been the case. Canadian equivocation on the subject is well illustrated by comments made in 1956 and 1957 in the House of Commons by two successive ministers of Northern Affairs and National Resources: Jean Lesage and Alvin Hamilton. In August 1956 a member inquired of Lesage, then the minister, whether there had ever been any discussion "of the principle of ownership of the ice cap north of the land." Lesage responded, "we have never subscribed to the sector theory in application to ice . . . 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" (Hansard, 1956[7]:6955). A year later the tables were reversed, with Lesage asking of Hamilton, now the minister, whether the waters north of the archipelago were "Canadian waters." Hamilton equivocated: the islands were part of Canada, but as to the northern waters covered with moving ice "the ordinary rules of international law may or may not have application" (Hansard, 1957[2]:1559).

By the following year it appears that greater clarity had emerged. The evidence for this is a 1969 speech by Prime Minister Trudeau on arctic sovereignty. Trudeau quoted from a 1958 speech of Alvin Hamilton's to the effect that: "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. . . . This is national domain" (Hansard, 1969[8]:8720). Trudeau continued his 1969 speech by stating that this view of the waters as being internal waters was not something with which other states might agree. But if this too amounted to equivocation, there could be no misunderstanding about the statement made as part of the official Canadian response to U.S. objections to the AWPPA: "with respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian" (Government of Canada, 1970b:18). A statement to the same effect was made in the House on the same day (16 April 1970) by the Hon. Mitchell

Sharp, then Secretary of State for External Affairs (Hansard, 1970). Was there not then an inconsistency here? On the one hand the government was at pains to point out that the AWPPA represented a claim to specialized jurisdiction and not sovereignty. On the other hand, the government was stating that these waters were Canadian (i.e., internal) waters. Did not the first position prejudice the latter? Mitchell Sharp was ready for this attack and responded that the North Atlantic Fisheries Arbitration case "held that a state may, without prejudice to its claim to sovereignty over the whole of a particular area of the sea, exercise only so much part of its sovereign powers over such part of the area as may be necessary for immediate purposes" (Hansard, 1970).

Here, then, we have a clear statement as to the dual nature of Canada's legislative activities. What is unclear is why claims to territorial sovereignty and associated arguments were not pressed more forcefully in 1970. It was not until nearly 15 years later, following the transit of the U.S. CGS *Polar Sea* through the Northwest Passage, that the Canadian government moved to strengthen its "Canadian waters" argument. Perhaps by this time Canada felt surer of its position, for it accepted, once again, the compulsory jurisdiction of the International Court of Justice. However, it is difficult to see what has changed since 1970 to improve significantly Canada's internal waters claim.

The passage of this U.S. icebreaker, unaccompanied by any Canadian vessel, through the Northwest Passage in the summer of 1985 raised public concerns and questions in the House of Commons about sovereignty in the archipelagic waters. It led to a formal statement in the House of Commons by the Right Honourable Joe Clark, Secretary of State for External Affairs, and the drawing of "straight baselines" to surround the archipelago. In the first place, Clark stated, the assurance of the United States had been obtained to the effect that "the voyage of the *Polar Sea* was without prejudice to Canada's legal position." But he went on to assert, in ringing phrases, that:

Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward facing coasts of the Arctic islands. These islands are joined and not divided, by the waters between them. . . . The policy of the government is to maintain the natural unity of the Canadian Arctic archipelago and to preserve Canada's sovereignty over land, sea and ice undiminished and undivided. [Hansard, 1985(5):6463.]

In order to establish this "unity," or at least to clarify it for the international community, the minister informed the House that "straight baselines" under the Territorial Sea and Fishing Zones Act (Government of Canada, 1970c) would be drawn around the archipelago, thus making the case that all the waters landward of the baselines would be "Canada's historical internal waters" (Hansard, 1985:6463; Government of Canada, 1985a).

This was an extremely important step for the government to take. It had been heralded in 1970, but this latest statement was clear and unequivocal. Historic waters in international law are waters that by long usage and general acquiescence, express or implied, are entitled to the status of "internal waters" — that is, waters that are subject to the full sovereignty of the coastal state and, most importantly, through which there exists no right of innocent passage. Transportation through the arctic waters would then become a matter for negotiation and agreement, rather than right.

To fend off possible objections from the United States, the



Canadian government reiterated, as it had at the time of the AWPPA, that it would be willing to enter into a suitable cooperative arrangement with the United States. Such an arrangement ought to have advantages for both states. For Canada, it would mean recognition and legitimization of its claim, but to the United States it would mean guaranteed access, while at the same time precluding access by other states (such as the Soviet Union) that did not have a comparable agreement.

As an additional part of the package to strengthen Canadian claims as to the internal status of these waters, Clark also announced the introduction of the Canadian Laws Offshore Application Act (Government of Canada, 1985b). Although much of this legislation deals with technical matters of law reform, it also supported Canadian arguments by establishing that the archipelagic waters were within the Northwest Territories. The legislation was given first reading but was never debated and has since died on the order paper. The failure of the government to press this legislation leaves unresolved questions about the strength of Canada's claims, for the bill was the obvious adjunct to the September straight baselines order. Some have speculated, however, that the bill might represent a dangerous concession of offshore areas to the territorial government by the federal government, dangerous because it might inflate the aspirations of coastal provinces. This would prove to be unnecessary in the event that Canada were able to negotiate a form of transit agreement with the United States as recommended by the Report of the Special Joint Committee on Canada's International Relations (Government of Canada, 1986). Once the cooperation of the United States can be assured, there is really no threat to the Canadian view that these waters are internal, and therefore no need for the federal government to make significant domestic concessions to the Territories or the coastal provinces.

In conclusion, at the present time it is not clear that Canada could establish to the satisfaction of an international tribunal that the archipelagic waters are historic internal waters, especially given the need to establish what we described above as an absolute title rather than just a relatively better title than any other state. The Canadian government can hardly claim to have consistently pressed its claim over the last 40 years. On the other hand, the U.S. government, the state most seriously affected by Canadian claims to special status, has not acquiesced and indeed has objected consistently.

#### *The Northwest Passage*

The Northwest Passage (in reality a combination of passages) is the key to regular shipping in the Arctic. It has been variously suggested as a way of shipping Alaskan resources to markets (although not oil since the construction of the Alaska pipeline) and as a means of reducing shipping distances between Europe and Japan. Although there are several potential routes through the Passage, the Prince of Wales Strait, between Banks Island and Victoria Island, is the most favoured for deep draft vessels. At its narrowest this passage is only 6.5 miles wide — well closed by the 12-mile territorial sea claimed by Canada. There is also another choke point in the main shipping route in Barrow Strait between Lowther and Young islands, where the passage shrinks to 15.5 miles (Pharand, 1984).

Canada and the United States have, for years, disagreed as to the international status of the Northwest Passage. The United States is of the view that the waters form an international strait through which there is a non-suspendable right of "transit

passage" (UNCLOS III, 1982; Pharand, 1984), which would permit, *inter alia*, submerged submarine transits. Canada takes the view that the Passage has exactly the same status as its other archipelagic waters (i.e., internal waters) and has therefore enclosed the Passage within the straight baselines referred to above. This position, most clearly enunciated in the Canadian response to U.S. objections to the AWPPA package, is based on the view that the waters have never been used for international navigation and therefore cannot amount to an international strait:

The Canadian Government is aware of United States interest in ensuring freedom of transit through international straits, but rejects any suggestion that the Northwest Passage is such an international strait. The widespread interest in opening up the Northwest Passage to commercial shipping and the well-known commitment of the Canadian Government to this end are themselves ample proof that it has not heretofore been possible to utilize the Northwest Passage as a route for shipping. The Northwest Passage has not attained the status of an international strait by customary usage nor has it been defined as such by conventional international law. The Canadian Government reiterates its determination to open up the Northwest Passage to safe navigation for the shipping of all nations subject, however, to necessary conditions required to protect the delicate ecological balance of the Canadian Arctic. [Government of Canada, 1970b:612.]

At present this difference of opinion continues despite the vigour with which Canadian arguments have been pressed. Undoubtedly, passages such as that of the U.S. CGS *Polar Sea* do little to improve the Canadian position, but they may not have damaged it if, as has been announced, appropriate disclaimers were obtained from the United States.

#### CONCLUSIONS

Sovereignty becomes an issue once threatened, but in between times interest lapses, for sovereignty tends to be assumed from the colour of the map or the colour of the adjacent terrestrial areas rather than asserted on a daily basis. Canadian sovereignty assertion throughout this period has given the appearance of being reactive. The key Canadian statements and actions on arctic territorial sovereignty and on more functional claims to jurisdiction have all followed directly from a threat, perceived or real, and those threats, despite the Cold War, the Korean War and the division between NATO and Warsaw Pact countries, have all come from the United States: weather stations, the SS *Manhattan* and the U.S. CGS *Polar Sea*. But it would be going too far to suggest that these threats were the cause of, as well as the occasion for, Canadian activity. There is evidence of a more planned approach to arctic sovereignty, which is particularly apparent in the second half of the period. The years prior to the introduction of the AWPPA saw Canadian participation in multilateral forums dealing with pollution control. In 1970 the AWPPA was introduced as part of an overall plan dealing with the extension of coastal jurisdiction. At the same time the compulsory jurisdiction of the international court was denied. The Canadian government then worked hard to bring about changes in the law, not forgetting that an alternative route to greater control over the archipelagic waters was an internal waters designation for the area. The transit of the U.S. CGS *Polar Sea* in 1985 saw the policy come together once again with the promulgation of the straight baselines, the broad acceptance of Article 234 of UNCLOS III by the international community

and the reacceptance by Canada of the compulsory jurisdiction of the international court. But there is a gap in this pattern.

The changes that have been brought in international law since 1970 have related to functional jurisdiction. There has been no indication during that time that the rules pertaining to the establishment of an historic title have been relaxed. Indeed, it would be surprising if they had, since many of the goals of the coastal states can now be met through the exercise of recognized functional jurisdiction, whether over fisheries, the continental shelf or pollution control. At the same time it is hard to point to any particular activities of the federal government that have strengthened the historic waters claims since 1970. The straight baselines order can hardly be relied upon, for that merely made the nature of the claim manifest. It is true that the federal government has settled an Inuit title claim recognizing the special status of waters in the Western Arctic, but at around the same time it allowed its proposed offshore laws legislation to lapse (Government of Canada, 1984). That legislation would clearly and unequivocally have established the "internal" status of the archipelagic waters in domestic law, and the failure of the federal government to pursue the goal is something of a puzzle.

There have, however, been successes in the Canadian policy of sovereignty assertion. There were doubts as to Canadian arctic sovereignty in 1947, and doubts still remain in 1987, but the nature of the doubts has changed. In 1947 the doubts related to Canada's ability to resist a U.S. claim to an undiscovered or unexplored portion of the archipelago. These doubts soon evaporated, as have doubts as to the validity of the AWPPA. But in 1987 we continue to have doubts as to the precise status of the archipelagic waters: are they historic internal waters, are they riven by an international strait, or are they composed of the usual conjunction of internal waters, territorial sea and economic zones subject, however, to enhanced functional jurisdiction to deal with pollution in ice-covered areas? In resolving these doubts, much will depend upon the reaction of potential user states over the next few years if and when regular commercial navigation becomes feasible. Will Japan, the United States and European maritime powers accept Canadian claims and negotiate mutually beneficial transit arrangements, or will they contest those claims ultimately in the International Court of Justice?

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