

10-1-1983

Canada's Arctic Jurisdiction in International Law

Donat Pharand

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Law of the Sea Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Donat Pharand, "Canada's Arctic Jurisdiction in International Law" (1982-1983) 7:3 DLJ 315.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. Introduction

The purpose of this study is to make a brief overview of Canada's jurisdiction in the arctic regions, jurisdiction which has developed since the transfer of the Arctic Islands to Canada by Great Britain in 1880. The study will concentrate on Canada's jurisdiction over the water areas of the Arctic, but will also cover the status of the other areas involved. More specifically, the areas to be covered are: 1) the islands; 2) the continental shelf; 3) the waters in general; 4) the Northwest Passage; and 5) the airspace.

II. Canada's Jurisdiction Over the Arctic Islands

Since the transfer of title from Great Britain in 1870 and 1880, Canada's sovereignty over the whole of the Arctic Archipelago has been completed and consolidated by official Canadian expeditions and various state activities carried out over the years by government officials, in particular, the Royal Canadian Mounted Police. Canada's title to the Arctic Islands was doubted on two occasions at most, once by Denmark and the other time by Norway. In 1920, after the Canadian government had requested that Denmark restrain its Eskimos from killing musk-oxen on Ellesmere Island because it feared the extinction of the oxen, the Danish government stated in its reply that it thought it could subscribe to the view, expressed by the Danish explorer, Rasmussen, that Ellesmere Island was "no man's land".¹ This resulted in an appropriate communication being sent to Denmark by Great Britain on behalf, and at the request, of Canada, and Denmark did not pursue the matter after that. The fact that, at about the same time, Great Britain recognized Denmark's sovereignty over Greenland might also have helped to convince Denmark not to make any claim relating to Ellesmere Island. As for

*Professor of International Law, University of Ottawa.

1. See letter of Danish minister to Lord Curzon, dated 12 April 1920, in *J. B. Harkin Papers*, Public Archives of Canada, MG 30, C 63, Vol. I, Folder July 1919 — October 1920. For a discussion of "the supposed Danish challenge to Canada's ownership of Ellesmere Island", see Trevor Lloyd, "Knud Rasmussen and the Arctic Islands Preserve", MUSK-OX 25, 85-90, at p. 86 (1979).

the doubts expressed by Norway, they related to Sverdrup Islands, which lie immediately west of Ellesmere Island in the northern part of the archipelago. It began with a letter in 1928 from the Norwegian consul in Montreal, who wrote to the Canadian government and reserved all rights of Norway under international law over Sverdrup Islands. This eventually resulted in the Canadian government paying a certain sum to the Norwegian explorer, Sverdrup, for his services to scientific research² and in an exchange of notes in 1930 between Canada and Norway, whereby the latter recognized Canada's sovereignty over Sverdrup Islands. Since then, there has never been any challenge to Canada's sovereignty over the whole of the Arctic Archipelago and Canada has been reasonably careful in maintaining adequate control over those islands.

III. *Canada's Jurisdiction Over the Arctic Continental Shelf*

Since there is no question as to Canada's full jurisdiction or sovereignty over the Arctic Islands, there is no question either as to Canada's exclusive jurisdiction over the continental shelf of the archipelago. Indeed, in international law it is sovereignty over the land area that automatically confers exclusive jurisdiction over the natural resources of the continental shelf, the latter being a continuation of the land territory of the coastal state into and under the sea. In other words, the submarine areas constituting the continental shelf are deemed to be part of the territory over which the coastal state has sovereignty, the rationale being that the continental shelf is merely a continuation of that territory under the sea.³ The international law relating to the delimitation of the shelf was somewhat uncertain for a number of years, but, with a few international decisions and the signing of the Law of the Sea Convention by some 119 states in December 1982, it is gradually becoming more settled. The problem of delimitation involves the seaward limit of the continental shelf, and its lateral limits.

(a) *Seaward Limit*

The question of the seaward limit of the continental shelf is, in effect, one of definition. The 1958 Continental Shelf Convention

2. See letter of Dr. Skelton, dated 22 May 1930, in *Documents on Canadian External Relations, 1926-1930*, Vol. IV, at p. 965.

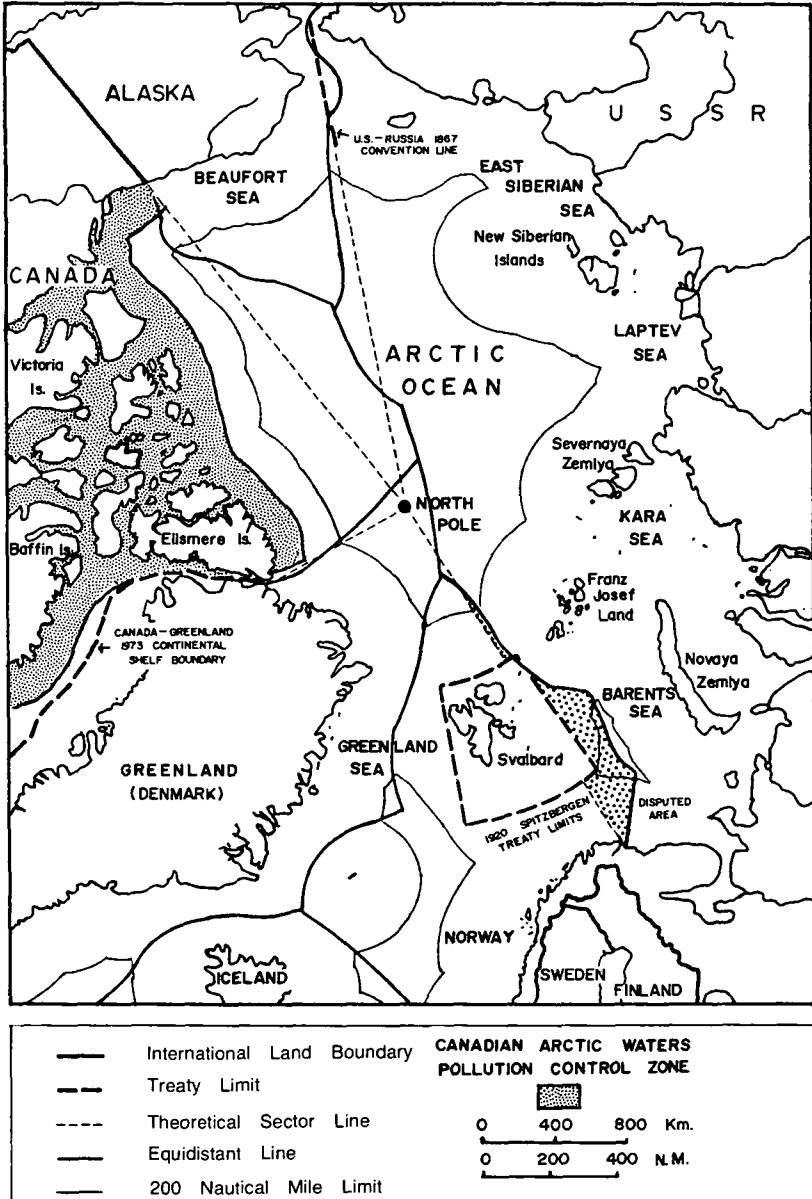
3. *The North Sea Continental Shelf Cases* (1969) I.C.J. Rep., at p. 31, para. 43.

defined the continental shelf as extending to a depth of 200 metres or to the point beyond that limit at which the depth of the superjacent waters permitted the exploitation of the natural resources. With developing technology permitting the exploitation of the continental shelf at ever increasing depths, the definition soon became obsolete. In 1968, when the United Nations' Deep Seabed Committee was formed, and for a number of years thereafter, attempts were made to arrive at a new definition, but were without success. It was only after the eighth session of the Third Law of the Sea Conference, in April 1979, that a consensus was reached on this question. The consensus is now incorporated into the new Law of the Sea Convention, which provides for two methods to determine the seaward limit of the continental shelf, one based on the thickness of the sedimentary rocks (with a distance limit) and the second on the configuration of the sea bottom. Under the first, or geological, method, the seaward limit must not extend beyond 350 miles from shore (or, where applicable, from the baselines from which the breadth of the territorial sea is measured), regardless of the actual length of the geological shelf, and, under the second, or physiographic, method, the seaward limit must not extend more than 100 miles beyond the 2,500-metre isobath. The 350-mile limit, however, does not apply to submarine elevations that are the natural components of the continental margin, such as its plateaux, rises, caps, banks, and spurs.⁴ Wide margin states, like Canada, will have to share with the rest of the international community the revenues from the exploitation of the resources of their continental shelf beyond 200 nautical miles. The revenue-sharing formula provides for those states to make a contribution of seven percent of the gross revenue at the wellhead after twelve years. On the basis of the definition just described, the arctic states in general, and Canada in particular, will have no difficulty in obtaining most, if not all, of their continental shelf in the Arctic Basin. Indeed, the full continental margin (that is, the continental shelf, slope, and rise) rarely exceeds 200 miles. It does so in the East Siberian and Chuckchi Seas (see *Map 1*) and, possibly, north of Ellesmere Island, if the Lomonosov Ridge and Alpha Ridge should turn out to be continental in nature and continuations of the landmass.

4. See *Convention of the Law of the Sea*, A/CONF.62/122, 7 October 1982, art. 76.

(b) *Lateral Limits*

The law pertaining to continental shelf delimitation between neighbouring states has had a rather difficult history, and the end



Source : Polar Atlas, GC 78-10040, 1978

Map 1: Jurisdictional Lines in the Arctic

result, contained in the 1982 Convention, is not very satisfactory from the point of view of clarity. The first provision which governed the situation was contained in the Continental Shelf Convention of 1958. Article 6 of that convention provided that the boundary of the continental shelf between two opposite or adjacent states was to be determined by agreement and, in the absence of such agreement, was to follow the median, or equidistance, line, unless another boundary line was justified by special circumstances. In other words, the principle of equidistance was to be the general rule, and a modification of the equidistance line would be the exception and permissible only when justified by special circumstances. The expression "special circumstances" was not defined in the convention, but the International Law Commission which prepared the draft of the convention specified three situations which qualified as special circumstances: an exceptional configuration of the coast, the existence of islands, and the presence of navigable channels.⁵

In 1969, the International Court of Justice had occasion to interpret Article 6 of the convention in its judgment of the *North Sea Continental Shelf Cases*. Although it held that Article 6 was not binding on Germany because the latter had not become a party to the 1958 convention and Article 6 had not become part of customary international law, the court did refer to Article 6 as embodying "the equidistance-special circumstances principle".⁶ It did not actually say that this constituted a single rule of delimitation, but this was done in 1977 by a special arbitral tribunal in the *English Channel Continental Shelf Case*⁷ between France and the United Kingdom. The tribunal held that Article 6 of the convention provides for a single rule, "a combined equidistance-special circumstances rule."⁸ It added that "[t]he fact that the rule is a single rule means that the question whether 'another boundary is justified by special circumstances' is an integral part of the rule providing for application of the equidistance principle."⁹ The 1977 arbitral decision specified that the role of the "special circumstances"

5. See *I.L.C. Yearbook*, Vol. II (1953), at p. 216.

6. See, *supra*, note 3, at p. 23, para. 21.

7. *The English Channel Continental Shelf Case*, decision of a Special Court of Arbitration, 30 June 1977, 236 typewritten pages.

8. *Ibid.*, at p. 80, para. 68.

9. *Ibid.*

element was to ensure an equitable delimitation and that the combined rule “gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined by equitable principles.”¹⁰

Following this decision, the delegates at the Third Law of the Sea Conference continued to be divided into two groups — perhaps even more so than before — with regard to what should be the method of delimitation. One group maintained that equidistance should be the basic method of delimitation, whereas the other argued that such delimitation should be done in accordance with equitable principles. As a consequence, the 1979 Informal Composite Negotiating Text provided that “the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law”, but it added that “such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.”¹¹ This provision did not rally sufficient support, and, on 28 August 1981, it was replaced by the following provision, which was adopted along with the rest of the Draft Convention on 30 April 1982: “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”¹² Since this provision gives us no guideline as to how to achieve an equitable solution, guidance must be obtained from relevant international decisions as to what the applicable international law is. Fortunately, the decision of the International Court of Justice of February 1982, in the *Continental Shelf Case* between Tunisia and Libya, did take into account the new provision, just quoted, as emerging law. In that recent case the court held that “the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances.”¹³ As for the meaning of “equitable

10. *Ibid.*, at p. 81, para. 70.

11. See *Informal Composite Negotiating Text*, A/CONF.62/WP.10/Rev. 1, 28 April 1979, article 83.

12. See, *supra*, note 4, art. 83.

13. *Case Concerning the Continental Shelf (Tunisia/Libya)*, 1982 I.C.J. Rep. 18, at p. 92, para. 133.

principles'', the court stated that, the principles being subordinate to the goal to be attained, the equitableness of the principles to be applied would be determined by reference to the equitableness of the solution.¹⁴ With respect to circumstances which may be considered as relevant in the area to be delimited, they will, of course, be very numerous, and so far have been held to include a number of factors, such as the general configuration of the coasts, the physical and geological structure, the natural resources of the area, a reasonable proportionality between the extent of the continental shelf and the length of the coast of a state, the size of the area to be delimited, a marked change in the direction of a coastline and any special configuration of the coast, the existence and position of islands, and the land frontier between the parties, as well as their previous conduct and attitude over a period of time. It should be added that, in all of the problems of delimitation that have been settled either by the International Court or by states themselves, the equidistance method has remained the most common mode of delimitation by far.

In summarizing the law applicable to continental shelf delimitation between neighbouring states, it may be stated that such delimitation must be done in accordance with equitable principles, taking into account all relevant circumstances in order to arrive at an equitable result, and that the equidistance method (with or without modification) has, in general, been found to produce such a result. Applying this summary statement of the law, we shall now examine briefly the two problems of continental shelf delimitation which Canada has with its arctic neighbours, Denmark and the United States.

With respect to our problem with Denmark, the continental shelf between Greenland and Ellesmere Island has already been delimited as far north as the Lincoln Sea, but there remains to be settled the shelf delimitation under the Lincoln Sea itself. The part of the continental shelf that is already delimited was determined on the basis of the equidistance rule, modified in certain sections of the line by taking into account the special configuration of the coasts, as well as the presence and size of islands, in order to achieve an equitable result. It is reasonable to assume that Canada and Denmark will follow a similar approach in delimiting the rest of the continental shelf in the Lincoln Sea. Should the Lomonosov Ridge

14. *Ibid.*, at p. 59, para. 70.

turn out to be continental in nature, the delimitation should cover this submarine feature as well.

With respect to the delimitation problem with the United States, that is, off the coast of Alaska and the Yukon in the Beaufort Sea, no agreement of any kind has yet been reached. If the equidistance principle is applied, the current delimitation line will be pulled over towards the Canadian side, due to the slightly convex coast of Alaska and the concave coast of the Yukon. Furthermore, there is evidence that the concavity in question is slowly being accentuated by a receding shoreline. It would thus appear that the special configuration of the coast would constitute an important relevant circumstance, and ought to justify a modification of the equidistance line.

Also in relation to the Alaska-Yukon continental shelf delimitation, Canada has been using the 141st meridian of longitude as its western limit for the exercise of different types of jurisdiction. In particular, it has been used for the issuance of oil and gas exploration permits commencing in January, 1965. The 141st meridian has also been used, up to a distance of 100 nautical miles from the coast, to describe, in the Arctic Waters Pollution Prevention Act of 1970, the waters over which Canada claimed pollution prevention jurisdiction. Then, in 1977, Canada turned to the 141st meridian again to indicate the western limit, of up to 200 miles, for its exclusive fishing zone in the Arctic. The various uses of the 141st meridian do not necessarily indicate that Canada is relying on the 1825 treaty between Great Britain and Russia as having established a maritime boundary. Indeed, a proper analysis of the treaty, taking into account the historical context, leads to the conclusion that the demarcation line, following the 141st meridian, went only *as far as* the Arctic Ocean. Furthermore, the parties could not have envisaged establishing a boundary of their continental shelf at a time when the concept itself was absolutely unknown in international law. However, the International Court did take notice, in the *North Sea Continental Shelf Cases*, that one of four possible methods of continental shelf delimitation considered by the committee of experts that were consulted by the International Law Commission was "the continuation in the seaward direction of the land frontier."¹⁵ This, of course, does not mean that the United States has to agree that the 141st meridian should be the delimitation

15. See, *supra*, note 3, at p. 43, para. 51.

line. It simply means that the various factors just discussed are not only relevant, but might be sufficiently important to justify a modification of the equidistance line in order to attain an equitable result.

IV. *Canada's Jurisdiction Over the Arctic Waters Generally*

Even if the question of Canada's jurisdiction over its Arctic Islands and continental shelf is beyond any possible challenge, such is not the case with respect to its claim of jurisdiction over the arctic waters within and beyond the Arctic Islands, particularly if such claim includes part of the Arctic Ocean.

(a) *Arctic Ocean*

Canada has made various claims of jurisdiction that extends seaward to distances considerably beyond the Arctic Archipelago. Three such claims of jurisdiction have been made, two of which have been well-defined and reasonably well-accepted, but the third claim, which will be the first to be addressed, is far from being well-defined, and is certainly not generally accepted by the international community.

(i) *The Sector Theory*

The sector theory has been invoked by various politicians and officials in Canada as a possible legal basis to claim jurisdiction not only over the islands of the Arctic Archipelago, but also over the waters within the islands and those north of the islands, continuing up to the North Pole. The origin of the theory is generally attributed to Senator Pascal Poirier, who invoked it in 1907 as a basis for claiming sovereignty over all of the islands north of Canada. This attribution is accurate only insofar as he was the first to actually systematize the use of meridians of longitude for the purpose of claiming territorial sovereignty in the arctic regions. Meridians of longitude had been made use of long before to mark the delimitation or demarcation of territorial claims.¹⁶ This does not mean, however, that the theory has ever received general acceptance as a legal basis for the validity of such claims. On the contrary, the exact opposite would seem to be true. In the first place, reliance by states

16. See Papal Bull *Inter Caetera*, 4 May 1493, reproduced (English translation) in W. M. Bush, *Antarctica and International Law*, Vol. 1, at p. 532 (1982), and Treaty of Tordisellas, 7 June 1494, *id.*, at p. 533.

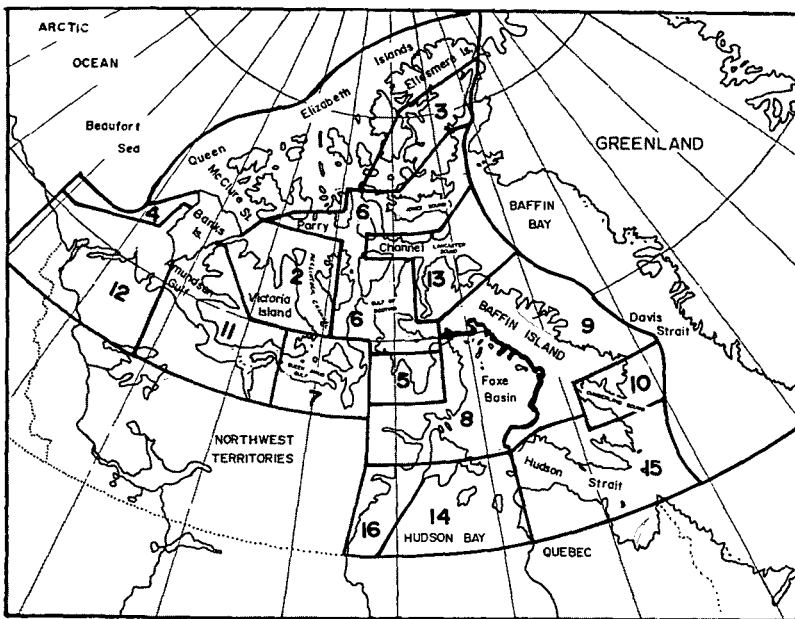
on the sector theory has been limited to a claim to lands and islands, such as was made by the Soviet Union in 1926 and which it has long since substantiated by application of the traditional principle for the acquisition of territorial sovereignty, namely, effective occupation and control. In the second place, states have not relied on the sector theory to claim part of the oceans. As far as Canada is concerned, no government has ever taken a very clear and consistent stand as to the legal validity of the sector theory and, in particular, as to the possibility that it might be a basis for a claim to the water areas within a Canadian sector. The position of the present government seems to be that the sector theory should be held in reserve as a possible support, and that nothing should be done to undermine any possible legal value it might have. However, the general opinion of publicists and informed commentators is that the sector theory has no legal validity as a source of title in international law, and cannot serve as a legal basis for the acquisition of sovereignty over land and, a fortiori, over sea areas. It is not surprising, therefore, that in all of the years of discussion at the Law of the Sea Conference, including several years of preparatory negotiations extending back to 1968, Canada has never made any reference to the sector theory, and neither has any other state, including the polar ones. Indeed, two of the arctic states, the United States and Norway, have long ago expressed definite disapproval of the sector theory, even as a basis to claim jurisdiction over land. A third arctic state, Denmark, refused to rely on the theory in its dispute with Norway over eastern Greenland, in 1933, before the International Court of Justice. My own personal conclusion is that the sector theory has no validity as a legal root of title, whether it be in respect of land or water, and Canada would be well-advised to abandon any hope of gaining legal support from that theory in the event of any dispute with respect to jurisdictional claims in the Arctic.¹⁷

(ii) *Pollution Prevention Zone, 1970*

In 1970, the Canadian Parliament unanimously adopted the Arctic Waters Pollution Prevention Act, thereby giving Canada jurisdiction for pollution prevention purposes up to 100 miles in the Arctic Ocean off of the Arctic Archipelago and the mainland of northern Canada. In 1972, Canada established shipping safety control zones

17. See Part I in *The Waters of the Canadian Arctic Archipelago in International Law*, to be published in book form by the present writer.

(see *Map 2*), and specified certain standards for navigation within those zones. Because the United States had objected strongly to such a claim of jurisdiction, Canada thereupon embarked on intense diplomatic efforts in a number of international fora to obtain recognition of international law principles which would serve as a basis for its legislation. These efforts were pursued mainly in international conferences, and culminated in the insertion of a special arctic clause into the Law of the Sea Convention.¹⁸ That special clause provides that coastal states may adopt special protective measures in certain ice-covered areas within their exclusive economic zone if exceptional hazards to navigation and marine pollution can cause irreversible disturbance of the ecological balance. The provision enables coastal states to enforce such protective measures themselves, instead of leaving the enforcement to the flag state. This provision has now rallied a sufficiently wide consensus in the international community that it may be considered as part of customary international law. The United States, however,



Map 2: Shipping Safety Control Zones

18. For a reproduction and discussion of this provision, see, *infra*, IV-Canada's Jurisdiction over the Northwest Passage.

having decided to remain outside the Law of the Sea Convention, could well challenge the legal status of that provision and, at the same time, Canada's legislation.

(iii) *Exclusive Fishing Zone, 1977*

On January 1, 1977, Canada extended its fishing jurisdiction to 200 nautical miles on the east and west coasts, and, on March 1 of the same year, it established an arctic fishing zone. Although Canada took the precaution of concluding bilateral agreements before 1977 with states traditionally fishing off its east and west coasts, this action was not necessary in relation to the arctic fishing zone, since, in fact, no commercial fishing took place in that zone. Furthermore, the concept of a 200-mile fishing zone is part and parcel of a wider concept, namely, that of the exclusive economic zone on which there has already been a very wide consensus at the Law of the Sea Conference for some five or six years. Indeed, perhaps this is the area in which a consensus has been established most strongly at the conference. Even after its decision not to become a party to the Convention, the United States issued a Presidential Proclamation adopting a 200-mile exclusive economic zone.¹⁹ In the circumstances, the international validity of Canada's 200-mile fishing zone cannot be attacked.

(b) *Ice Islands*

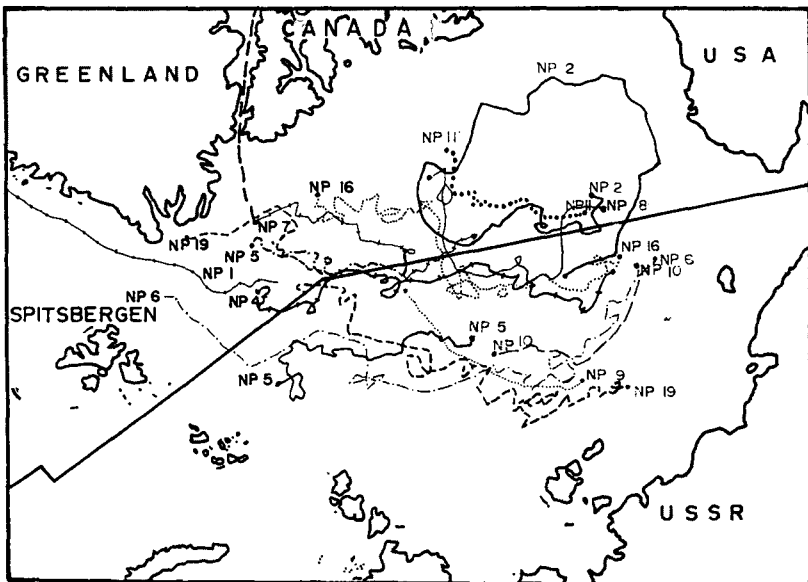
A considerable number of ice islands have been located in the Arctic Ocean and most of them appear to have originated from ice shelves off the north coast of Ellesmere Island.²⁰ Those ice islands have been used by the Soviet Union and the United States for carrying out marine scientific research. The United States has operated five such ice islands so far, and the number used by the Soviet Union has now reached twenty-five (see *Map 3*). Canada, for its part, is presently conducting its second scientific expedition aboard an ice floe, about 200 miles to the east of the Soviet ice island NP-25. The purpose of the Canadian Expedition to Study the Alpha Ridge (CESAR) is to

19. The White House Fact Sheet, released 10 March 1983, specified that "the concept of the EEZ is already recognized in international law and the President's Proclamation is consistent with existing international law".

20. See G. Hattersley-Smith, "Comments on the Origin of the Ice Islands", 5 ARCTIC 95-103 (1952) and Martin Jeffries, "The Ward Hunt Ice Shelf, Spring 1982", 35 ARCTIC 542-544 (1982).

determine if this submarine feature is of continental or oceanic origin.

Since it is impossible to control the movements of such ice islands (and, a fortiori, simple ice floes), the drift of which depends on the currents and the wind, the question arises as to what control, if any, the coastal state may exercise over the activities on such ice islands when they come within its adjacent waters. The question did arise in July 1970, when a homicide took place on the American ice island, T-3, within the so-called Canadian sector, approximately 185 nautical miles north of the Arctic Archipelago. The American government did not hesitate to exercise criminal jurisdiction over the accused person, and neither did the American courts. The latter, however, did not deal specifically with the question of jurisdiction in international law, and it was not really necessary for them to do so, since the Canadian government had made an express waiver of jurisdiction in the case.²¹ Such a waiver was quite proper for at least



Map 3: Drift Paths of Soviet North Pole Stations (1937-1973)

21. The waiver specified, however, that Canada continued to reserve its position on the question of jurisdiction over the alleged offense, but that it did not object to having the drifting ice island considered as a ship for the purpose of the proceedings.

two reasons: first, Canada could not have justified any territorial jurisdiction on the basis of the sector theory, and second, both the victim and the accused were of American nationality. Consequently, the United States was quite justified in exercising personal jurisdiction, even if the offence took place outside its territory.²²

Aside from any question of criminal offence among members of the crew of an ice island, the question might arise as to Canada's jurisdiction over other activities on such an ice island when it is in waters adjacent to its coast. The question did arise in 1977, when an ice island being operated by the Soviet Union, NP-22, drifted within 200 miles of the Canadian islands. It would seem that, in such a case, the coastal state can have no more jurisdiction over the activities of such an ice island than it would have if it were a ship. Indeed, until such time as ice islands acquire a definite status in international law, the analogy with ships would appear to be the most adequate one. In other words, the principle of the exclusive jurisdiction of the flag state would apply. However, if the activities being carried out are in violation of the exclusive jurisdiction of the coastal state, the latter would be completely justified in intervening. Such would have been the case in 1977 if the Soviet Union had been exploring Canada's continental shelf, contrary to the 1958 Convention, or had been engaged in fishing (if there had been any fish in that zone) within the exclusive fishing zone of 200 miles. Canada would also have jurisdiction over such an ice island within its 100-mile pollution prevention zone if the activities on the ice island threatened Canada's marine environment, contrary to the legislation of 1970. It is not impossible either that Canada might legitimately allege jurisdiction, under the general principles of international law relating to self-defense and self-protection, if the activities on an ice island were to constitute an actual threat to its national security.

(c) *Waters of the Canadian Arctic Archipelago*

Canada has not yet established its territorial sea in the Arctic, and until it does, the question arises as to exactly what the legal status of the waters of the archipelago is.

22. For a more complete treatment of this case, see Donat Pharand, *The Law of the Sea of the Arctic, with Special Reference to Canada* (Ottawa: University of Ottawa Press, 1973) at pp. 199-204.

(i) *Present Status*

It will be recalled that, in 1970, shortly after the American ship *Manhattan* had crossed the Northwest Passage in order to reach Prudhoe Bay, Canada extended its territorial waters from three to twelve miles. It was stated at that time by the legal adviser of the Department of External Affairs, as well as by the Secretary of State for External Affairs, that the effect of the legislation was to create a territorial waters gate in Barrow Strait at those points where the distance between Lowther and Young Islands is less than twenty-four miles.²³ If such is the case, then the remaining waters of the Northwest Passage would presumably have the status of high seas where the distance between islands is more than twenty-four miles. However, Canada has given a number of indications since then that it considers the waters of the Canadian Arctic Archipelago to be internal waters. In December, 1973, the Bureau of Legal Affairs of the Department of External Affairs wrote that "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation."²⁴ This view was confirmed in May, 1975, by the Secretary of State for External Affairs, Allan MacEachen, when he stated in front of the House of Commons Committee on External Affairs and National Defence that the arctic waters were considered by Canada as being its "internal waters".²⁵ This appears to have been the first clear statement made on the question by a member of the government. It represented Canada's position, and apparently still does.

23. See the statement of J. Alan Beesley in *Minutes of Proceedings and Evidence of Standing Committee on External Affairs and National Defense*, No. 25, 29 April 1970, at p. 18. See also the statement by Mitchell Sharp in *Canadian House of Commons Debates*, 17 April 1970, at p. 6015. A first gate of territorial waters already existed in Prince of Wales Strait, where the presence of the small Princess Royal Islands reduces the width to less than six miles.

24. Reproduced in 12 *Canadian Yearbook of International Law* at p. 279 (1974).

25. See *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defense*, No. 24, 22 May 1975, at p. 6. A previous, but less definite, statement had been made by the Secretary of State for External Affairs, Mitchell Sharp, in April 1970, in answer to questions in the House of Commons. He stated at first that the waters within the archipelago were Canadian internal waters, but then, in answer to a subsequent question, agreed that there might be territorial waters around the Arctic Islands. See *Canadian House of Commons Debate*, 16 April 1970, at pp. 5953-5954.

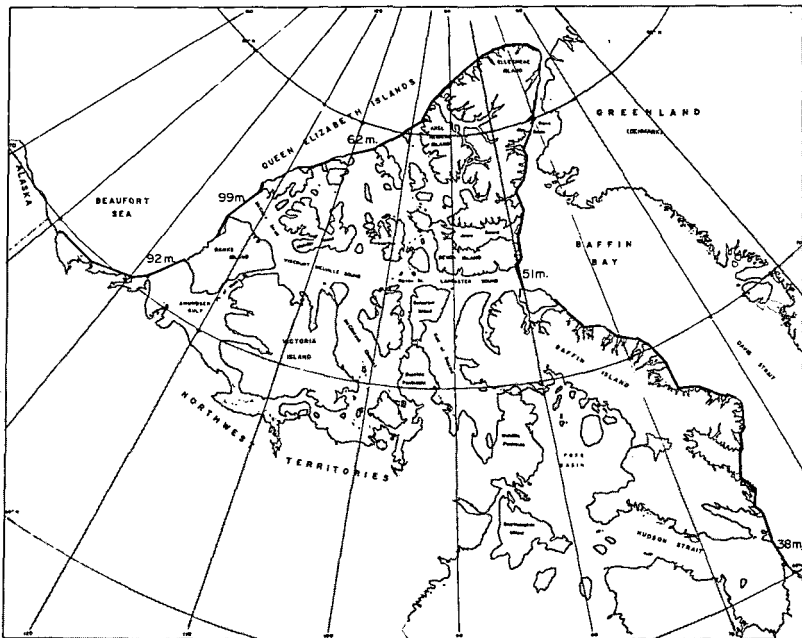
As indicated in the 1973 Memorandum from the Bureau of Legal Affairs, Canada's claim is based on an historical title. Indeed, since Canada has not yet drawn straight baselines around its Arctic Archipelago, this could be the only legal basis. It is true that Canada is certainly in a position to invoke the fact that it performed a number of manifestations of sovereignty, at least as far back as the beginning of the century, in support of such a claim, and, in particular, that it enforced fisheries and whaling legislation in the Eastern Arctic as far back as the Low expedition in 1904. It can also point to the fact that, after World War II, it took the precaution of exercising control over the movement of ships in those waters, particularly of American ships involved in supplying weather stations to the Queen Elizabeth Islands. Whether these and similar activities, including the long-standing use of sea ice by its Inuit for fishing and hunting, would be considered sufficient to meet the stringent legal requirements for the proof of historic waters is another question. Indeed, it is generally agreed that at least two basic requirements must be met before a claim to historic waters is established: the exercise of exclusive authority and control by the claimant state over a long period of time, and acquiescence by foreign states, particularly those affected by the claim in question. In view, however, of the United States' traditional attitude towards the status of those waters and the official protest, in 1970, when Canada extended its territorial waters to twelve miles, it would be rather difficult for Canada to successfully prove its claim of internal waters on the basis of an historical title alone.²⁶ The best approach would seem to be to draw straight baselines around the Arctic Archipelago and to point to Canada's historic activities in those waters as additional support only.

(ii) *Future Status, After Encircling With Straight Baselines*

As already indicated, it would seem that the best legal basis on which Canada could claim exclusive jurisdiction or sovereignty over the waters of the Canadian Arctic Archipelago would be to encircle the archipelago with straight baselines from which it would then measure its territorial sea. Of course, this would mean drawing a certain number of baselines of considerable length, in particular, the following: ninety-two miles across Amundsen Gulf; ninety-two

26. For a more complete treatment of this question, see, *supra*, note 22, at pp. 99-144.

miles at the entrance of M'Clure Strait; and fifty-one miles across Lancaster Sound (see *Map 4*). In justifying such straight baselines, Canada has the choice of relying on either the *Anglo-Norwegian Fisheries Case* of 1951²⁷ or the 1958 Territorial Sea Convention. The latter being essentially a codification of the decision in the *Fisheries Case*, its provisions have been retained in the 1982 Law of the Sea Convention. Conceivably, Canada could also rely on the provisions of the 1982 Convention which pertain to archipelagic states, but this would not be advisable, since virtually complete freedom of passage would apply in the enclosed waters. As for the choice between the first two alternatives, it would seem preferable for Canada to rely on the *Fisheries Case* of 1951 for two reasons.



Map 4: Straight Baselines Around Arctic Archipelago

First, the legal result is a preferable one, in that Canada would have complete sovereignty over the enclosed waters, although it might very well permit innocent passage and, indeed, probably should, but would not have to. Second, there would seem to be more flexibility under the court's judgment to meet the geographic

27. See 1951 I.C.J. Rep. 4.

requirements than there is under the Territorial Sea Convention. Canada could emphasize the very special geographic and physical characteristics of its Arctic Archipelago in order to convince a tribunal that those islands do constitute an integral part of the mainland of Canada and cannot be separated for the purpose of delimiting territorial waters. The International Court proved to be quite receptive to this line of argument in the *Fisheries Case*, particularly when it stated that “the drawing of straight baselines must be adapted to the special conditions obtaining in different regions.”²⁸ Canada would have to admit, of course, that its Arctic Archipelago is not composed of a string of islands along its coast, as is the case for Norway, and would have to argue that the law applicable to straight baselines must be adapted to the special conditions obtaining in the Canadian arctic region. An important part of those special conditions is the fact that the archipelagic waters in question are frozen solid for some nine months of the year, thus enhancing the physical unity of the archipelago and reducing the logic of attempting to delineate territorial waters around the individual islands.

V. *Canada's Jurisdiction Over the Northwest Passage*

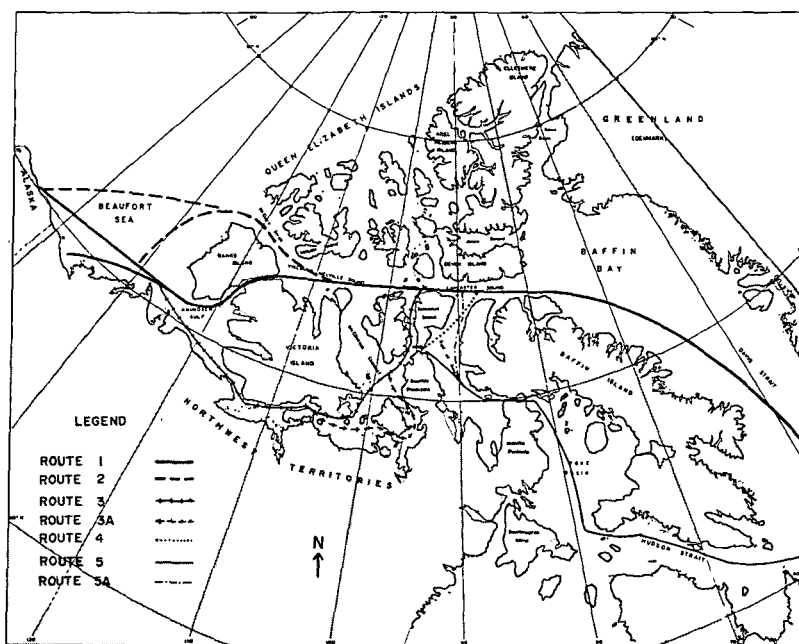
Considering the preparations now being made by both Canada and the United States to eventually transport hydrocarbons from the Beaufort Sea through the Northwest Passage, it becomes important for Canada to examine the extent to which it may exercise jurisdiction over that series of straits and sounds which constitute the passage.

(a) *Main Routes*

The Northwest Passage consists of five basic routes, in addition to at least two variations of those routes (see *Map 5*). All of the routes are potentially feasible for navigation, but not all of them are suitable for deep-draft ships. At the moment, only two of them, Routes 1 and 2, which might be referred to as the northern routes, are known to be so suitable. Route 3 (and its variation, 3A) and Route 4 might be considered to be the southern routes, since they follow the continental coast of Canada for more than half the distance and are not suitable for deep-draft navigation. As for Route

28. *Ibid.*, at p. 21.

5, it presently leads only to Routes 3 and 4. However, if hydrographic surveys should indicate sufficient depth in Fury and Hecla Strait, its variation, Route 5A, could lead to Routes 1 and 2. It could then be used by deep-draft ships and could become a viable alternative to Lancaster Sound.



Map 5: Main Routes of the Northwest Passage

(b) *Present Status*

If the Northwest Passage is an international strait, the applicable freedom of passage is virtually the same as that on the high seas. If this were not the case, a mere right of innocent passage would exist. Keeping in mind the test formulated and applied by the International Court in the *Corfu Channel Case* of 1949,²⁹ namely, that a strait must have been a useful route for international maritime traffic before it can be considered as an international strait, it appears quite obvious and beyond question that the few transits of the Northwest Passage since Amundsen's first crossing in 1903-06 are not sufficient to turn it into an international strait. Indeed, only thirty-five complete crossings are known to have been made so

29. See (1949) I.C.J. Rep. 4.

far.³⁰ All of these were experimental in nature, and only one vessel, the *S/T Manhattan*, in 1969, was a commercial ship. Of the thirty-five transits, only eleven were made by foreign flags and they took place with Canada's consent or acquiescence.

Of the eleven foreign crossings, eight were American. These included the 1957 crossing by a squadron of three U.S. icebreakers (*Storis*, *Spar*, and *Bramble*), with the assistance of the Canadian naval icebreaker, *Labrador*; the submarine crossing of 1960 by the *Seadragon*, with a Canadian government representative aboard; the 1962 submarine crossing of the *Skate*, within the context of Canada-U.S. defense arrangements; and the 1969 round trip of the *Manhattan*, which had a Canadian representative aboard and received the assistance of the Canadian icebreaker, *Macdonald*. For its return trip, the *Manhattan* was also accompanied by the American icebreaker, *Staten Island*, thus making eight crossings by American ships. As for the three other foreign crossings, the first one was made in 1903-06 by the Norwegian herring boat, *Gjoa*, while commanded by the explorer Amundsen, in order to prove the navigability of the Northwest Passage. The second one was made by the small sailboat, *Williwa*, in 1977, the skipper of which had obtained express permission. The last foreign vessel to complete the passage was a small Japanese yacht, *Mermaid*, which had considerable difficulty and took two years, 1979-81, to effect the transit.

On the basis of the above, one has to conclude that by no stretch of the imagination could these few foreign crossings constitute sufficient commercial use to turn the Northwest Passage into an international strait. Indeed, not a single one of those passages was made for commercial navigation, including that of the *Manhattan* in 1969, since the ship carried no oil whatsoever and the trip was strictly an experimental passage. Those who maintain that the Northwest Passage may already be classified as an international strait obviously confuse *actual use* with *potential use*. The latter is the criterion used by the American courts to determine whether a waterway is navigable or not.³¹ However, the criterion used by the International Court is that of actual use, and it is the one to be applied here.

30. Based on a list compiled by Captain T. C. Pullen, R.C.N. (ret.).

31. The distinction is made clearly by R. R. Baxter in his book, *The Law of International Waterways*, at p. 3 (1964).

(c) *Future Status, After Use for International Navigation*

Should the Northwest Passage become an international strait, the new right of "transit passage" would become applicable. This new right, which evolved at the Third Law of the Sea Conference and has been incorporated in the 1982 Convention, has replaced the non-suspendable right of innocent passage which is presently applicable to international straits.

Under the Territorial Sea Convention of 1958, there is a right of innocent passage in favour of all foreign ships which move through straits used for international navigation, and such passage must not be suspended. This right extends to warships under both the Territorial Sea Convention and customary law, as confirmed by the International Court in the *Corfu Channel Case* of 1949. But, also under that convention, submarines are required to navigate on the surface and show their flags. Under the provisions of the 1982 Convention, the right of "transit passage" (and, in the case of oceanic archipelagoes constituting a state, "sea lanes passage") will afford foreign ships virtually the same freedom of navigation as that which they now possess on the high seas.³² This passage must not be impeded in any way by the coastal or archipelagic state. In addition, foreign ships may exercise that right in their normal mode of passage.³³ Since this right is applicable to *all* ships, including icebreakers, warships, and submarines, it means that the latter will be able to go through such straits while submerged. It should also be noted that this new right of transit gives a parallel right of overflight to aircraft, which presently enjoy no such right. In short, if transit passage becomes applicable in the Northwest Passage, Canada would have virtually no control over foreign ships, other than tankers, because of the special arctic clause.

Fortunately for Canada, even if the regime of transit passage were to apply to the Northwest Passage, Canada would still have considerable powers, under the special provision of the 1982 Convention, to prevent and control pollution. This well-known "ice-covered area" provision, the acceptance of which the Canadian delegation worked hard to obtain and for which it must have had to bargain, reads as follows:

Coastal states have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction

32. See, *supra*, note 4, articles 38 and 53.

33. *Ibid.*, art. 39, para. 1.

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.³⁴

It will be noted that these powers of the coastal state extend not only to the establishment of standards, but also to their enforcement, and the standards may be more stringent than those otherwise permitted by international law. This special provision was, of course, intended to legitimize, on the international plane, the Arctic Waters Pollution Prevention Act of 1970, which gave Canada extensive powers of standard-setting and enforcement. In 1970, and until recently, some doubt existed as to the international legal validity of such regulations, particularly because they applied to a sea area which extends up to 100 nautical miles from the coast and where the principle of exclusive jurisdiction of the flag state had traditionally applied. However, the Canadian regulations have now rallied a wide consensus on the international plane and have been legitimized by the insertion, into the 1982 Convention, of the special, "ice-covered areas" provision.

The pollution prevention zone established by the regulations covers all of the Northwest Passage, since it applies to waters which lie north of the sixtieth parallel and between the 141st meridian of longitude in the west, and, in the east, the equidistance line between the Canadian Arctic Islands and Greenland. This legislation empowers Canada to impose stringent preventive measures against the possibility of oil spills, either from marine transportation by tanker or from land-based and offshore resource development activities. Pursuant to this legislation, Canada established shipping safety control zones (see *Map 2*) and specified the standards ships must meet before they may be permitted to navigate in those zones.³⁵ The standards cover such features as hull and fuel tank construction, navigation equipment, navigation personnel, and the quantity and nature of the cargo to be carried. The regulations further specify what class of ship may navigate in what zone and at what time of year. For instance, only ships classified as Arctic Class

34. *Ibid.*, article 234.

35. See Arctic Shipping Pollution Prevention Regulations, S.O.R./72-426, *Canada Gazette*, Part II, Vol. 106, No. 20, at p. 1847 (25 October 1972).

10 and complying with the standards specified for that class are admissible in Zone 1 throughout the year. Zone 1 includes M'Clure Strait, north of Banks Island at the western end of the Northwest Passage. No tanker may navigate within any of the zones without the aid of an ice navigator who has had previous experience as a master while the ship was operating in ice conditions. Finally, no owner or master of any ship may enter any zone unless he has obtained a certificate of standards of the form set out in the regulations.

In addition to the above, it is important to note that the special provision in question occupies a completely independent position in the Convention, and is unaffected by the other provisions relating to international straits. More specifically, even if the Northwest Passage were to become an international strait, the special arctic clause would still enable Canada to apply its pollution prevention regulations of 1972. That special clause was inserted into the Negotiating Text of 1976, and has been kept without change in all the subsequent Negotiating Texts of 1977, 1979, and 1980. Considering the wide consensus which the clause received, particularly on the part of other arctic states (including the United States, which had strongly opposed Canada's 1970 legislation), it may now be regarded as part of customary international law, and completely validates Canada's legislation.³⁶

In spite of the guarantee just described, however, the future of the Northwest Passage is not necessarily adequately protected. With regard to the contemplated use of the Northwest Passage and the possibility of it becoming an international strait, the question arises as to whether Canada would have adequate protection under the special arctic clause and, if not, what measures it could take to gain such protection. In the first place, Canada would have practically no control over military vessels and aircraft if the Northwest Passage were to become an international strait, since they would benefit from the principle of sovereign immunity. And, as previously indicated, submarines would have the right of submerged passage. They have no such right now, since the passage is not an international strait, although this does not mean that the waters of

36. For a study of the international validity of this provision, see Donat Pharand, *La contribution du Canada au développement du droit international pour la protection du milieu marin: le cas special de l'Arctique*, 11 *Etudes internationales* 441-466 (1980).

the Canadian Arctic Archipelago are not already visited by submerged submarines. In addition, Canada would have little control over foreign icebreakers. This would be so particularly if its own icebreaking capability were not sufficient to commend it to foreign users of the passage.

VI. *Canada's Jurisdiction Over the Arctic Airspace*

As a general principle, it may be stated that the legal status of the airspace is governed by the legal status of the subjacent land and water areas. The basic rule of international law is that the sovereignty of the subjacent state extends to the airspace above its territory and territorial waters. This means that there is no right of overflight for foreign aircraft. Since territorial sovereignty over the Canadian Arctic Islands is well established, Canada's jurisdiction over the airspace above those islands is as complete as that over the islands themselves. In other words, there is no freedom of overflight over the Arctic Islands, nor over the territorial waters of those islands. With regard to jurisdiction above the continental shelf, the 1958 Convention on the Continental Shelf specifies that the rights of the coastal state over the natural resources of the continental shelf do not affect the status of the superjacent airspace and, therefore, the traditional freedom of overflight remains. This freedom has been retained in the 1982 Law of the Sea Convention.³⁷ There is no doubt that the waters of the exclusive economic zone and, a fortiori, those of the exclusive fishing zone, remain subject to the freedoms of navigation and overflight, as above the high seas.³⁸ Finally, there is at the moment, and even assuming that the waters of the passage are not internal waters, no freedom of overflight in Barrow Strait where there is a barrier of territorial waters. There is also no such freedom over Prince of Wales Strait east of Banks Island, where there is an overlap of territorial waters as well. Should the Northwest Passage become an international strait, however, the new right of "transit passage" would apply, and this would mean a freedom of overflight in favour of all aircraft.

37. See, *supra*, note 4, art. 78.

38. *Ibid.*, art. 58.

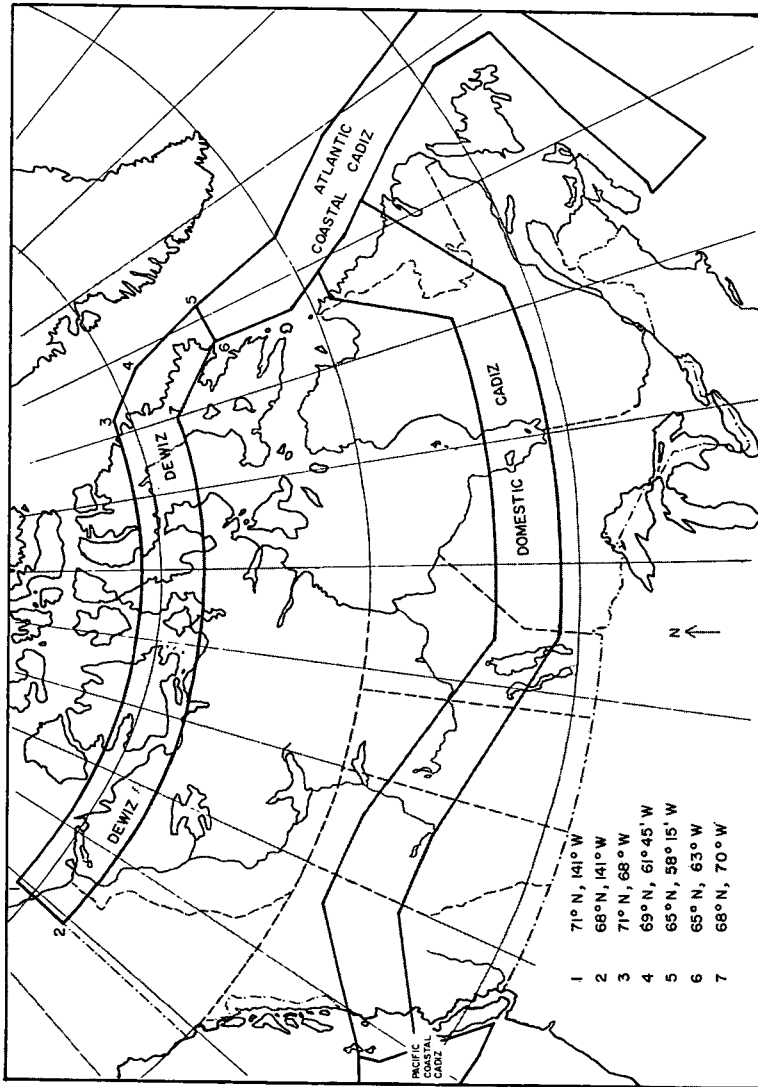
(a) *Jurisdiction Within the Distant Early Warning Identification Zone*

At least twelve states³⁹ have now adopted identification zones for aircraft which extend considerable distances over the high seas, and two of the five arctic states have adopted such zones, namely, the United States and Canada. The United States was the first country to adopt, in 1950, an air defense identification zone, and its present zone off of Alaska extends to approximately 380 nautical miles from the Alaskan coast. Canada followed suit in 1951, and its present distant early warning identification zone extends to the Beaufort Sea, to a distance of approximately 185 nautical miles (see *Map 6*). The jurisdiction exercised by Canada within the identification zone in question imposes an obligation on the pilot in command of an aircraft, operated at a true airspeed of 180 knots or more, to file a flight plan before taking off from the location he was last at prior to penetrating the zone. He must also make a position report by radio-telephone communication during flight, and must indicate any difference as to the estimated time and place of the zone penetration.

No precise legal basis for the establishment of such identification zones over the high seas may be found in conventions, but it does appear that such zones have found a legal basis in customary international law. They have been adopted by a number of states, and have been respected and submitted to by a large number of states, including the major powers. More specifically, not only has there not been protest on the part of interested states, but, on the contrary, there has been general acquiescence and submission. In the circumstances and with the passing of some thirty years since the beginning of this practice, which is based on the general right of self-protection, one must conclude that the zones are permitted in general international law.⁴⁰

39. The twelve states are Burma, Canada, Iceland, India, Japan, Korea, Oman, the Philippines, Sweden, Taiwan, the United States, and Vietnam. The Soviet Union announced that it would adopt an air defence identification zone after the incident of the U-2 high altitude reconnaissance flight in 1960, but did not do so. France adopted such a zone at one time off the Algerian coast, but abandoned it in 1956 when Algeria became independent.

40. For a more complete discussion of the legal basis for air defence identification zones, see Donat Pharand, *The Legal Status of the Arctic Regions*, 163 *Recueil des cours* 53, at pp. 108-111 (1979).



Map 6: Canadian Air Defence Identification Zones

VII. Conclusion

Having completed this overview, let us try to summarize what the extent of Canada's jurisdiction in the Arctic is, and project briefly how it might develop in the future. Canada has, unquestionably, complete sovereignty over all of the islands constituting the Arctic Archipelago, including the group of islands north of the Parry Channel, known as the Queen Elizabeth Islands. This sovereignty extends to the airspace above all of the islands. In addition, Canada

exercises a limited form of jurisdiction within a distant early warning identification zone, extending over the adjacent part of the Beaufort Sea. This type of jurisdiction is now recognized in customary international law.

Flowing from its territorial sovereignty, Canada has exclusive rights over the natural resources of its continental shelf, which extends, on the average, for over a hundred miles off its arctic territory and islands. Canada's jurisdiction might extend considerably beyond that, should it turn out that certain submarine ridges which project into the Arctic Basin are of continental, rather than oceanic, origin. However, Canada must still establish a lateral delimitation of its continental shelf with its arctic neighbours — in the Beaufort Sea, with the United States, and, in the Lincoln Sea, with Denmark. This delimitation will be accomplished either by agreement or by a decision of an international tribunal, in accordance with principles of international law. These principles are still somewhat imprecise, but are in the process of being developed by the International Court of Justice. Regardless of the exact mode of delimitation that will eventually be used, the equidistance method is bound to play a central role.

As to the extent of Canada's jurisdiction over the arctic waters, the legal situation is not altogether clear at present. On the one hand, Canada is perfectly justified in claiming a 100-mile pollution prevention zone, as well as a 200-mile exclusive fishing zone; both of these zones are now recognized by customary international law. On the other hand, the precise legal status of the waters within the Canadian Arctic Archipelago, including those of the Northwest Passage, is not as well established. Canada's claim is that those waters have the status of internal waters, over which it has complete sovereignty on the basis of an historic title. However, the proof of such a title is difficult and remains to be made.

Now that the Third Law of the Sea Conference is over, it is suggested that Canada ought to draw straight baselines around the Arctic Archipelago, from which it could measure its 12-mile territorial sea and within which the waters would be internal in nature. The status of internal waters would, of course, apply to the Northwest Passage. Such straight baselines would be justified in customary international law, in light of the state practice and the 1951 decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* between Norway and the United Kingdom. In addition, Canada could gain legal support from the

historic use of the sea ice over those waters by the Inuit.

If Canada does not take the necessary steps to clarify the status of those waters before foreign ships begin to transport hydrocarbons through the Northwest Passage, the latter will likely develop into an international strait to which the new right of transit passage will apply. Although Canada would, in that event, still have anti-pollution jurisdiction over tankers, it could exercise very little control over foreign icebreakers and warships, including submerged submarines. Indeed, under the new right of transit passage, as opposed to the traditional right of innocent passage, submarines would no longer have any obligation to surface during transit. Without wanting, in any way, to magnify the danger, such a situation could be somewhat worrisome with regard to the security of Canada.