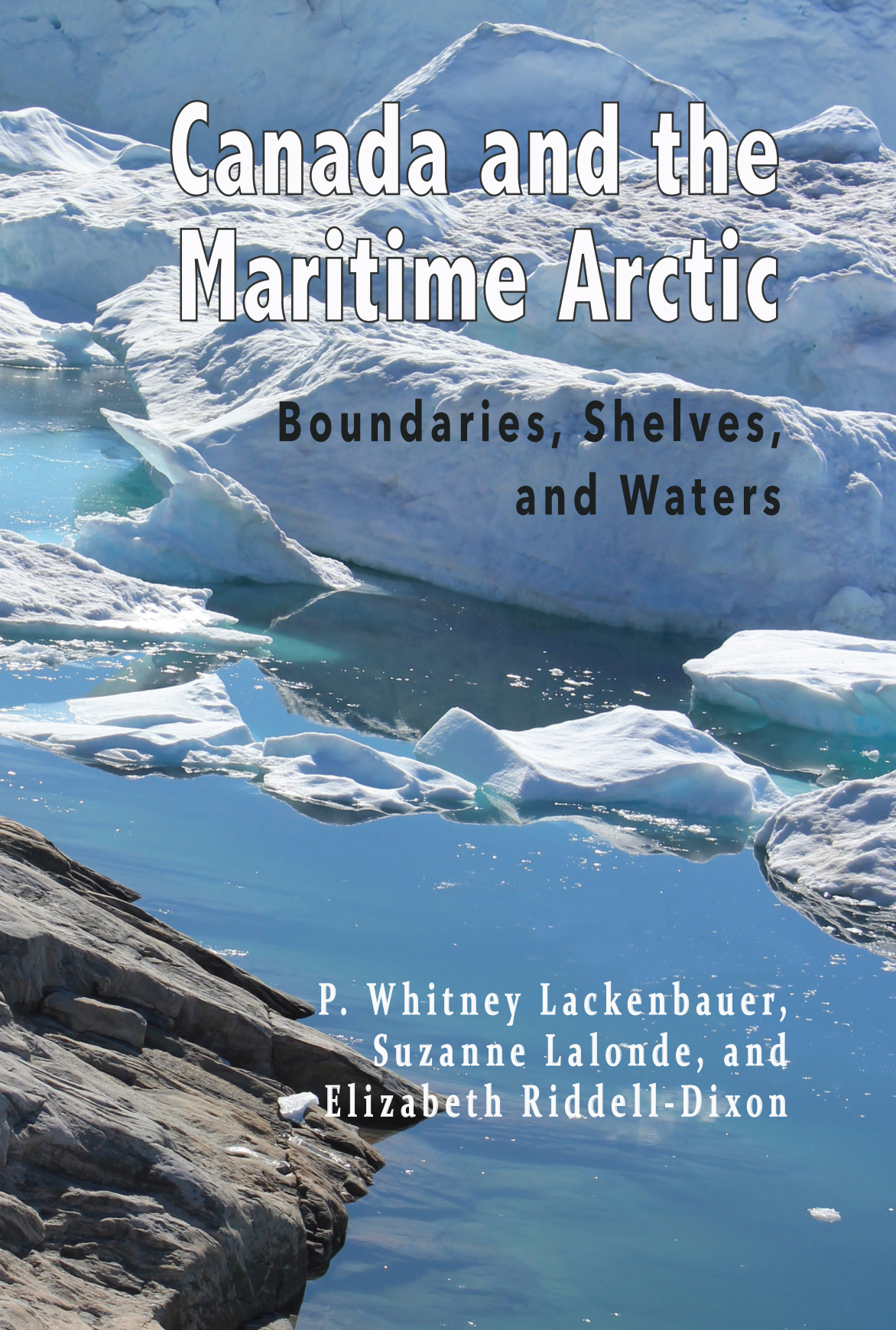
Canada and the Maritime Arctic
Boundaries, Shelves, and Waters
P. Whitney Lackenbauer, Suzanne Lalonde, and Elizabeth Riddell-Dixon

Canada and the Maritime Arctic

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LIST OF ACRONYMS

ANPF	Arctic and Northern Policy Framework
AWPPA	*Arctic Waters Pollution Prevention Act*
AZRF	Arctic Zone of the Russian Federation
CBC	Canadian Broadcasting Corporation
CCG	Canadian Coast Guard
CE	Current Era
CLCS	Commission on the Limits of the Continental Shelf
DCER	*Documents on Canadian External Relations*
DEXAF	Department of External Affairs
ECS	Extended Continental Shelf
ed.	editor(s)
EEZ	Exclusive Economic Zone
HBC	Hudson's Bay Company
ICC	Inuit Circumpolar Council
ICJ	International Court of Justice
IMO	International Maritime Organization
LAC	Library and Archives Canada
LOSC	Law of the Sea Convention
NLCA	Nunavut Land Claims Agreement
n.m.	nautical miles
NSR	Northern Sea Route
NWP	Northwest Passage
NWT	Northwest Territories
OPP	Oceans Protection Plan
RG	Record Group
SAR	Search and Rescue
TC	Transport Canada
UN	United Nations
UNCLOS	United Nations Law of the Sea Convention
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
U.S.	United States of America
U.S.S.R.	Union of Soviet Socialist Republics
USCGC	U.S. Coast Guard Cutter
USSEA	Undersecretary of State for External Affairs

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Introduction

P. Whitney Lackenbauer and Suzanne Lalonde[1]

The evolution of the law of the sea, particularly since the middle of the 20th century, has had a profound impact on inter-state relations. Two specific innovations – the recognition of coastal States' sovereign rights over the resources of the continental shelf[2] and in fisheries zones,[3] eventually subsumed by the exclusive economic zone (EEZ)[4] – triggered a massive reordering of the oceans to define the spatial extent of these new prerogatives.

The introduction of continental shelf and EEZ legal regimes, extending far offshore, brought distant coastal States into contact, transforming them into neighbours in need of new international boundaries.[5] According to Philip Steinberg in *The Social Construction of the Ocean*, it also brought traditional visions of an ocean commons open to all into conflict with expansive claims to jurisdiction over ocean spaces for resource exploitation and conservation, a clash exacerbated by differing interpretations of the rules governing maritime boundary delimitation.[6]

This tension between the oceans as a global commodity and national preserve is also at play in the Arctic region. In the International chapter of the *Arctic and Northern Policy Framework* (ANPF) released in October 2019, the Government of Canada highlights that:

> The Arctic is a geopolitically important region. Global interest in this region is surging as climate change and natural hazards profoundly affect the Arctic. Climate-driven changes are making Arctic waters more accessible, leading to growing international interest in the prospects for Arctic shipping, fisheries and natural resources development. At the same time, there is growing international interest in protecting the fragile Arctic ecosystem from the impacts of climate change.

Lest the reader worry that these changes place Canada in a vulnerable position, the policy statement emphasizes that:

> The Government of Canada is firmly asserting its presence in the North. Canada's Arctic sovereignty is longstanding and well established. Every day, through a wide range of activities, governments, Indigenous peoples, and local communities all express Canada's enduring sovereignty over its Arctic lands and waters. Canada will continue to exercise the full extent of its rights and sovereignty over its land territory and its Arctic waters, including the Northwest Passage.[7]

These are not new observations and pledges. The 2009 *Northern Strategy* identified "exercising Canada's Arctic sovereignty" as the country's number one priority, committing the government to "seeking to resolve boundary disputes"; to securing international recognition for the full extent of Canada's extended continental shelf; and to addressing Arctic governance issues. Despite media, academic, and political anxiety about melting sea ice, increased international interest, and uncertain Arctic boundaries, the *Northern Strategy* insisted that all of Canada's disagreements with foreign States about its Arctic lands and waters "are well-managed and pose no sovereignty or defence challenges for Canada. In fact, they have had no impact on Canada's ability to work collaboratively and cooperatively with the United States, Denmark or other Arctic neighbours on issues of real significance and importance." It also proclaimed that Canada's sovereignty over its lands and waters in the Arctic is "longstanding and well established."[8]

The ANPF pursues the same sound strategy and promotes a collaborative agenda, both internally and externally. Emphasizing that Canadian interests benefit from a robust legal regime, the ANPF identifies as a key priority (Goal 6) the strengthening of "the rules-based international order in the Arctic, which has already helped ensure the region remains peaceful and stable." It reiterates Canada's resolve to play a leadership role, in partnership with Northerners and Indigenous peoples, to ensure that evolving international norms promote Canadian interests and values. It also recognizes that international rules and institutions will play a critical role in helping Canada resolve its outstanding boundary disputes and continental shelf overlaps in the Arctic.[9]

The objectives listed under Goal 6 include to "strengthen bilateral cooperation with Arctic and key non-Arctic states and actors" and to "define more clearly Canada's marine areas and boundaries in the Arctic." The ANPF specifically "targets" cooperation with Canada's

North American Arctic partners: the United States-Alaska and Kingdom of Denmark-Greenland. Ironically, it is with these neighbours that Canada has outstanding boundary and "status-of-waters" disagreements. Acknowledging this reality, the Framework notes that Canada:

> will also seek appropriate opportunities to resolve, peacefully and in accordance with international law, Canada's three outstanding boundary disputes, one with the United States in the Beaufort Sea and two with the Kingdom of Denmark regarding the Lincoln Sea and Hans Island, as well as any continental shelf overlaps. Further, we will modernize the data used to establish the baselines from which Canada's maritime zones in the Arctic are measured.[10]

In a recent article on Canada's unresolved boundary disputes, Michael Byers and Andreas Østhagen observe that "the status of each maritime boundary can only be explained on the basis of its own unique geographic, historic, political, and legal context. Canada's unresolved maritime boundaries are the result of circumstances specific to each of them."[11]

This short book aims to contribute to a more balanced understanding of Canada's unresolved boundary "disputes" (perhaps better described as differences of legal opinion, disagreements, or unresolved boundaries) in the Arctic by providing a comprehensive analysis of the three most important cases: the Beaufort Sea boundary between Canada and the United States, the limits of Canada's extended continental shelf, and the status of the Northwest Passage. (A brief overview of the Hans Island and Lincoln Sea disagreements is provided in Appendix 1.) The authors – an historian, a political scientist, and a legal scholar – bring distinct approaches to their individual chapters. Yet each confirm Canada's official mantra that its three main "sovereignty disputes" in the Arctic are well-managed and do not pose a threat to the territorial integrity of Canada, its identity, or its future prosperity.

To provide a broader context against which the three case studies can be situated and better understood, this volume begins with a brief historical account of Canada's Arctic sovereignty as a national priority and clearly defined governmental policy. A summary bibliography providing key sources for the three cases is also included at the end of the book.

Canadian Arctic Sovereignty: A Brief Historical Context[12]

Although the vast majority of Canadians live close to the country's southern border (the 49th parallel) with the United States, the Arctic occupies a distinctive place in Canada's national identity. Symbolism, imagery, and mythology in Canada casts the Arctic as a resource-rich "frontier of destiny," a homeland for Indigenous peoples, a fragile environment in need of protection, and a source of national inspiration. Accordingly, Canada's dilemma has always been (and remains) how to balance sovereignty, security, and stewardship in a manner that protects and projects national interests and values, promotes sustainable development and healthy communities, and facilitates circumpolar stability and cooperation.[13]

Inuit and other Northern Indigenous groups have occupied what is now the Canadian North since "time immemorial." As hunter-gatherer societies, their use and occupancy of the lands and waters form a core consideration of what is now widely accepted to constitute Canadian sovereignty. As such, Canada has a recognized legal duty to consult and, where appropriate, accommodate Indigenous groups when their treaty and Aboriginal rights could be impacted. Their inter-connectedness with the land imposes special obligations on the Canadian State to ensure that its practices are representative of their rights, interests, and wishes as recognized in both domestic and international law. Furthermore, these Indigenous peoples are transnational in that their memberships include citizens of two or more countries. This is reflected in the Permanent Participant organizations representing them at the Arctic Council today. The Inuit Circumpolar Council (ICC), an NGO that formed in 1977 (nearly two decades before the Council) represents 155,000 Inuit of Chukotka (Russia), Alaska, Canada, and Greenland (Denmark), including just over 50,000 Inuit Canadians. The Gwich'in Council International represents the Gwich'in peoples who live in the northernmost third of Yukon and adjacent areas in Alaska and the Northwest Territories. The Arctic Athabaskan Council represents 30,000 people of Athabaskan descent who live in Northern Canada and Alaska, with Canadian members including the Dene Nation, the Council of Yukon First Nations, and the Métis Nation of the NWT. Cumulatively, the ongoing vitality of Northern Indigenous peoples makes them an influential force in Canadian domestic politics and in international norm-making in the Arctic more generally.[14]

Apart from short-lived Norse settlements around the turn of the first millenium CE, the earliest European interest in what is now the Canadian North fixated on trying to find a route *through* the region to reach the riches of Asia. The attempts to navigate through the icy labyrinth of islands north of the Canadian mainland from the 16th through the 19th centuries proved futile, however, and the much-sought Northwest Passage did not materialize as a feasible commercial frontier. Instead, the fur trade drew both French and English interests further into the northern reaches of the continental mainland. This economic activity played a pivotal role in forging relationships between Indigenous and Euro-Canadian peoples, eventually supplemented by the presence of missionaries, whalers, policemen, and the sporadic appearance of explorers. The Royal Navy resumed its quest to establish a Northwest Passage in the nineteenth century, and while the search for Sir John Franklin's ill-fated 1845 expedition proved the existence of an Arctic maritime route, it also demonstrated its lack of utility. After Confederation in 1867, Euro-Canadians invested their resources and energies into establishing east-west linkages to consolidate the Dominion of Canada. The northern limits of the young country, inherited from the Hudson's Bay Company in 1870, remained ambiguous, and defining them seemed a remote, future consideration.[15]

Canada inherited all of Great Britain's territories/possessions and associated rights in the High Arctic in 1880, but undertook little State activity in the region in the late 19th century. The Alaska Boundary Dispute between Canada and the United States suggested, in the minds of Canadians, that not only did the United States cast covetous eyes at Canada's Northern territories, but that Britain would sell out Canadian interests to court American goodwill.[16] The Government of Canada would have to defend its own national interests in the North. The Klondike Gold Rush prompted the first official assertions of authority in the form of the Northwest Mounted Police and a small field force sent to the region around the turn of the 20th century, but the expansion of official State activity into the region remained modest before the Second World War. Official expeditions into the Northwest Passage, matched by flag planting and the assertion of a Canadian "sector claim" up to the North Pole, were complemented by diplomatic activities to confirm Canadian sovereignty over the islands of Canada's Arctic archipelago.[17]

The Second World War ushered in the new idea that the Canadian North also represented a military frontier. The American imperative to build the Alaska Highway through the Canadian Northwest, as well as supporting airfields and an oil pipeline, brought a flurry of new activity into the region. Although undertaken in the name of continental security, these activities also resurrected fears about the United States' encroachment on Canadian sovereignty in this sparsely-populated corner of North America.[18] The Americans withdrew at the end of the war and confirmed Canadian ownership over the Yukon and the infrastructure built therein, but visions of a looming Cold War provided a primary impetus for another round of military-inspired development beginning in the late 1940s. The dictates of geography placed the Arctic at the centre of Cold War superpower geopolitics, and in popular opinion and in the eyes of some Canadian officials, the American security agenda again seemed to pose a potential threat to Canada's rights. In the end, however, the North American neighbours found solutions that affirmed Canada's terrestrial sovereignty.[19]

Economic development became intertwined with issues of sovereignty, Indigenous rights, and environmentalism in the context of oil and gas exploration. The discovery of the Prudhoe Bay field off the north slope of Alaska in 1968 set off an Arctic exploration boom that persisted until oil prices declined precipitously in the mid-1980s.[20] The viability of these northern projects depended upon the ability to transport resources to market. In 1969, American-owned Humble Oil sent an icebreaker, the *Manhattan,* through the Northwest Passage to determine whether it was a viable commercial shipping route for oil and gas from the Beaufort Sea. The Canadian media reported the voyage as a direct challenge to Canadian Arctic sovereignty and, in response, the Liberal government of Pierre Elliott Trudeau announced its "functional" approach to maritime management in 1970. It cast the Arctic as an ecologically delicate region: Canada needed to extend its jurisdiction northward to ensure that foreign vessels did not pollute Canadian waters. The *Arctic Waters Pollution Prevention Act* (AWPPA) allowed Canada to regulate and control future tanker traffic through the NWP by creating a pollution prevention zone one hundred nautical miles outside the archipelago as well as in the waters between the islands.[21] Although initially opposed to this unilateral measure, the United States supported Canadian-sponsored Article 234 in the 1982 *UN*

Convention on the Law of the Sea (UNCLOS), which gives coastal States "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."[22]

Alongside environmental considerations encouraging Canadians to reconceptualize the Arctic as a *place* in need of protection rather than simply as a frontier space, the idea of the Arctic as homeland gained greater political salience in the Canadian dialogue on development in the 1970s. Indigenous groups emerged as a political force in Canada, and Northern leaders would no longer tolerate being left out of discussions related to resource development in their traditional territories. The Berger Inquiry, conducted to look into the socio-economic and environmental impact of a pipeline along the Mackenzie Valley through the Yukon and NWT, elicited unprecedented public engagement. Justice Thomas Berger's final report, *Northern Frontier, Northern Homeland*, highlighted competing visions of Canada's Northern history and the future. "We look upon the North as our last frontier," he noted of the southern Canadian view. "It is natural for us to think of developing it, of subduing the land and extracting its resources to fuel Canada's industry and heat our homes. But the native people say the North is their homeland. They have lived there for thousands of years. They claim it is their land, and they believe they have a right to say what its future ought to be." Berger recommended a ten-year moratorium on any pipeline development so that Aboriginal land claims could be settled and appropriate conservation areas established beforehand.[23] Thus, internal sovereignty claims by Canadian Indigenous groups changed the political dialogue, and Canada embarked upon a process of settling comprehensive land claims with Northern Indigenous peoples whose land rights had not been dealt with by treaty or other legal means—a process that has dramatically transformed Canada's political landscape and remains ongoing today.

Domestic drivers dominated the Canadian political agenda for most of the 1970s and early 1980s, but the external dimensions of sovereignty re-emerged with the August 1985 voyage of the US Coast Guard icebreaker *Polar Sea* through the Northwest Passage. Although launched for reasonable operational reasons relating to the resupply of the American base at Thule, Greenland, the Americans refused to seek

official permission from Canada, recognizing that this would prejudice their own legal position on international straits globally. In response, the Conservative government of Brian Mulroney officially drew baselines around the Arctic Archipelago effective 1 January 1986, thus confirming Canada's sovereignty over the NWP as "historic internal waters." Canada, however, announced its willingness to negotiate with the United States—a strategic move that, owing to Prime Minister Mulroney's close relationship with President Ronald Reagan, yielded the 1988 Arctic Cooperation Agreement[24] under which, in the interests of safe navigation, the "United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada."[25] By "agreeing to disagree" on the legal status of the passage, the two countries reached "a pragmatic solution based on our special bilateral relationship, our common interest in cooperating on Arctic matters, and the nature of the area"—one that did not prejudice either country's legal position or set a precedent for other areas of the world.[26] With this understanding in place and the perceived "crisis" averted, Canadian political attention associated with Arctic sovereignty faded once again.

The rising tide of evidence about the pace and impacts of global warming in the Arctic resurrected visceral Canadian concerns about Arctic sovereignty in the early 2000s. Demands for a more proactive Arctic strategy anticipated perceived security challenges associated with climate change, boundary disputes like Hans Island, the contested status of the waters of the Northwest Passage for international transits/navigation, resource development, and heightened international activity in the region more generally.[27] In 2005, the Liberal Government's *International Policy Statement* identified the Arctic as a priority area, noting that "in addition to growing economic activity in the Arctic region, the effects of climate change are expected to open up our Arctic waters to commercial traffic by as early as 2015.... These developments reinforce the need for Canada to monitor and control events in its sovereign territory."[28] It fell to the Conservatives, who came into office in January 2006, to implement this agenda and to make Arctic sovereignty and security a major political priority.

The Canadian North was a key component of the Stephen Harper Conservatives' 2005 election platform, which played on the idea of an Arctic sovereignty "crisis" demanding decisive action. Harper promised

that Canada would acquire the military capabilities necessary to defend its sovereignty against external threats. "The single most important duty of the federal government is to defend and protect our national sovereignty," he asserted. "It's time to act to defend Canadian sovereignty. A Conservative government will make the military investments needed to secure our borders. You don't defend national sovereignty with flags, cheap election rhetoric, and advertising campaigns. You need forces on the ground, ships in the sea, and proper surveillance. And that will be the Conservative approach."[29] In short, the new prime minister's political message emphasized the need for Canadian action with a particular attention to conventional military forces, differentiating his government from the Liberals whom he believed had swung the pendulum too far towards diplomacy and human development.

The Harper government's "use it or lose it" approach to Arctic policy dominated the agenda from 2006-09. A spate of commitments to invest in military capabilities to defend Canada's rights in the region, including new Arctic patrol vessels and more vigorous patrolling, reinforced the government's emphasis on "hard security" rather than "human security" like its predecessors.[30] This formulation offered little political incentive to downplay the probability of military conflict in the Arctic, given that the Conservative government was trying to project an image of strength and commitment to defend the country's sovereignty. But this "use it or lose it" rhetoric frustrated and even offended Northerners, particularly Indigenous peoples who had lived in the region since "time immemorial" (and thus resented any intimation that it was not sufficiently "used") and continued to express concerns about their lack of substantive involvement in national and international decision-making. Some Inuit representatives suggested that the government agenda prioritized military investments at the expense of environmental protection and improved social and economic conditions in the North. They insisted that "sovereignty begins at home" and that the primary challenges were domestic human security issues, requiring investments in infrastructure, education, and health care.[31] Furthermore, the Inuit Circumpolar Council's transnational *Circumpolar Inuit Declaration on Sovereignty in the Arctic* (2009) emphasized that "the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states

to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic."[32]

After the *Ilulissat Declaration* by the Arctic coastal States in May 2008,[33] official Canadian statements began to adopt a more optimistic and less bellicose tone. The following March, Minister of Foreign Affairs Lawrence Cannon acknowledged in a speech that geological research and international law (not military clout) would resolve continental shelf and boundary disputes, and he emphasized "strong Canadian leadership in the Arctic ... to facilitate good international governance in the region."[34] These constructive messages were echoed in *Canada's Northern Strategy: Our North, Our Heritage, Our Future*, released in July 2009. It emphasized four main pillars: exercising Canada's Arctic sovereignty, promoting social and economic development, protecting Canada's environmental heritage, and improving and devolving Northern governance. The strategy reinforced a message of partnership: between the federal government and Northern Canadians, and between Canada and its circumpolar neighbours. Although it trumpeted the government's commitment to "putting more boots on the Arctic tundra, more ships in the icy water and a better eye-in-the-sky," it also emphasized that Canada's disagreements with its neighbours were "well-managed and pose no sovereignty or defence challenges for Canada." This signaled a rather abrupt change of tone from previous political messaging.[35]

The idea that outstanding Arctic boundary disputes would be resolved through diplomacy rather than brute force received a boost in April 2010, when Russia and Norway settled a forty-year disagreement over the division of the Barents Sea. Cajoling Canada to take note of this landmark resolution, Sergei Lavorv and Jonas Gahr Støre (the Russian and Norwegian foreign ministers respectively) noted that "the Law of the Sea provided a framework that allowed us to overcome the zero-sum logic of competition and replace it with a process focused on finding a win-win solution." In a preachy tone, they expressed "hope that the agreement will inspire other countries in their attempts to resolve their maritime disputes, in the High North and elsewhere, in a way that avoids conflict and strengthens international co-operation."[36] It must be emphasized, however, that a shared commitment to the Law of the Sea does not preclude ongoing and even intractable disputes

stemming from differing interpretations and applications of international law in specific contexts.

The Department of Foreign Affairs released its *Statement on Canada's Arctic Foreign Policy* in August 2010, which reiterated the importance of the Arctic in Canada's national identity and Canada's role as an "Arctic power." The overall message mirrored the broader *Northern Strategy*, outlining a vision for the Arctic as "a stable, rules-based region with clearly defined boundaries, dynamic economic growth and trade, vibrant Northern communities, and healthy and productive ecosystems." The statement identified "the exercise of our sovereignty over the Far North" as the first and foremost pillar of Canada's foreign policy. Amplifying the tone of cooperation with circumpolar neighbours and Northerners, it reaffirmed that Canada's Arctic sovereignty is longstanding, well-established and based on historic title (rooted, in part, on the presence of Inuit and other Canadians in the region since time immemorial). Overall, the statement projected a stable, secure circumpolar world – but one in which Canada will continue to uphold its rights as a sovereign, coastal State. Accordingly, it committed Canada to "seek to resolve boundary issues in the Arctic region, in accordance with international law" and to secure its rights to the extended continental shelf. Longstanding disputes respecting the Northwest Passage, Beaufort Sea, and Hans Island are well-managed and pose no acute sovereignty or security concerns to Canada.[37]

Leading Canadian academic experts seem to have reached a similar consensus over the last decade, with previous proponents of the "sovereignty on thinning ice" school largely abandoning their earlier arguments that Canadian sovereignty will be a casualty of climate change and foreign challenges. Instead, academic narratives anticipating potential conflict now emphasize how other international events (such as Russian aggression in the Ukraine) could "spill over" into the Arctic or how new non-Arctic State and non-state actors might challenge or undermine Canadian sovereignty and security.[38]

Given Canada's longstanding position that its sovereignty in the Arctic is well-established, there is unlikely to be any reversing of its basic stance on the rights and roles of Arctic States in regional governance. With Prime Minister Justin Trudeau having criticized his predecessor for allegedly politicizing the scientifically-informed legal process to delineate the outer limits of Canada's continental shelf in the

Arctic, Canada is likely to emphasize openness, transparency, the rule of law, and science-based decision-making as it navigates the UNCLOS process[39] and works to resolve its other boundary disagreements. Alarmist narratives suggesting that military threats warrant a deviation from our established approach to managing outstanding sovereignty and status of water disputes are off the mark and should be dismissed. Instead, a more nuanced understanding of the legal, historical, and political issues involved, as well as the institutional mechanisms and constraints, can help to manage expectations and assess future prospects for their management or resolution.

Notes

[1] Sections of this introduction are derived from Lackenbauer and Lalonde, "Searching for Common Ground in Evolving Canadian and EU Arctic Strategies," in *The European Union and the Arctic*, ed. Nengye Liu, Elizabeth Kirk, and Tore Henriksen (Leiden: Brill, 2017), 119-71; and Lackenbauer and Lalonde, "Canada, Sovereignty, and 'Disputed' Arctic Boundaries: Myths, Misconceptions, and Legal Realities," in *The Networked North: Borders and Borderlands in the Canadian Arctic Region*, ed. Heather Nicol and P. Whitney Lackenbauer (Waterloo: Borders in Globalization/Centre on Foreign Policy and Federalism, 2017), 95-113.

[2] First in the *Truman Proclamation* (Proclamation 2667, issued by U.S. President Harry S. Truman on 28 September 1945, 10 *Federal Regulations* 12303) and then later codified in the 1958 *Geneva Convention on the Continental Shelf* (adopted 29 April 1958, entered into force 10 June 1964, 499 *U.N.T.S.* 311) and in Part V of the 1982 *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994, 1833 *U.N.T.S.* 397).

[3] The assertion by coastal states of claims to distinctive fishery zones occurred throughout the 20th century but a rapid development in state practice occurred in the period between the Second and Third United Nations Conferences on the Law of the Sea (1960-73). See Donald R. Rothwell, "Fishery Zones and Limits," in *The Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrum (Oxford: University Press, 2020), 1-89.

[4] Created by Part V of the 1982 United Nations Law of the Sea Convention, supra note 2. In settling a dispute over the delimitation of the continental shelf between Libya and Malta in 1985, the International Court of Justice stated that in its view, the institution of the exclusive economic zone had become part of customary law. *Continental Shelf (Libyan Arab Jamahiriya / Malta*, Judgment of 3

June 1985, *I.C.J. Reports 1985*, p. 13, para. 34.

[5] Clive Schofield explains that determining the number of potential maritime boundaries worldwide is "challenging as certain assumptions need to be made. For example, if maritime boundaries composed of multiple distinct segments are treated as one boundary (for example treating the potential delimitations between Canada and the United States as one maritime boundary), a figure of 366 can be reached. However, if each individual boundary segment is counted as a maritime boundary (Canada and the United States on this basis contributing four to the total), the figure rises dramatically to 434 maritime boundaries. These figures do not include potential maritime boundaries beyond 200nm from the coast, the number of which … is difficult to predict given that many coastal states have yet to finalize the outer limits of their extended continental shelf areas." Schofield, "The Delimitation of Maritime Boundaries: An Incomplete Mosaic," in *The Routledge Research Companion to Border Studies*, ed. Doris Wastl-Walter (Farnham: Ashgate, 2011), 670.

[6] Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 18–25. See also Douglas M. Johnston, *The History and Theory of Ocean Boundary-Making* (Montreal & Kingston: McGill-Queen's University Press, 1988); and Bernard Oxman, "International Maritime Boundaries: Political, Strategic, and Historical Considerations," *University of Miami Inter-American Law Review* 26:2 (1995): 243–95.

[7] Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), "Arctic and Northern Policy Framework International Chapter" (October 2019), https://www.rcaanc-cirnac.gc.ca/eng/1562867415721/1562867459588.

[8] Department of Indian Affairs and Northern Development (DIAND), *Canada's Northern Strategy: Our North, Our Heritage, Our Future* (2009), Department of Indian Affairs and Northern Development, *Canada's Northern Strategy*, reproduced in P. Whitney Lackenbauer and Ryan Dean, eds., *Canada's Northern Strategy under the Harper Conservatives: Key Speeches and Documents on Sovereignty, Security, and Governance, 2006-15* [Documents on Canadian Arctic Sovereignty and Security (DCASS) No. 6] (Calgary and Waterloo: Centre for Military, Strategic and Security Studies/Centre on Foreign Policy and Federalism/Arctic Institute of North America, 2016), 100-13.

[9] CIRNAC, "Arctic and Northern Policy Framework" (October 2019), https://www.rcaanc-cirnac.gc.ca/eng/1560523306861/1560523330587.

[10] CIRNAC, "Arctic and Northern Policy Framework International Chapter."

[11] Michael Byers and Andreas Østhagen, "Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?" *Canadian Yearbook of International Law: 2017* (Cambridge: Cambridge University Press, 2017), 1. They note that Canada's five unresolved (or only partially resolved) maritime boundaries

within 200 n.m. of its shores are in the Gulf of Maine, Beaufort Sea, Lincoln Sea, Dixon Entrance, and seaward of Juan de Fuca Strait.

[12] This section is derived from Lackenbauer and Lalonde, "Canada, Sovereignty, and 'Disputed' Arctic Boundaries," 95-113.

[13] For an introduction to these themes, see Franklyn Griffiths, Rob Huebert, and P. Whitney Lackenbauer, *Canada and the Changing Arctic: Sovereignty, Security, and Stewardship* (Waterloo: Wilfrid Laurier University Press, 2011).

[14] See, for example, Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (Toronto: University of Toronto Press, 2007); Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," *Canadian Bar Review* 29 (2000): 252; Canada, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (March 2011), http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675; and Timo Koivurova and Leena Heinämäki, "The Participation of Indigenous Peoples in International Norm-Making in the Arctic," *Polar Record* 42:221 (2006): 101-10.

[15] For a sweeping overview, see Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2011).

[16] The Alaska Boundary dispute, which was resolved by arbitration in 1903, concerned the boundary between the Alaska panhandle and British Columbia. Britain still handled Canada's foreign affairs at the time, and one of three Canadian arbitrators – Lord Alverstone, Lord Chief Justice of England – sided with the Americans in drawing a line that was considerably closer to the American position than to the Canadian. This ignited a firestorm of criticism in Canada amongst nationalists who believed that Alverstone had supported the Americans because Britain, worried about the growing military power of Germany, had sacrificed Canadian interests to bolster Anglo-American relations. See John A. Munro, ed., *The Alaska Boundary Dispute* (Toronto: Copp Clark Publishing Company, 1970) and Norman Penlington, *The Alaska Boundary Dispute: A Critical Reappraisal* (Toronto: McGraw-Hill Ryerson, 1972).

[17] On sovereignty in the Canadian Arctic before the Second World War, see Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North: Terrestrial Sovereignty, 1870–1939*, ed. P.W. Lackenbauer (Calgary: University of Calgary Press, 2014).

[18] See Ken Coates and William Morrison, *The Alaska Highway in World War II: The US Army of Occupation in Canada's Northwest* (Norman: University of Oklahoma Press, 1992); and Shelagh Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950* (Vancouver: UBC Press, 1988).

[19] See, for example, P. Whitney Lackenbauer, "Right and Honourable:

Mackenzie King, Canadian-American Bilateral Relations, and Canadian Sovereignty in the Northwest, 1943-1948," in *Mackenzie King: Citizenship and Community*, ed. John English, Kenneth McLaughlin, and P.W. Lackenbauer (Toronto: Robin Brass Studio, 2002," 151-68, and Lackenbauer and Peter Kikkert, "Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68," in *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009*, ed. Greg Donaghy and Michael Carroll (Calgary: University of Calgary Press, 2011), 101-20.

[20] On oil and gas activities in the 1970s and 80s, see Robert Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland & Stewart, 1986).

[21] The AWPPA (1970, R.S.C. 1985) and its regulations provide specific construction standards for vessels engaged in Arctic shipping, a system of shipping safety control zones, a ban on discharges of oil, hazardous chemicals, and garbage, and requirements for vessels to carry insurance to cover damages from any these discharges. On this period, see J. Alan Beesley, "Rights and Responsibilities of Arctic Coastal States: The Canadian view," *Journal of Maritime Law and Commerce* 3 (1971): 1 and Ted McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (Oxford: Oxford University Press, 2009).

[22] See Don McRae, "The Negotiation of Article 234," in *Politics of the Northwest Passage*, ed. Franklyn Griffiths (Kingston & Montreal: McGill-Queen's University Press, 1987): 98-114, and Rob Huebert, "Article 234 and Marine Pollution Jurisdiction in the Arctic," in *The Law of the Sea in the Polar Oceans: Issues of Maritime Delimitation and Jurisdiction*, ed. Don Rothwell and Alex Oude Elferink (Dordrecht: Kluwer, 2001), 249-67.

[23] Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* vol. 1 (Ottawa: Minister of Supply and Services Canada, 1977), 1. See also Canadian Broadcasting Corporation (CBC) archives, "The Berger Pipeline Inquiry," http://archives.cbc.ca/IDD-1-73-295/politics_economy/pipeline/, and Martin O'Malley, *The Past and Future Land: An Account of the Berger Inquiry into the Mackenzie Valley Pipeline* (Toronto: P. Martin Associates, 1976).

[24] Agreement on Arctic Cooperation, 11 January 1988, reprinted in *International Legal Materials* 28 (1989): 142.

[25] It must be emphasized that the careful wording of the Agreement commits the United States to seek the consent of the Canadian government only for those U.S. icebreakers intending to conduct marine scientific research. See the sources listed at footnote 58 in Chapter 3.

[26] Christopher Kirkey, "Smoothing Troubled Waters: The 1988 Canada-United States Arctic co-operation agreement," *International Journal* 50:2 (1995): 401-26.
[27] See, for example, Rob Huebert, "Climate Change and Canadian Sovereignty in the Northwest Passage," *Isuma*: *Canadian Journal of Policy Research* 2:4 (2001); Ken Coates, P. Whitney Lackenbauer, Bill Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008); Michael Byers, *Who Owns the Arctic? Understanding Sovereignty Disputes in the North* (Vancouver: Douglas & McIntyre, 2009); and Griffiths et al, *Canada and the Changing Arctic*.
[28] Canada, *Canada's International Policy Statement*, Overview (2005), excerpted in Ryan Dean, P. Whitney Lackenbauer, and Adam Lajeunesse, *Canadian Arctic Defence and Security Policy: An Overview of Key Documents, 1970-2012* (Calgary and Waterloo: Centre for Military and Strategic Studies/Centre on Foreign Policy and Federalism, 2014), 39-40.
[29] Stephen Harper, "Harper Stands Up for Arctic Sovereignty," address in Ottawa, 22 December 2005.
[30] See, for example, Kathleen Harris, "Laying claim to Canada's internal waters," *Toronto Sun*, 23 February 2007. On Harper's early vision, see Klaus Dodds, "We are a Northern Country: Stephen Harper and the Canadian Arctic," *Polar Record* 47:4 (2011): 371-74.
[31] See, for example, Paul Kaludjak, "The Inuit are here, use us," *Ottawa Citizen*, 18 July 2007; Mary Simon, "Does Ottawa's northern focus look backwards?," *Nunatsiaq News*, 11 April 2008; and the perspectives in Inuit Tapiriit Kanatami, *Nilliajut: Inuit Perspectives on Security, Patriotism and Sovereignty* (Ottawa: Inuit Qaujisarvingat, 2013).
[32] Inuit Circumpolar Council (ICC), *A Circumpolar Declaration on Sovereignty in the Arctic* (April 2009), https://www.itk.ca/publication/circumpolar-declaration-sovereignty-arctic. Inuit representatives have opposed state actions that they feel violate their interests, such as Canada's decision to host a meeting for the five Arctic coastal states in March 2010 without inviting Inuit and First Nations to the discussions, and even critiqued a bilateral Canada-Denmark Arctic defence and security cooperation agreement because they were not involved in negotiating it. As such, Indigenous voices add to the complexity (and richness) of the Canadian message projected to the rest of the world.
[33] *The Ilulissat Declaration*, Arctic Ocean Conference, Ilulissat, Greenland, 27-29 May 2008, https://web.archive.org/web/20120310172346/http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.
[34] Speaking Notes for the Hon. Lawrence Cannon, Minister of Foreign Affairs, "Canada's Arctic Foreign Policy: The International Dimension of Canada's Northern Strategy," Whitehorse, Yukon, 11 March 2009.

[35] DIAND, *Canada's Northern Strategy* (2009).
[36] Sergei Lavrov and Jonas Gahr Støre, "Canada, take note: Here's how to resolve maritime disputes," *Globe and Mail*, 21 September 2010.
[37] Department of Foreign Affairs and International Trade, *Statement on Canada's Arctic Foreign Policy* (2010).
[38] See, for example, Rob Huebert, "Why Canada, US must resolve their Arctic border disputes," *Globe and Mail*, 21 October 2014; Derek Burney and Fen Osler Hampson, "Arctic alert: Russia is taking aim at the North," *Globe and Mail*, 9 March 2015; Michael Byers, "The Northwest Passage Dispute Invites Russian Mischief," *National Post*, 28 April 2015; and Scott Borgerson and Michael Byers, "The Arctic Front in the Battle to Contain Russia," *Wall Street Journal*, 8 March 2016. For less alarmist views, see Adam Lajeunesse and Whitney Lackenbauer, "Canadian Arctic Security: Russia's Not Coming," *Arctic Deeply*, 14 April 2016, https://www.opencanada.org/features/ canadian-arctic-security-russias-not-coming; Lackenbauer, "Canada & Russia: Toward an Arctic Agenda," *Global Brief* (Summer/Fall 2016): 21-25; and Lackenbauer and Suzanne Lalonde, eds., *Breaking the Ice Curtain? Russia, Canada, and Arctic Security in a Changing Circumpolar World* (Calgary: Canadian Global Affairs Institute, 2019).
[39] After PM Harper "ordered a rewrite of Canada's international claim for Arctic seabed rights to include the North Pole" in December 2013, Trudeau (as Liberal leader) noted: "I am going to defer to scientists. There has been an awful lot of work done over the past years, and even decades, on mapping out the undersea floor of the North Pole to align with the United Nations regulations. … And I don't know that it is a place where we need necessarily to have political interference. I trust our scientists and oceanographers in terms of how we're mapping it." Steven Chase, "Turf war with Russia looms over Ottawa's claim to Arctic seabed," *Globe and Mail*, 5 December 2013.

1

The Beaufort Boundary: An Historical Appraisal of a Maritime Boundary Dispute

P. Whitney Lackenbauer

Commentators have long identified the Beaufort Sea boundary as a significant unsettled Canada-U.S. bilateral maritime boundary dispute, owing in large part to the size of the disputed zone (6,250 n.m.^{2} or 21,437 km^2 of ocean and seabed) and the resource potential of the region. For decades, they have also suggested that the stakes involved demand a quick resolution before development pressures heighten and push the two countries into more serious conflict.[1] International law scholar Donald Rothwell summarizes the dispute as follows:

> Canada's position with respect to the maritime boundary in the Beaufort Sea has traditionally been that its maritime sovereignty extends from the Alaska/Yukon land frontier, at the 141st meridian, and north along that line towards the North Pole. The principal basis of the Canadian claim is the 1825 *Boundary Treaty* signed by Great Britain and Russia. In support of this claim, Canada can also rely upon the sector theory, the historical usage of the area by Canadians, the acquiescence by the United States towards the Canadian claim, and the coastal geography of the area. On the other hand, the United States relies upon the equidistance theory as the basis for an equidistance line which would run in a north-east direction from the land frontier. The United States does not accept that the 1825 *Boundary Treaty* defines a maritime boundary in the Beaufort Sea.[2]

This chapter provides an historical overview and analysis of Canadian activities and claims in the Beaufort Sea to 1 March 1977, when the United States proclaimed a 200 nautical mile-wide Fishery Conservation Zone which defined the lateral boundary between Alaska and the Yukon in the Beaufort Sea as the equidistance line from the low-water line of both coasts. Because the coast trends in the southeasterly

direction on the Canadian side (making it concave), there is an overlap between the two claimed jurisdictions of approximately 6,250 n.m.[2] (see figure 1-1).[3] Although both the United States and Canada have offered oil and gas exploration licenses and leases in the disputed zone, neither country has allowed exploration or development in the area pending resolution of the dispute.

According to some Canadian experts, the geographical reality of Alaska's convex coastline and Canada's concave coastline in the Beaufort region makes any simple application of the equidistance principle inequitable. Does the configuration of the Yukon coast represent a "special circumstance" that must be accommodated in an "adjustment" to the equidistance line?[4] Furthermore, as Donat Pharand originally observed, beyond the 200-mile exclusive economic zone (EEZ) the equidistance line starts turning away from the Canadian coastline, owing to the presence of Banks Island.[5] This is significant owing to the extensive continental shelf beyond 200 n.m. in the Beaufort Sea.[6] If Canadian and American rights to the continental shelf in the Beaufort prove to stretch up to 400 n.m. from shore, the established legal positions of both countries within 200 n.m. might, if extended beyond the EEZ, actually favour the other party.[7]

Geographical Overview

The Beaufort Sea is adjacent to the Arctic Ocean and has a geological continental shelf that extends about 40 n.m. offshore in the vicinity of the 141°W meridian. The shelf extends laterally as one continuous entity from Russia, across the Chukchi Sea, along the north shore of Alaska, Yukon and Northwest Territories as far east as Amundsen Gulf.[8]

The waters of the Beaufort Sea on both sides of the 141st meridian are distinct from the Arctic Archipelago in that they contain no islands. As early as 1952, historian Gordon W. Smith concluded that "[f]or this reason, a Canadian claim to the portion of Beaufort Sea east of the 141st meridian would be less justifiable than a claim to the waters within the archipelago, and might meet with strong and understandable American objections."[9]

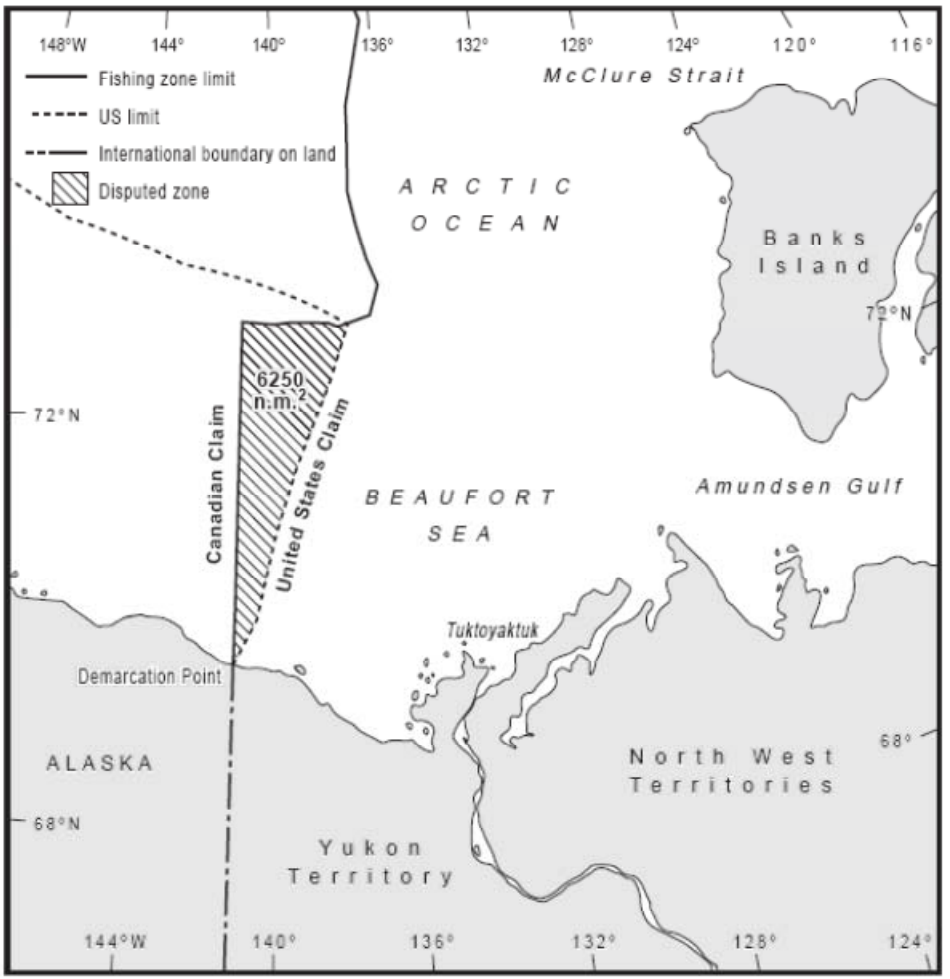

Figure 1-1: The Disputed Zone in the Beaufort Sea. David H. Gray, "Canada's Unresolved Maritime Boundaries," IBRU *Boundary and Security Bulletin* (1997): 63.

The United States has never explicitly accepted Canada's argument that the 141st meridian constitutes an agreed maritime boundary. Karin Lawson lays out the basic conflict in resolving the Beaufort Sea controversy:

> The United States argues that the equidistance principle must be used, and maintains that no special circumstances temper its application in the Beaufort Sea dispute. Canada, on the other hand, believes that the 141st meridian constitutes the maritime as well as the land boundary between the two countries.[10]

Boundary delimitation is predicated on geography. The extensive land boundary between the Yukon and Alaska follows the 141st meridian from Mount St. Elias to Demarcation Point at the Arctic Ocean. The United States, however, argues that this land boundary has no bearing on the maritime boundary. Instead, it looks to the configuration of the adjacent American and Canadian coasts: Alaska has a convex coast, while the configuration of the Canadian coast is concave.

This geographic reality makes the simple application of the principle of equidistance inequitable for Canada, Michel Frederick argued in 1979:

> La côte du Yukon, d'une longueur d'environ 350 km, est fortement concave par rapport à la convexité de la côte de l'Alaska. Ainsi, selon la définition même de l'équidistance, il s'ensuit nécessairement que l'application de ce principe aurait tendance à infléchir la ligne de délimitation du plateau continental dans la direction générale de la concavité. Cette inclinaison s'accentue graduellement à mesure que l'on s'approche de la ligne de délimitation vers la mer du plateau continental…. [L]e Yukon perd, par rapport au 141e méridien (la frontière terrestre), environ un tiers de son plateau continental au profit de l'Alaska. Il s'agit donc d'une perte importante de territoire sous-marin.[11]

As such, Frederick concludes that the configuration of the Yukon coast represents a "special circumstance" that must be accommodated to reach an equitable boundary in the Beaufort.

Similarly, Donat Pharand explained in his 1973 study that an equidistance line would not result in a reasonable degree of proportionality between Canada's coastline and its share of the continental shelf (an important issue in determining a maritime boundary, as discussed below and in chapter 2), and that an:

> equidistance line would adversely affect Canada all the way to the seaward limit, since it is only beyond the 200-mile limit that the equidistance line starts turning away from the Canadian coastline. Canada might then wish to argue that this exceptional configuration of the coast constitutes a special circumstance and that the 141st meridian would be a more equitable boundary line to divide the continental shelf between itself and the United States.[12]

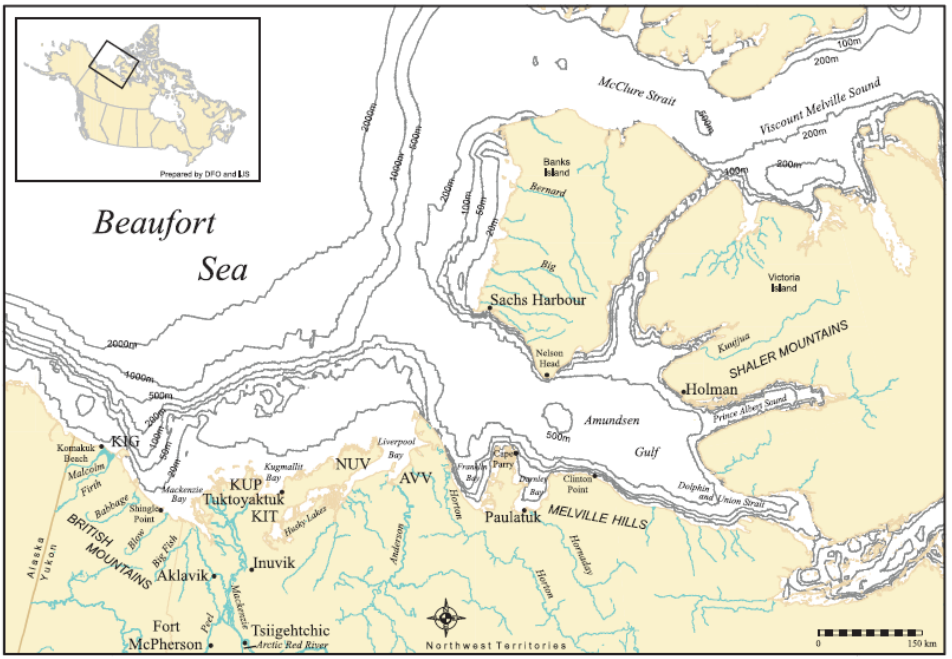

Figure 1-2: The Canadian Beaufort Region. G. Burton Ayles and Norman B. Snow, "Canadian Beaufort Sea 2000: The Environmental and Social Setting," *Arctic* 55, supp. 1 (2002): 5.

1825 and 1867 Treaties

The authority for Canada's position on the 141st meridian has traditionally been the 1825 Convention between Great Britain and Russia signed at St. Petersburg respecting the northwest coast of America. Article Three of the 1825 Convention (original in French) defined the boundary between British North American possessions (now the Yukon) and Russian Alaska as follows:

> The line of demarcation between the Possessions of the High Contracting Parties, upon the Coast of the Continent, and the islands of America to the North-West, shall be drawn in the manner following:- Commencing from the Southernmost Point of the Island called Prince of Wales Island, which Point lies in the parallel of 54 degrees 40 minutes North latitude, and between the 131st and the 133rd degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the channel called Portland Channel, as far as the Point of the Continent where it strikes the 56th degree of North latitude; from this last-mentioned Point, the line of demarcation shall follow the

> summit of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West longitude (of the same Meridian); and, finally, from the said point of intersection, *the said Meridian Line of the 141st degree, in its prolongation as far as the Frozen Ocean*, shall form the limit between the Russian and British Possessions on the Continent of America to the North West.[13] [emphasis added]

The problem of interpretation relates to specific expressions ("jusqu'à," "la Mer Glaciale," "ligne de demarcation," and "Possessions") contained in the original French version of the Treaty, which reads:

> la ligne de démarcation suivra la crête des montagnes situées parallèlement à la Côte, jusqu'au point d'intersection du 141me degré de longitude Ouest (même Méridien); et, finalement, du dit point d'intersection, la même ligne méridienne du 141me degré formera, *dans son prolongement jusqu'à la Mer Glaciale*, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amerique Nord-Ouest.[14] [emphasis added]

Does the italicized phrase imply that the boundary between the Yukon and Alaska follows the 141st meridian *up to* the Arctic Ocean, or that it follows the meridian *into* the Arctic Ocean?[15]

There are several possible interpretations of the key phrase italicized above:

1. "to where the land ends and salt water begins"
2. "to where the permanent arctic ice pack, as distinct from seasonally open coastal water, begins"
3. "to the main body of the Arctic Ocean, as distinct from the Beaufort Sea"
4. "as far as the beginning of the Frozen Ocean"
5. "as far as and including the Frozen Ocean."[16]

Canada has interpreted this Article to mean that the Convention provides for a boundary which divides what are now Canada's and the United States' interests on both land and sea because the U.S. adopted the same wording in the 1867 Alaska Purchase from Russia.

Eminent international lawyer Donat Pharand's careful analysis of the description of the line of demarcation in Article III of the 1825 Boundary Treaty concluded that it ended at the Arctic Ocean. "Applying the ordinary meaning of the term 'jusqu'à' to the present situation, it would seem that the end of the boundary line along the 141st

degree of longitude was intended to be at its point of intersection with 'la Mer Glaciale', the topographical element chosen by the parties," he noted. In his reading, the parties intended "to use the Arctic Ocean as a topographical feature indicating the limit of the demarcation line between their respective positions." Extending the boundary along the meridian across the Arctic Ocean up to the North Pole "would have been against the principle of the freedom of the high seas, already established and subscribed to by both Great Britain and Russia" before the 1825 Treaty was signed. "The extent of the territorial sea and the exact nature of the coastal State jurisdiction over waters adjacent to its coast, however, had not been established."[17] Other scholars also conclude that Article III of the 1825 Treaty deals only with land boundaries, and that an extension of the 141st meridian into the Beaufort would be a line of demarcation for land territory, not a maritime boundary.[18] Furthermore, historical context might suggest that the rights that Canada inherited from Britain were unlikely to include any claims to the sea beyond the three-mile limit for territorial waters, given Great Britain's adherence to the principle of freedom of the high seas.

Even commentators who have been more favourably disposed towards Canada's position acknowledge the contextual limitations of assuming that extensive maritime boundaries were intended in 1825. Legal scholar Donald Rothwell noted that:

> Canada's greatest problem in relying on the *1825 Boundary Treaty* is the difficulty in proving that at the time of its making, the parties sought to delimit a maritime boundary. The history of maritime boundaries shows the difficulty in this approach, given that the concept of the territorial sea did not become accepted until late in the eighteenth and early nineteenth centuries, and that it is not until the 1945 Truman Declaration[19] that the concept of a coastal state having sovereign rights over its adjacent continental shelf became recognized in customary international law.

Nevertheless, Rothwell found sufficient ambiguity in the meaning of the 1825 Treaty to argue that it "unlikely … would be considered conclusive in this dispute." Accordingly, he suggested that Canada's position "should not be completely dismissed as Canada has relied upon its present interpretation of the Treaty for some time and that this, when added to other factors, could be to Canada's benefit in an adjudication."[20]

Given that the concept of a continental shelf did not appear on the international scene for a century, Michel Frederick found it difficult to prove that the authors of the 1825 Treaty intended to include a maritime boundary along the 141st meridian. In his assessment:

> la lecture de tout le traité nous donne plutôt l'impression que les parties avaient l'intention de ne procéder qu'à la délimitation des frontières terrestres. En effet, le préambule du traité indique clairement qu'il s'agit d'un "accord qui règlerait, d'après le principe des convenances réciproques, divers points relatifs au Commerce, à la Navigation, et aux Pêcheries de leurs sujets sur l'Océan pacifique, ainsi que les limites de *leurs Possessions respectives* sur la Côte Nord-Ouest de l'Amérique." Il ne fait aucun doute que ce traité devait toucher, dans un premier temps, à diverses questions *maritimes* et, dans un second temps, à d'autres questions de nature plutôt *terrestre*, comme semble l'indiquer l'emploi de l'expression "Possessions respectives." Il convient de souligner également que l'article 3 du traité ne parle pas simplement des possessions bien définies, c'est-à-dire celles situées "sur la *Côte du Continent* et les *Iles* de l'Amérique Nord-Ouest"; de plus, … cet article se termine sur les mots "la limite entre les *Possessions* Russes et Britanniques sur le *Continent* de l'Amérique Nord-Ouest." L'emploi de ces mots et expressions par la Grande-Bretagne et la Russie donne fortement à entendre que les limites qu'elles désiraient établir par ce traité étaient strictement terrestres…. Prétendre, à l'instar du Canada, que le traité de 1825 a aussi établi une frontière maritime et a ainsi délimité le plateau continental entre l'Alaska et le Yukon dans la mer de Beaufort constitue à notre avis un argument dont la valeur juridique et pratique est à peu près nulle.[21]

The boundary established by the Anglo-Russian treaty of 1825 was retained following the sale of Alaska in 1867 and of Canada succeeding Great Britain as the sovereign State adjacent to Alaska. Rothwell observes that the 1867 *Boundary Treaty* adopted "terms similar to those of the 1825 *Boundary Treaty* when it describes the maritime boundary between Russia and the United States in the Chukchi Sea as proceeding 'due north, without limitation, into the same Frozen Ocean.'" The United States, however, accepts that the 1867 *Boundary Treaty* delimits a maritime boundary applicable to the continental shelf, which it extends to 72°N because the U.S. does not accept the sector theory (see below). Rothwell notes that this position is contradictory, with the U.S. "virtually saying that the same treaty that delimits a maritime boundary

in the west does not delimit a maritime boundary in the east, and it sets up an argument for equidistance in the east that does not recognize the 1867 Line as a special circumstance calling for deviation, partial or full, from an equidistance line."[22]

Other commentators have argued that the 1867 Treaty established an ocean boundary. The American jurist David Hunter Miller, in considering the western boundary of the 1867 treaty, concluded in 1928 "that it fixed the American-Russian boundary, as far as these two countries could then fix such a boundary, right up to the North Pole, and that it, along with the treaty of 1825, provided at least part of the basis for the Canadian sector theory."[23] Historian Gordon W. Smith noted in 1952 that "one may agree with Miller that this treaty 'comes very near to fixing the territorial rights of Russia and the United States … up to the pole'" and that "[i]f the two treaties were given their strongest interpretation, an Alaskan sector would automatically be created."[24] In 1930, a study produced for the General Staff at the Department of National Defence noted:

> The expression … quoted from the Treaty of 1825 was incorporated in the French text of the Treaty of 1867.
>
> In the quotation, the French words may be translated "in its prolongation as far as the Frozen Ocean" or "to the Frozen Ocean". But, whatever the choice of words, it is, at least, arguable that the line runs as far as the 141st meridian itself runs. Weight to such argument is given by the wording in the same Treaty, (1867), which, in laying down the U.S. Western boundary, states that it "proceeds North without limitation into the same Frozen Ocean."
>
> As regards Canada's western boundary in the Arctic, therefore, there appear to be well established Treaty rights.[25]

The U.S. position, however, rejects the argument that the 1867 Treaty established an ocean boundary in the Beaufort Sea.[26] A Department of State boundary study (1965) on the U.S.-Russia Convention Line of 1867 notes that:

> Rather than a boundary per se, this report concerns a convention line which ordinarily appears on official maps in the same manner as a boundary. According to Boggs, "most lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction of the contracting parties, but a cartographic device to simplify description of the land areas involved…." He further describes such a line as a "line of allocation" of land. For example, all land areas

> to the east of the Convention line in question belong to the United States; to the west to the U.S.S.R. without regard to the water areas involved.
>
> It should be noted that the original Convention language stated that the line "proceeds thence due north, without limitation, into the same Frozen Ocean." Since the United States does not support so-called "sector claims" in the polar regions, the northernmost point for the representation of the Convention line was agreed to be 72° 00′ N. Furthermore, in keeping with the policy that the line does not constitute a boundary, the standard symbol for the representation of an international boundary should never be used. Furthermore, labeling of the line as "U.S. - Russia Convention of 1867" is recommended.[27]

In short, the U.S. position is that the convention line is simply a "line of allocation" of land.

Although the 1880 Transfer of the Arctic Islands from Great Britain to Canada appears to have no direct bearing on the Beaufort Sea claim, the discussions that led to it did refer to the 141st meridian. Lord Carnarvon's 6 January 1875 despatch, requesting that the Canadian ministers specify the territorial limits of the British lands to be annexed, referred to the 141st meridian separating British and American territory in the west. It also suggested that "To the North, to use the words of the Hudson's Bay Co. in 1750, the boundaries might perhaps be, 'the utmost limits of the lands towards the North Pole.'"[28] The western boundary was also mentioned in the joint address of the House of Commons and Senate of Canada to the British Parliament on 3 May 1878, which asked for the transfer of all Arctic lands and islands lying between the 141st meridian of longitude and the straits between Ellesmere Island and Greenland. The description of the lands and territories was:

> on the East by the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, Baffin's Bay, Smith's Straits and Kennedy Channel, including all the islands in and adjacent thereto, which belong to Great Britain by right of discovery or otherwise; on the North the Boundary shall be so extended as to include the entire continent to the Arctic Ocean, and all the islands in the same westward to the one hundred and forty-first meridian west of Greenwich; and on the North-West by the United States Territory of Alaska.[29]

In January 1879, Admiralty Hydrographer Frederick Evans proposed that the definition of the northern boundaries of Canada be adjusted to follow "the parallel of 78° 30′ North Latitude, to include the entire

continent to the Arctic Ocean, and also the islands in the same Westward to the one hundred and forty first Meridian West of Greenwich; and thence on that Meridian Southerly till it meets on the N.N.W. part of the continent of America the United States territory of Alaska." If this had been adopted, the British claim would have stopped at 78° 30′ N (in deference to American explorations farther north).[30]

At this point, the British and Canadian authorities abandoned attempts to delimit an exact claim. Instead, the order-in-council effecting the transfer of the Arctic islands to Canada adopted what Smith described as the "almost meaningless expression":

> all British territories and possessions in North America, and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion.[31]

There is no mention of meridian lines in the transfer itself. Smith noted that "the British authorities may have been genuinely reluctant to claim territories where the American title might be stronger than their own, or possibly, in more Machiavellian fashion, they may have hoped that by an indefinite claim rights could be gained, in the passage of time, that Britain did not at the moment possess."[32] Dominion archivist H.R. Holmden pithily observed that "the Imperial Government did not know what they were transferring, and on the other hand the Canadian Government had no idea what they were receiving."[33]

After an 1895 order-in-council, intended to form all unorganized Canadian territory into provisional districts and thus to bring the northern territories under effective government control, failed to account for islands more than three miles from the Yukon and Mackenzie coasts, the government passed an 18 December 1897 order-in-council (P.C. 3388) that was intended to address these deficiencies. West of 125°30′, as far as the 141st meridian, the Mackenzie and Yukon Districts were extended to include all islands within twenty miles of the coast. The western boundary of the Franklin District was extended to the 141st meridian to include all islands "not included in any other provisional district."[34] When the Yukon Territory was created by an Act of Parliament on 13 June 1898, the western boundary was described as: "Beginning at the intersection of the 141st meridian of west longitude from Greenwich with a point *on the coast of the Arctic Sea*, which is

approximately 69°39′, and named on the Admiralty Charts, 'Demarcation Point'; thence due South on said meridian …" [emphasis added].[35] As Dr. W.F. King noted, the act reverted to the terminology of the defective 1895 order-in-council that included only islands within three miles of the Yukon coast. "Since the measure of 1898 was an act of parliament," Smith noted in his 1952 study, "it might be considered to supersede the Order in Council of 1897 and might perhaps annul it altogether, not only for the Yukon Territory but also for the other districts bordering upon the arctic coast."[36] The 141st meridian has remained the Yukon's western boundary since that time, and the territory includes one offshore island: Herschel Island (2.7 n.m. or 5 km off its coast).[37]

In 1906, Great Britain and the United States established an International Boundary Commission to survey and map the 141st meridian between Alaska and the Yukon. The land boundary was thus surveyed "between 1906 and 1912 by the prolongation of an astronomic meridian observed at the Yukon River through 26 turning points to the shores of the Beaufort Sea," David Gray notes. "Monuments were established at frequent intervals and accepted as the definitive location of the land boundary. A triangulation net (of about third order accuracy) was also surveyed to support mapping of the boundary area."[38] The survey stopped at the coastline, however, leaving offshore claims unsettled.[39]

Little was known about the Beaufort Sea at the turn of the twentieth century. "At the present time Beaufort sea is bounded by the Parry islands on the east and Alaska on the south and is the least known of the arctic regions and one which contains the most interesting geographical seas," Sir Clements Markham informed the Royal Geographic Society in London in 1905. "Knowledge of the arctic region will remain very incomplete until this sea has been explored," and he encouraged British exploration accordingly.[40] In 1905-07, Dr. A.H. Harrison discovered no new lands in a Royal Geographic Society sponsored expedition in which he traversed part of the Beaufort Sea.[41] Danish explorer Ejnar Mikkelsen, co-leader of the Anglo-American expedition of 1906-07, sought land in the Beaufort Sea and completed a sled journey over the ice up to latitude 71 where deep soundings indicated that the expedition had crossed the continental shelf and that there was no land beyond.[42] Joseph Elzéar Bernier's 1908 Arctic expedition included instructions to collect

licensing fees from whalers and "to annex territory as far west as meridian 141." He did not discover any new lands in the Beaufort.[43] In short, exploration in the Beaufort region in the first decade of the twentieth century did not yield any new territorial discoveries that would have forced clarification of the offshore Canada-U.S. boundary.

The Sector Principle and the 141st Meridian, 1904-1971

The "sector principle" is a special application of the use of meridians and parallels which can be found in treaties dating back to the 16th century. Ivan Head, a lawyer with the Department of External Affairs, defined the application of the theory to the Arctic in 1963:

> An Arctic sector is deceptively simple, and is compounded of only two ingredients: a base line or arc described along the Arctic Circle through territory unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic Circle pierced by the state. Under the theory, nations possessing territory extending into the Arctic regions have a rightful claim to all territory – be it land, water or ice – lying to their north.[44]

Although this description of the drawing of boundaries using meridians is sound, Head's comment about the sector principle encompassing "land, water or ice" is contested in the historical record.

The origins of Canada's sector theory can be traced back to the early twentieth century. According to Pharand,

> The first indication of Canada's practice relating to its boundaries in the Arctic regions appears on a map of Canada, published by the Department of the Interior in 1904, entitled "Explorations in Northern Canada and adjacent portions of Greenland and Alaska". That map showed the western boundary of Canada as being the 141st meridian of west longitude extending to the North Pole, and the eastern boundary as being the 60th meridian of west longitude extending also to the Pole and beginning at a point north of the 78th parallel between Ellesmere Island and Greenland. Interestingly enough, virtually all subsequent maps of the Arctic regions published by Canada showed those same meridians as international "boundaries".[45]

An official Government of Canada map of its "Territorial Divisions" (1906) also included the 141st meridian as Canada's northwestern boundary.[46] Since that time, the Government of Canada has published many maps of the Arctic regions with the same meridian line delimiting

its sector, Frederick notes. "Ainsi, le Canada peut faire état d'une certain pratique démontrant qu'à ses yeux, le 141e méridien constitue à la fois une frontière terrestre et maritime."[47]

The most famous articulation of the sector principle related to the Canadian Arctic came on 20 February 1907 when Senator Pascal Poirier presented a motion to the Senate asserting "That it be resolved that the Senate is of opinion that the time has come for Canada to make a formal declaration of possession of the *lands and islands* [emphasis added] situated in the north of the Dominion, and extending to the North Pole." As successor to the rights of the Hudson's Bay Company (HBC), Poirier insisted, Canada could claim as its territory all of the islands lying between 141°W and 60°W longitude up to the Pole. He referred to a meeting of the Arctic Club in New York the previous year, attended by Canadian Captain Joseph-Elzéar Bernier, where:

> it was proposed and agreed – and this is not a novel affair – that in future partition of northern lands, a country whose possession today goes up to the Arctic regions, will have a right, or should have a right, or has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from the western extremity north. *All the lands* between the two lines up to the north pole should belong and do belong to the country whose territory abuts up there.[48] [emphasis added]

Although Poirier's comment that "from 141 to 60 degrees west we are on Canadian territory" could be interpreted to imply that Canada was entitled to everything within these boundaries (land, ice, and water), his frequent specification of "lands" and "land and islands" throughout the rest of his speech strongly suggests that his intent was only to include land areas within the sector lines.[49]

The speech has assumed great significance as a point of origin for Canada's sector claim. However, Senator Poirier's motion was never seconded nor debated. Sir Richard Cartwright, the Liberal leader in the Senate, reserved his opinion on whether Canada or any other nation could extend their territorial claim to the North Pole. "I am not aware that there have been any original discoverers as yet who can assert a claim to the North Pole," he explained to dissociate himself from the proposal, "and I do not know that it would be of any great practical advantage to us, or to any country, to assert jurisdiction quite as far north as that." To avoid prejudicing any negotiations over customs

duties or control over whaling activities in Arctic waters, Cartwright suggested that "it may not be the part of policy to formally proclaim any special limitation or attempt to make any delimitation of our rights there." By extension, he advised Senator Poirier not to press his motion and the debate was adjourned.[50]

Although Canada did not incorporate the sector principle in statute, Smith explained that it "afterwards proceeded, by a series of semi-official and official actions and pronouncements, to stake out a sector claim."[51] On 1 July 1909, Captain Bernier revived the idea of a Canadian sector when he installed a plaque on Melville Island taking possession of the "whole Arctic Archipelago lying to the north of America from long. 60°W to 141°W up to latitude 90°N."[52] This proclamation made no mention of waters, and his own descriptions of the ceremony reinforce that his intentions related to lands. For example:

> I briefly referred to the important event in connection with the granting to Canada by the Imperial government on September 1st, 1880, all the British *territory* in the northern waters of the continent of America and Arctic Ocean, from 60 degrees west longitude to 141 degrees west longitude, and as far north as 90 degrees, that is to say to the North Pole.[53] [emphasis added]

Frequent references to "territory" in subsequent government statements referring to the sector theory may suggest that the federal government did not intend to claim maritime areas beyond the territorial sea.[54]

Interest in and commentaries on the Beaufort Sea appear to affirm this trend. The main purpose of Vilhjalmur Stefansson's Canadian Arctic Expedition (1913-18) was "to discover new land along the 141st Meridian," and his Northern Party conducted hydrographic and oceanographic work in the Beaufort Sea up to a "farthest north" of 74°N.[55] They "carried a line of soundings of over 4500 feet through 4 degrees of latitude and 19 degrees of longitude, most of it unexplored and all of it unsounded territory [in the Beaufort Sea]," and claimed to "have determined the 'continental shelf' off Alaska and off Banks Island, and have learnt something of the currents of the Beaufort Sea."[56] These activities within the Canadian "sector" yielded discoveries of new islands east of the 141st meridian (including Brock, Mackenzie King, Borden, Meighen, and Lougheed Islands), thus precluding foreign explorers from claiming these territories. When the three provisional districts of Mackenzie, Keewatin and Franklin were officially defined by

an order-in-council on 16 March 1918 (effective 1 January 1920), the accompanying map shows the western limit of Franklin District as the 141st meridian. This suggests that Canadian authorities were upholding a sector claim.[57]

The overwhelming focus of government attention during the interwar years was on Arctic lands, and particularly the Arctic islands, and offered little clarification about the legal status of Arctic waters. On 24 November 1924, American Charles Theodore Pedersen, manager of the Northern Whaling and Trading Company (a corporation registered in New York), inquired to O.S. Finnie of the Department of the Interior about the legal status of the Beaufort Sea. Two particular questions were of direct relevance to the Beaufort:

1. Can we engage in whaling in the Beaufort Sea as customary in past years? ...
4. Has any law been passed, or is the Dominion contemplating passing a law which would make an inland water of the Beaufort Sea?

Finnie's reply, written on 10 February 1925, stated that:

1. There has been no change in the law affecting whaling in Beaufort Sea. The usual three mile limit prevails there….
4. We are not aware of any law which defines Beaufort Sea as an inland water.[58]

In short, the government did not apply the sector principle to waters beyond the three-mile territorial sea, nor did it claim the entire Beaufort Sea east of the 141st meridian as Canadian. There is no mention made, however, about delimitation of the continental shelf as this specific inquiry related to whaling in the waters.

O.D. Skelton, the Under-Secretary of State for External Affairs, was sceptical about the sector theory, and about Canada's 141st meridian boundary claim more generally. On 15 June 1925, R.M. Anderson, the Chief of the Division of Biology at the Victoria Memorial Museum, requested information about Canada's boundary in the Beaufort based upon the treaties of 1825 and 1867. With respect to the eastern boundary of Alaska, Anderson did "not think that it has been questioned during the 58 years since 1867, and the 100 years since 1825. As [U.S. President Theodore] Roosevelt states, in interpreting a treaty a prime consideration is the way in which authorities have interpreted it subsequently."[59] Skelton replied that "the question whether the 141st

meridian can be held to constitute a boundary in the waters of the Arctic Ocean from the mainland to the North Pole is of much interest." After quoting the 1825 treaty, he noted that "the 141st meridian is taken as the boundary only to the Arctic Ocean." With respect to the 1867 treaty, Skelton explained:

> It is true that the provisions as to the western limit of Alaskan territory indicate that it "proceeds due north without limitation, into the same Frozen Ocean." The endeavor to trace a boundary line through the ocean is, however, made only on the western and not on the eastern boundary. It might be held, of course, that the action on the western boundary would afford a precedent for similar action on the eastern boundary; but, in the first place, this action was not taken in the case of the eastern boundary, and, in the second place, the attempt of the United States to base its control over pelagic sealing in [the] Behring Sea in part upon the provisions of this treaty with Russia was very rigorously combatted by Canada and Great Britain, and ruled against by the international court of arbitration.
>
> As a matter of fact, I think there is practically *no precedent for any claim on our part to territorial control over part of the Arctic Ocean or over undiscovered islands in that area*. The fact that the islands hereafter to be discovered lie east of the 141st meridian would at most give some ground for a claim on the plea of contiguity and pre-sumption, but it is very doubtful whether such a plea would be valid as against discovery on the part of some other country, followed up by measures of occupation. Our claim to the discovered islands is strong, but our claim to the undiscovered territory is really quite dubious.[60] [emphasis added]

In short, Skelton had grave doubts about the validity of any Canadian claim to the Arctic waters or to undiscovered islands within its "sector."[61]

Other appraisals were more favourable. James White, "technical adviser" at External Affairs, wrote an important memo outlining the legal foundation for Canada's Arctic claim in 1925. He emphasized that the absence of any protest from "Norway and all other nations" to Canada's 1904 map, which clearly outlined the Canadian sector, revealed "a tacit acquiescence, during over a fifth of a century," that barred their right to protest Canada's claims.[62] With respect to the Beaufort, White noted that:

> Canada claims, as her western boundary, the 141st meridian from the mainland of North America northward, without limitation.

> There is at least one precedent for the claim to the 141st meridian; namely, the Russian-United States Treaty of 30th March 1867, whereby the present territory of Alaska was ceded to the United States…. This, in terms, is a claim by the United States that the western boundary of Alaska is a due north line passing through the middle of the Bering strait and thence due north to the North Pole.
>
> In 1867, this contention received the recognition and support of the Russian Government and, so far as the Government of Canada is aware, it has never been protested by any other Power, nor has the United States ever indicated that she does not propose to maintain it in its entirety.
>
> Inferentially, the United States would make a similar contention respecting its eastern boundary – the 141st meridian. Such claim, if formulated, will receive the support of the Government of Canada.[63]

Armed with White's memo, the federal government pushed forward with its most explicit assertion of the sector principle to that time. On 1 June 1925, it introduced a bill in the House of Commons to amend the *Northwest Territories Act* so that scientists and explorers would be required to secure licenses prior to entering the territories. Hon. Charles Stewart, the Minister of the Interior, emphasized that the government intended to ensure sovereignty over *land* within the Canadian sector "right up to the North Pole." On 10 June, Stewart clarified that:

> I made the statement in the House the other evening that we claimed all the territory lying between meridians 60 and 141. This afternoon when dealing with the estimates of the Department of the Interior I propose to bring down a map to make it clear what precautions we are taking to establish ourselves in that territory….[64]

Pharand observed that "Canada was giving official support to the sector theory to assist in establishing her claim to territory of which she did not have quite full control or which she thought was perhaps yet undiscovered but contiguous to her northern coast and within the sector in question."[65] The Governor General reported to the Chargé d'Affaires in the United States on 12 June 1925 that Stewart had informed the press that:

> Canada's northern territory includes the area bounded on the east [description follows] … to the 60th meridian of longitude, following this meridian to the Pole; and on the west by the 141st meridian of longitude following this meridian to the Pole, as indicated for example by the official map published in 1904 showing "Explorations in

> Northern Canada." Mr. Stewart emphasized the fact that no new claims are being advanced on Canada's behalf, and that the present policy of the Government was simply a continuation of methods followed for many years past in administering the northern territories of the Dominion.[66]

Subsequent legislation also made use of the 141st meridian to delineate the western boundary of Canada in the Beaufort Sea. In 1926, a federal order-in-council established the Arctic Islands Preserve which comprised "all that tract of land" between meridians 60 and 141 to latitude 75° North. The order made no mention of water, but the purpose of the Preserve was "to protect both the natives and the wildlife and to place something on the map to indicate that this government control and administer the area between the 65th [*sic*], and 141st degrees of longitude right up to the Pole." This description of the Arctic Island Preserve in sector form was reiterated when it was joined with the previously created Victoria Island and Banks Island Preserves and new Game Regulations were adopted in 1929. The accompanying map drew the Canada-U.S. boundary along the 141st meridian from Demarcation Point to the North Pole.[67]

On the eve of the Second World War, Canada had not officially adopted the "sector principle" as a statute but it was commonly cited in internal documents as supporting its terrestrial sovereignty in the Arctic. A memorandum entitled "British Sovereignty in the Polar Regions" (1937) dealt with sovereignty of Canada's Arctic islands, and noted that "[t]he Sector Theory is perhaps the weakest and has little if any weight under International Law." Nevertheless, the annex stated that Canada's claim to British sovereignty in the Arctic was based upon:

1. Discovery and Proclaiming Northern Islands for Britain.
2. Reaffirmation of Discovery.
3. Assuming jurisdiction and placing region under Legislative Acts and Canadian Law.
4. Occupation where feasible and necessary to carry into effect Regulations and Legislative Acts….
5. Yearly trip of a government expedition supervising conditions in the Eastern Arctic….
6. Contiguity of northern islands to mainland of Dominion of Canada.
7. Sector principle which includes all lands and islands discovered and undiscovered, lying in the sector between Canada's northern

> coast and the Meridians 60°W. longitude and 141°W. longitude, north to the pole.[68]

On 20 May 1938, T.A. Crerar, the Minister of Mines and Resources, reiterated in the House of Commons that:

> What is known as the sector principle, in the determination of these areas is now very generally recognized, and on the basis of that principle as well as our sovereignty extends right to the pole within the limits of the sector. My own view is that our supremacy there is established to a point where it could not be successfully challenged by any other country.[69]

The United States did not lodge any official protests against Canada's "sectoral" pretensions during the interwar years, which Canadian commentators have suggested is an indication of acquiescence.[70] With reference to the 1904 map showing Canadian sector lines, the General Staff, Department of National Defence, noted in 1930 that "[t]his official map was published twenty-six years ago, and obviously a tacit acquiescence during over a quarter century on the part of Norway, the United States and of other nations bars their right to protect [*sic*: protest] the Canadian claim." A later comment notes that "[s]o far as can be determined, the countries mainly interested in the Canadian Arctic Archipelago have not officially accepted the boundaries prescribed by Canada in 1904, and re-affirmed in 1925. On the other hand, silence can reasonably be accepted as acquiescence."[71] This assertion seems to have been based on James White's 1925 memorandum, which made the same case. Nevertheless, Pharand explained that the United States still opposed the application of the sector theory to the Arctic as well as the Antarctic:

> In 1929, when someone suggested that the Arctic should be partitioned into five national sectors, the Secretary of the Navy expressed his disapproval and stated, in particular, that the proposed sector division "is in effect a claim of sovereignty over high seas, which are universally recognized as free to all nations, and is a novel attempt to create artificially a closed sea and thereby infringe the rights of all nations to the free use of this area".[72]

Following the United States' declaration of war in December 1941, unprecedented military attention was directed to northwest defence projects conducted on Canadian soil. Arctic maritime issues were seldom discussed. Although sovereignty was a prime motivation

behind the voyages of the Royal Canadian Mounted Police schooner *St. Roch* through the Northwest Passage in 1940-42 and 1944, the focus was on the Arctic islands, not the Arctic waters (including the Beaufort Sea through which it passed).[73] Wartime questions also related to whether the U.S. would potentially claim known or "new claimable land" in the "sector west of Greenland and east of meridian 141 W, northward to the pole."[74] Southam newspapers' Washington correspondent R.T. Bowman wrote in a 27 January 1944 article in the *Ottawa Citizen*:

> Before long Canada may have to look to her northern boundary and decide which Arctic lands she wishes to claim…. Representatives of the U.S. State Department have refused to make an official statement about the sections of the Arctic claimed but not policed by Canada; they expressed the opinion that no problem would arise incapable of being settled easily and amicably. Nevertheless, the United States has never claimed any territory north of Alaska, and does not recognize Canada's claims in certain parts of the Arctic to the North Pole….

Of note, the article equated the sector principle to territorial claims and explicitly acknowledged that the U.S. did not officially consent to it.

During the early postwar period, as the United States took greater interest in the geostrategic importance of the Canadian Arctic as a "gateway to invasion," Canadian officials discussed the validity of the sector theory. The first discussions related to requests from the U.S. Navy to carry out training exercises in Canadian Arctic waters. The second related to the proposed Arctic weather station programme, which generated some concerns in Ottawa that the U.S. might claim "territory which is assumed to belong to Canada under the Sector Theory."[75] Although some Canadian officials, including Ambassador Lester Pearson in Washington, saw this as an opportunity to push for formal American acquiescence to the sector principle, other officials were more hesitant and acknowledged that the United States remained firmly opposed to it. For example, Associate Under-Secretary of State for External Affairs Hume Wrong emphasized the difficulties of getting the U.S. to give any credence to the sector principle, and questioned the wisdom of raising the issue just then, since "for a good many years now we have proceeded without difficulty on the assumption that our sovereignty was not challenged."[76] In short, Canada did not wish to undermine its quiet 'agree to disagree' approach to managing

sovereignty issues with the United States, even though their positions differed on the legality of the sector principle.[77]

Some Canadian statements in the early postwar period suggested – inconsistently, critics will be quick to note – that the "sector principle" applied to the water and ice. In a celebrated 1946 article in *Foreign Affairs*, Pearson described the Canadian "sector" as follows:

> A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland but the islands *and the frozen sea north of the mainland between the meridians of its east and west boundaries*, extended to the North Pole. [78] [emphasis added]

The sector described by Pearson, encompassing the "frozen sea," includes the Beaufort. This idea also found support in Hugh Keenleyside, the Deputy Minister of Mines and Resources, who in 1949 described Canada's Arctic and sub-Arctic regions as "the Yukon Territory, the North-West Territories including the Arctic Islands and their waters, the northern half of Quebec and Labrador, and that segment of the ice-capped polar sea that is caught within the Canadian sector."[79]

Although Pearson indicated that Canada claimed the land *and* sea within its "sector," statements by other officials indicated that this was not a clear government position. On 8 December 1953, Prime Minister Louis St. Laurent emphasized the importance of the north and asserted that Canada "must leave no doubt about our active occupation and exercise of our sovereignty in these lands right up to the Pole."[80] In this statement, and subsequent ones, Canada seemed to restrict its sector claim to land.[81] R.G. Robertson's answer before the Special Committee on Estimates in 1955 noted:

> Canada has never formally asserted a claim to the northern sector as such. Sector lines have been drawn on the map since about 1903 at which time there was no complete knowledge of the land that is in the far north and the indication was that Canada was, in effect, claiming any land within this sector line, though there was no formal statement of claim…. The sector lines were not drawn up, however, to indicate any claim to water or ice, so when this ice island floated into that sector where it is all water, it entered an area to which there has never been a Canadian claim formally extended.[82]

On 3 August 1956, Minister of Northern Affairs and National Resources Jean Lesage reiterated to the House of Commons that:

> We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic islands. There is no doubt about it and there are no difficulties concerning it... We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty exists over the lands and over our territorial waters.[83]

After the Conservatives took office in 1957, the sector principle was somewhat ambiguously applied to waters. Alvin Hamilton, the new Minister of Northern Affairs and National Resources, suggested that:

> the Arctic ocean is covered for the most part of the year with polar pack ice having an average thickness of about eight feet. Leads of water do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen, then, that the Arctic ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application.[84]

Pharand observed that "the least that can be said about this answer is that it is noncommittal. It cannot be considered as an application of the sector theory to ice or water." Subsequent government statements were also ambiguous on whether Canada's claims to the North Pole were merely terrestrial or also included water areas.[85] When Opposition leader Lester Pearson suggested that the sector theory might not suffice as a solid basis for Canada's sovereignty claim, given that it had "not yet, I think, been generally considered a valid doctrine in international law," Prime Minister John Diefenbaker noted a few days later that "everything that could possibly be done should be done to ensure that our sovereignty to the North Pole be asserted, and continually asserted, by Canada."[86]

By the late 1950s, External Affairs saw "little advantage and numerous disadvantages to the assertion by Canada of the claim to the waters of the [Polar Basin lying north of the Canadian mainland], at least at the present time" because "it would undoubtedly stir up international controversy." International law did not justify it, and the conditions in the region made such a claim "next to impossible to enforce." External Affairs also noted that, if other nations asserted "sector" claims to the Polar Basin, it would restrict freedom of navigation and "severely restrict reconnaissance in the Arctic." In

conclusion, the Canadian Under-Secretary of State for External Affairs "thought that it would be in no nation's interest to invite an international wrangle, comparable perhaps to the one now going on concerning the Antarctic, by laying controversial claims to the waters and ice of the Arctic Basin."[87]

Senior Canadian officials admitted that Canada had not clearly formulated its position with regard to sovereignty over the waters of the Arctic basin and the channels between its Arctic islands, both from "narrow national" and international points of view.[88] External Affairs officials recognized that pushing for clarity and trying to secure American and other countries' acquiescence to Canadian claims was not a straightforward matter. As the legal division reported to the acting under-secretary on 23 February 1954, to establish sovereignty over an area:

> it is not necessary to solicit formal admissions of our sovereignty from other governments. In fact, such solicitation carries an implication that we may have some doubts regarding our sovereignty in the absence of formal recognition by foreign states. Since our intention has already been sufficiently demonstrated, Canadian sovereignty over Arctic areas only remains to be perfected by the continuous and actual exercise of state activity in this region. In time, this will be sufficient to confer an absolute title in international law…. From our point of view, it would seem to be desirable and advisable to rely on this peaceful and effective method of perfecting our claim to sovereignty over the whole of our Arctic region and avoiding any possibility of provoking communications from foreign governments which might deliberately refuse … to recognize our formal claim to sovereignty over the whole or part of this region…. [I]t would seem to be unwise on our part to run the risk of provoking another government to assert such a denial or register a reservation with respect to our claim.[89]

Provoking protests from foreign countries would hardly serve Canada's national interests, and the longer Canada exercised authority the stronger its claims would become. "It is almost a certainty that the United States would not concede such a claim and that the world at large would not acquiesce in it," a legal appraisal at External Affairs explained in 1958. "It would therefore seem preferable not to raise the problem now and to implicitly reserve our position in granting permission for the U.S. to carry out work in Canadian territorial waters." It made more sense for Canada to reach agreements with the

U.S. on "the unstated assumption that 'territorial waters' in that area means whatever we may consider to be Canadian territorial waters, whereas the U.S. does likewise. These two views may not coincide but this need give rise to no difficulty until something happens which might involve Canada asserting jurisdiction over an area which the U.S. considers to be high seas." Only at this point, the assessment noted, "would it be necessary for Canada to state its claim or by implication from silence, relinquish it or seriously weaken it."[90]

Similarly, senior government officials in the late 1950s quietly advised against any outright rejection of a claim to maritime jurisdiction based on the sector principle, suggesting that uncertainty over Canada's stance caused little harm while officials contemplated a more equivocal approach. For example, at the 52nd meeting of the Advisory Committee on Northern Development in April 1959, chairman R.G. Robertson, the Deputy Minister of Northern Affairs and National Resources, noted that a recent "study of Canadian sovereignty over arctic waters had led to the conclusion that little would be gained by asserting a Canadian claim over the waters of the Polar Basin to the north of Canada, and that other countries with the possible exception of the U.S.S.R. would certainly oppose such a claim," but that "asserting Canadian sovereignty over the waters within the Archipelago on the other hand would have real advantages." He explained that "the sector lines should be retained on the maps since removing them might be construed as an indication of Canadian policy." Similarly, Marcel Cadieux from External Affairs advised that "a claim made prematurely could weaken the Canadian case. With regard to the waters of the Polar Basin it seemed clear that Canadian sovereignty should not be asserted under existing conditions. Circumstances might change however and nothing would be gained by specifically denying any claim."[91]

In 1963, Maxwell Cohen proclaimed that "the 'sector' theory seems to have triumphed at long last, if not as a matter of formal acceptance by non-sector Arctic states, then at least because the facts of geography and administration make it difficult to oppose." He continued, however, that:

> The great unsolved problems of the Arctic are, of course, those that have to do with the contrasting attitudes of Canada and the U.S.S.R. toward the 'open' waters of the Arctic and toward the ice-pack. *It is perfectly clear from everything said by Canadian governments since 1950*

> *that Canada makes no claim to jurisdiction either over the open Arctic sea (for example, the Beaufort Sea)* or over the ice-pack that surrounds the polar zone.[92] [emphasis added]

Government statements echoed this assessment. On 4 September 1964, Minister of Northern Affairs and Natural Resources Arthur Laing assured the House of Commons that:

> For some years now, the present government and the previous governments have asserted our sovereignty over the islands extending northward from the meridians appropriate to Canada: on the west from the meridian which divided Alaska from the Yukon and on the east from the appropriate eastern meridian, with a sinuosity devised to provide for the existence of Greenland and thence extending to the North Pole. Canada has not only asserted its sovereignty there but we are implementing our sovereignty in many places. I have never heard or seen that assertion called in question by any nation, let alone the United States of America.[93]

Although this statement clearly invoked the sector theory, the meridians were used to circumscribe the Arctic archipelago over which Canada claimed sovereignty, not the Beaufort Sea itself.[94] Similarly, a 1964 publication by the Department of Mines and Technical Surveys included several maps with sector lines extending to the North Pole and presumed that:

> Lines delimiting the sector have subsequently appeared on political maps of Canada published by the Federal Government. These it is presumed, however, should merely be regarded as lines of allocation, which are delimited through the high seas or unexplored areas for the purpose of allocating lands without conveying sovereignty over the high seas.[95]

In the 1960s, Lester Pearson's Liberal government continued to officially endorse a three-mile territorial sea but it also announced its intention to expand its control beyond those limits. "Following the failure of the 1958 and 1960 conference on the Law of the Sea to reach agreement on the breadth of the Territorial Sea and fishing, Canada decided to implement by unilateral action a nine-mile fishing zone adjacent to its three-mile territorial sea," an External Affairs statement declared on 21 January 1965. Although the government introduced legislation to this effect and instituted an exclusive fishing zone based upon straight baselines along the east and west coasts, it retreated from

making any moves to do the same in the Arctic out of recognition that the U.S. would object.[96] This does not support an argument of American acquiescence to Canada's sector claims (if deemed to include waters beyond the territorial sea).[97]

The sector theory next entered the public record in 1969 when Prime Minister Pierre Trudeau explained in the House of Commons:

> I believe the sector theory applies to the seabed and the shelf. It does not apply to the waters. The continental shelf is of course under Canadian sovereignty - this is the seabed, but not the waters over the shelf…. My assertion of the sector theory would apply to the seabed, not to the waters or ice.

Based on this comment, Pharand concluded that "it is therefore quite clear that the Trudeau government does not subscribe to the sector theory to claim sovereignty over water and ice."[98] It did, however, apply to the continental shelf.[99]

Writing in 1967, Gordon W. Smith noted that "the variety of views [about the sector theory] among qualified authorities is at least as great as are the variations in state doctrine and practice."[100] In the end, he opined that:

> The sector principle, although asserted unilaterally by some states, has been denounced by others, and since it lacks international sanction, is of dubious validity. As a device simply for marking out land territories where sovereignty has been established or is to be established by other means, it may be unobjectionable; but as a justification in itself for claims to land, and even more to waters beyond territorial limits or airspace above, it could only be judged invalid. Canada would do well to abandon all semblance of a sector claim as such, even the sector lines of the Arctic Islands Game Preserve, and to make it clear beyond doubt that there is no longer any pretense of such a claim. By doing otherwise she really has little to gain but international disrespect, and on this issue invites, ultimately, some form of rebuff or humiliation…. Canada's case for the territoriality of sector waters, ice, and airspace would doubtless be very weak from a legal point of view.[101]

The Oil and Gas Era, 1965-77

Promising hydrocarbon formations were identified in the 1950s, and the Canadian government issued regulations releasing Arctic lands for oil and gas leasing in 1960. As exploration activity turned to the

offshore, Canada used the 141st meridian as a functional western boundary when it began granting oil and gas exploration permits in the Beaufort Sea up to and along that line in January 1965. Pharand noted that, "in the same year, the Department of Energy, Mines and Resources sent to the United States Department of the Interior a small-scale map indicating the offshore areas where oil and gas permits had been issued."[102] There is no evidence that U.S. officials protested these permits until May 1976 – eleven years later.

Discoveries of large oil reserves at Prudhoe Bay by the Atlantic Richfield and Exxon Corporations in June 1968 precipitated an unprecedented level of interest in the hydrocarbon potential of the continental shelf underlying the Beaufort Sea, including the disputed boundary area with its favourable geological structures for oil and gas.[103] International lawyer Erik Wang explained that, as a result of these discoveries:

> Canadian and American government-sanctioned developmental oil and natural gas efforts – in the late 1960s and into the mid 1970s respectively – concentrated on the Mackenzie Bay/Mackenzie River delta region, westward to the Prudhoe Bay area. In turn, the extensive search for hydrocarbons, both on land…, and especially along the corresponding section of the Beaufort Sea continental shelf, focused attention on a long-standing Canadian-American boundary dispute, namely, the unresolved delineation of the Beaufort Sea boundary.
>
> Conflicting Canadian-American legal positions, and overlapping jurisdictional claims on how and where to delimit the Beaufort boundary, left a promising hydrocarbon maritime area of 6,180 nautical miles open to dispute.[104]

When potentially rich and exploitable oil and gas bearing structures were found in the area between Prudhoe Bay and Banks Island in 1970, international law scholar Karin Lawson explained, "the Canadian government began actively parcelling out portions of the Beaufort Sea continental shelf for off-shore oil and gas exploration."[105] From 1973 until the summer of 1976, the only drilling which took place offshore in the Beaufort Sea appears to have been from artificial islands constructed in shallow water close to the Mackenzie Delta. Drill ships began operating in the area in 1976, when Canadian Marine Drilling Limited obtained drilling permits for two wildcat wells in the southern Beaufort

Sea. None of these offshore drilling sites or artificial islands were located in the disputed zone.[106]

Scientific activity occurred concurrently. The geographical emphasis of the Polar Continental Shelf Project shifted to the Beaufort Sea-Mackenzie Delta region in 1969, which included hydrographic surveys of the Beaufort Sea and coastal area and, in subsequent years, gravity measurements on sea ice for a gravity map of the Beaufort, a major plot study of the Beaufort, and geological mapping. Of note, the 1969 Hydrographic Survey indicates activity respecting the 141st meridian as the western extreme of Canadian jurisdiction.[107] The Beaufort Sea Project, a joint government-petroleum industry initiative which ran from 1973-76 at an estimated cost of $12 million, included studies on wildlife, marine life, oceanography, meteorology, sea ice and oil spill countermeasures.[108] In 1974-75, the Polar Continental Shelf Project supported 32 individual studies in connection with the Beaufort Sea assessment program related to offshore exploration for oil and gas.[109]

In response to the U.S. oil tanker S.S. *Manhattan*'s transit of the Northwest Passage in 1969, Canada extended its territorial sea from three to twelve miles the following year. It also passed the *Arctic Waters Pollution Prevention Act* (R.S.C. 1970, c.2), defining a 100-mile pollution prevention zone delimited partly on the sector theory. Paragraph 3(1) of the *AWPPA* establishes control over an offshore area bounded on the west by the 141st meridian of longitude, inside of which Canada intended to exercise full jurisdiction over pollution in both the waters and on the continental shelf.[110] Trevor Lloyd reported in *Foreign Affairs* that this legislation was "consistent with and in a sense an extension of that which established the Arctic Islands Preserve in the 1920s."[111] Pursuant to the *AWPPA*, Canada declared various "Shipping Control Safety Zones" in 1972.[112] Zone 12, running along the 141st meridian into the Beaufort, is described as follows:

> COMMENCING at latitude 70°30′, longitude 141°00′; THENCE along meridian of longitude 141°00′, to latitude 66°20′; THENCE along parallel of latitude 66°20′, to longitude 121°45′; THENCE along a line to the most southerly intersection of longitude 123°00′ with the shore of Banks Island, near Cape Lambton….[113]

Rothwell notes that although "the western boundary of these zones could not be equated with a maritime boundary and the recognized sovereignty which accompanies it, this declaration is further evidence

that Canada has sought to exercise jurisdiction up to this point and this position is consistent with its interpretation of the 1825 Boundary Treaty."[114]

Although the *AWPPA* received unanimous consent at its second reading in the Canadian House of Commons, Canada received a formal protest against the new legislation from the United States on the grounds that Canada had no right to control pollution in Arctic waters outside of its territorial limits.[115] "The proposed Canadian legislation is in our view entirely unjustified in international law," legal advisor Theodore Lyman Eliot, Jr. explained to President Richard Nixon. "There is no international basis for the assertion of a pollution control zone beyond the 12-mile contiguous zone; there is no basis for the establishment of exclusive fishing zones enclosing areas, of the high seas; and there is no basis for an assertion of sovereignty over the waters of the Arctic archipelago." He also noted that "[t]he proposed Canadian unilateral action ignores our frequent request that Canada not act until we have had an opportunity for serious bilateral discussions."[116] Although the formal protest does not indicate American acquiescence, Frederick notes that the United States "ont contesté cette loi mais il semble que l'attaque visait l'esprit général de celle-ci plutôt que l'emploi dudit méridien comme frontière maritime."[117]

The government continued to use the 141st meridian as an administrative and regulatory boundary in the following years. The *Ocean Dumping Control Act*,[118] enacted by the federal government in 1975, also used the 141st meridian as its western boundary, and there is no evidence that it elicited a protest from the U.S. Canada also used this line in other administrative acts, including for air navigation pursuant to the International Civil Aviation Organization.[119] When the *Electoral Boundary Readjustment Act* was amended, "the No. 1 'Western Arctic' District was described in the Canada Gazette in 1976 as including the District of Mackenzie and a triangular strip north of the Yukon between the 141st and the 134th meridians of longitude…." Hunting and trapping regulations, drawn in 1976, also described "'Game Management Zone No. 31' as having for northern boundaries the 141st and 60th meridians of longitude right up to the Pole."[120]

Exploratory Discussions on Maritime Boundary Disputes

From late 1975 to early 1977, the Department of External Affairs and the Department of State initiated exploratory discussions to discuss each country's legal position on outstanding maritime boundary disputes, including the Beaufort Sea continental shelf and water column.[121] Canada's position, founded on the principles of treaty interpretation and historical/functional jurisdiction, held that the offshore or "wet" boundary was simply an extension of the 141st meridian. The United States, on the other hand, continued to articulate a position based on the rules contained in the 1958 Continental Shelf Convention, its interpretation of customary international law, and criteria established by the International Court of Justice (ICJ). Accordingly, it argued that the boundary had to be delimited using equitable principles and that it followed an equidistant line to the northeast of the 141st meridian. It did not recognize the 141st meridians laid down in the 1825 and 1867 treaties as applicable to delimit "wet" boundaries.[122]

On 1 November 1976, both Canada and the United States announced their intention to extend their fisheries jurisdiction from twelve to two hundred nautical miles.[123] Wang explained how these decisions changed the bilateral situation:

> The previous extension of fisheries jurisdiction from 3 to 12 miles by Canada in 1964 and by the United States in 1966 had not raised any serious problems between the two countries. The United States catch in the 3- to 12-mile zone off Canada was less than 1 percent of the total national catch, as was the Canadian catch in the same zone off the United States coast. The situation was quite different in 1977 since each country had extensive and long-established fishing interests in areas out to 200 miles off the coast of the other which had up until then been considered high seas. Moreover the two countries had overlapping claims in each of the four boundary areas--the Gulf of Maine, off Juan de Fuca Strait, inside and off Dixon entrance, and in the Beaufort Sea.[124]

These overlapping claims were now articulated officially. Canada's fishing zone was delimited partly on the sector theory: the western limit at 141° W and the easterly limit at 59°51′57″ W.[125] The United States first asserted jurisdiction in the Beaufort Sea in June 1976 when it announced a 200 n.m. fishing conservation zone that adhered to its equidistance line effective 1 January 1977.[126]

Lawson cited a U.S. Department of State memorandum on "Maritime Boundary Negotiations with Canada" from September 1976 which considered the U.S. and Canada to be mutually bound to the 1958 Continental Shelf Convention. The U.S. position maintained that "equidistance is an appropriate principle for determining a maritime boundary when there are no special circumstances in the area and when equidistance results in a boundary in accordance with equitable principles." The U.S. insisted that no special circumstances existed in the disputed area of the Beaufort Sea.[127] Lawson argued that the sector principle was not accepted as a norm of international law, and Canada's adoption of the equidistance/median line method to delimit the continental shelf between eastern Canada and Greenland in 1973 (rather than a sector line) "supports the U.S. refusal to agree to the use of the 141st meridian – a *de facto* sector line – to delimit the continental shelf in the Beaufort Sea." In arguing for equidistance as the most appropriate means of delimiting the boundary, Lawson noted:

> The special geographic attribute of the Beaufort Sea – the relative concavity of Canada's coastline – does not appear to weigh against using this method. Although the Canadian coastline is slightly concave in the area closest to the U.S.-Canada boundary, it becomes convex further down the coast. As a result, a boundary delimited on the basis of equidistance would not unfairly deprive Canada of her "share" of the shelf, and would thereby accord with the need for equity in continental shelf delimitation. Furthermore, "natural prolongation" of the land territory in this area accords with use of the equidistance method. The continental shelf off the coast of Alaska and the Yukon is not unusually broad or narrow at any point, is not marked by particular depressions or rifts that might otherwise cut it short, nor is it usually extended by reference to islands.[128]

Canadian international lawyer Michel Frederick reached the opposite conclusion. He argued that the principle of equidistance would produce an inequitable decision for Canada on the basis of geography and government practice. The concave configuration of the Yukon coast constituted a clear case of "special circumstances" in his view, and represents, "dans l'arsenal canadien, la pièce de maîtresse. Elle pourrait peut-être, à elle seule, faire pencher la balance en faveur du Canada, si jamais la question de la délimitation du plateau continental dans la mer de Beaufort devait être tranchée par la Cour internationale de justice ou

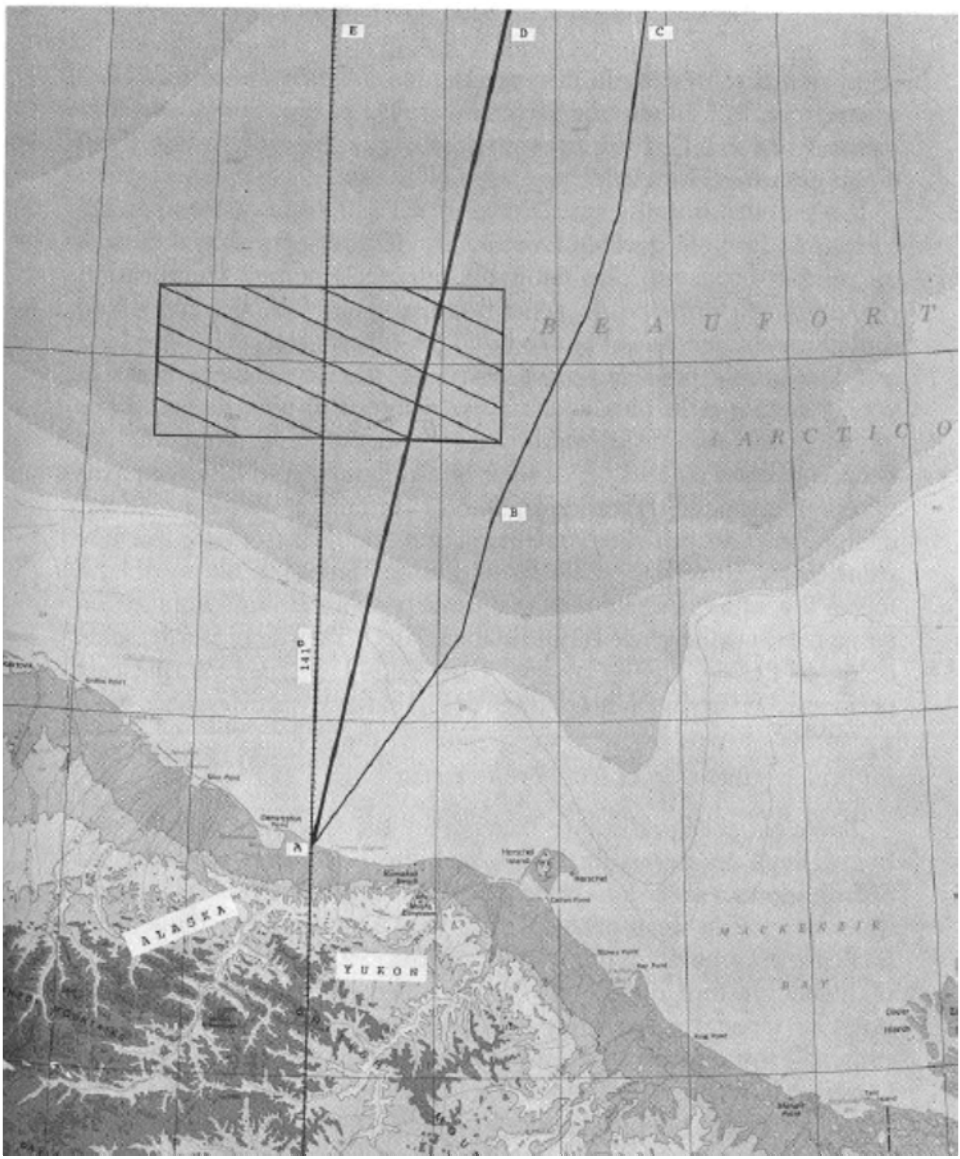

Figure 1-3: Michel Frederick's proposal to adopt the 141st meridian as the continental shelf boundary with a shared resource zone.

Line A-B-C: equidistance line

Line A-D: modified equidistance line envisaged by the Canadian government with resource sharing zone (box with hashed lines)

Line A-E: Frederick's proposed solution (extension of terrestrial border and same resource sharing zone)

par un tribunal arbitral." Frederick suggests that the extension of the land boundary along the 141st meridian is justifiable and justified in the context, but also recommends that Canada and the United States create "une zone de partage des ressources énérgétiques semblable à celle envisagée pour la ligne d'équidistance 'tempérée" (see figure 1-3).[129] This is a legal issue rather than an historical one.

In July 1977, Prime Minister Pierre Trudeau and President Jimmy Carter appointed Marcel Cadieux and Lloyd Cutler as principal negotiators respectively to conduct negotiations to reach a comprehensive settlement regarding Canada-U.S. maritime boundaries and related resource issues. During the first phase of negotiations (August-October 1977), Canada told the U.S. delegation that it would "accept a compromise jurisdictional boundary [in the Beaufort Sea] more or less along the geographic coordinates put forth by the United States, provided American officials would grant Canada similar boundary concessions in the Gulf of Maine and off the Strait of Juan de Fuca." In short, Canada was willing to be flexible with the Beaufort boundary in exchange for a comprehensive settlement. Canadian officials also proposed a shared access hydrocarbon zone which, in the words of David Colson, was "designed to be an insurance against a bad boundary compromise." Lorne Clark explained that the shared access zone proposal attempted to make the positioning of the actual boundary:

> relatively less important and almost irrelevant in the context of an overall agreed resolution of the boundary dispute. The hydrocarbon potential would not then become a political or economic issue between the two countries because there would be joint access ... from the point of view of hydrocarbons, where the line was wouldn't make any difference.

The United States, however, insisted that the equidistant principle applied to the delimitation of the Beaufort Sea, and that Canada should accept the American position. It was open to the possibility of a shared access zone on the American side of a boundary determined according to equidistance, but it refused to link the four outstanding boundary issues.[130]

In October 1977, the Chief Negotiators reported that "the two sides directed their attention to the basic principles of long-term resource arrangements for fisheries and hydrocarbons as a basis for reaching

detailed agreement on these issues and on boundary delimitations during the second phase." The most substantive issues on shared access zones remained unresolved, however, and the negotiations intensified from November 1977-March 1978. Neither side was willing to concede to the other. "Canadian officials, while willing to accept the concept of a hydrocarbon shared access zone principally on the U.S. side of a maritime boundary delimited largely according to equitable principles, were prepared to do so only if the United States would provide boundary concessions to Canada in the Gulf of Maine and off the Strait of Juan de Fuca," political scientist Christopher Kirkey explained. U.S. authorities found this unacceptable. "This stalemated situation was yet further exacerbated by an inability to agree upon the magnitude of the Beaufort Sea zone, and in particular how it should be configured – presuming a boundary could be agreed upon." As Erik Wang noted, "boundary considerations kept intruding and complicating the negotiation."[131]

Kirkey identified three key reasons why Canadian officials could not accept the American proposal independent of the other boundary disputes:

> First, if Ottawa were to accommodate the U.S. position on the Beaufort Sea boundary, this would by consequence not only necessitate a departure from the official Canadian government position on the issues (i.e., the 141st meridian should serve as the boundary), but more importantly, be inconsistent with Canada's overall legal approach to delimiting maritime boundaries. That latter approach, which sought to delimit boundaries by equidistance – except in cases where an applicable treaty exists – would be highly discredited and of little use in future international maritime boundary cases that Canadian officials would have to confront. In particular, the Canadian negotiation delegation was explicitly concerned that if it acquiesced to the U.S. favoured position of the equidistance principle in the Beaufort Sea, and mutual satisfaction was not achieved on all three other outstanding maritime boundaries, that the Canadian legal position would be severely weakened should at least one of these remaining cases ultimately go before the International Court of Justice for settlement.
>
> Secondly, the American position offered no reasonable quid pro quo for Canada. As the U.S. proposal did not include forthcoming balanced boundary concessions/accommodations by the United States on any of the other three outstanding maritime boundaries – the

> critical precondition for Canadian flexibility on the Beaufort boundary – Canadian officials could not move to accept the American position. Thirdly, Canadian acceptance of the U.S. position on the Beaufort Sea boundary – in the absence of an equitable, comprehensive settlement – would by consequence place the Trudeau government in the politically undesirable position of having to defend an agreement that unquestionably favoured American maritime jurisdictional interests in the North over those of Canada.

Although negotiations over a hydrocarbon shared access zone in the Beaufort and the related maritime boundary continued past the 1 December 1977 deadline, the stalemate could not be broken. In bilateral talks from June-November 1973, "Canada and the United States agreed to abandon further attempts to reach settlement over hydrocarbon shared access zones, and instead concentrate their energies on resolving the four maritime boundary disputes, and fishing zones on the east and west coasts." The two sides could not reach a mutually satisfactory solution to the Beaufort dispute which, as a lesser priority than the east coast problems, was set aside.[132]

Kirkey concluded that neither country was favoured by the final outcome:

> For its part, Canada was only prepared to cooperate in the Beaufort Sea if the United States would grant boundary concessions on the east and west coasts, especially in the Gulf of Maine Georges Bank area. The United States, on the other hand, was unwilling to consider such a proposal, and insisted that the Beaufort Sea case be settled independently of any other outstanding Canada-U.S. maritime boundary dispute. These national positions were not, however, acceptable to Washington and Ottawa for economic, political, and legal reasons. The potential accommodation by Canada or the United States of the other's Beaufort Sea boundary proposal was particularly frustrated by international legal concerns. In the words of Lorne Clark:
>
> > the Beaufort Sea maritime boundary issue was difficult to ultimately settle precisely because we [Canada and the U.S.] had diametrically opposed legal positions; the 141st parallel of longitude on the Canadian side and the principle of equidistance on the American side. It was very, very difficult to try to split the difference there because if you did you would derogate from the legal position of one side or another.

With neither country willing to compromise its legal position by accepting the other country's proposal for delimiting the maritime

boundary, "no acceptable political arrangement could be reached through the process of negotiation."[133]

With the historical facts established, the legal arguments in favour of the Canadian position would appear to follow Rothwell's suggestion that Canada might be able to support its claim on the grounds of American acquiescence to Canada's exercise of jurisdiction over the Beaufort east of the 141st meridian. The U.S. did not "take any action during the late 1960s when Canada issued exploration permits in the disputed area, or when Canada purported to exercise jurisdiction over the disputed waters by the Arctic Waters Pollution Prevention Act, 1970," and Canada could therefore argue "that this acquiescence by the United States allowed the Canadian claim to solidify into a valid legal title in that there was, until 1976, an implied acceptance by the U.S. of the boundary along the 141st meridian." While Rothwell acknowledges that this argument is "not conclusive, Canada can do no harm to its case by using it to support its interpretation of the 1825 *Boundary Treaty*, especially if its most favoured interpretation of that Treaty is not accepted."[134] Frederick also argued that the Canadian issuing of future exploration and exploitation permits to oil and gas companies, without inviting American protests before 1976, could constitute a "special circumstance" or, at least, an "equitable" variable when deciding upon an applicable or appropriate delimitation method. In short, he concluded that the absence of formal U.S. protest to Canada's legislative, regulatory and administrative use of the 141st meridian as a western boundary served to reinforce Canadian government practice.[135]

American commentators are more critical. Lawson, for example, argued that "a claim to the sea east of the 141st meridian based on historic title fails due to lack of acquiescence. The United States has never recognized the applicability of the land boundary to delimitation of the shelf in the Beaufort Sea, and has consistently rejected the validity of the sector theory." To divide along this meridian "would offend traditional notions of sovereignty and lend support to a rule not recognized by the majority of States," with international ramifications.[136]

Whether this eleven-year timeframe constitutes acquiescence is a legal question. Pharand argued that the absence of American protest may be considered a "special circumstance" as per paragraph 6(2) of the 1958 Continental Shelf Convention:

> A third possible special circumstance upon which Canada could draw is that of "special exploitation rights." Indeed, the Canadian government has been issuing oil and gas permits in the Beaufort Sea for some time, using the 141st meridian as the westerly limit. If this exercise of continental shelf jurisdiction is carried on without protest on the part of the United States, Canada might be deemed to have acquired a certain priority in exploitation rights.[137]

Again, this is a matter of legal argument rather than one of historical fact.

Inuvialuit Use of the Beaufort Sea and the Inuvialuit Land Claim

> Canada could also possibly bolster its claim [to the Beaufort Sea] on the grounds of historical usage by the Canadian natives of the MacKenzie [*sic*] Delta region. Though research in this area to date has been limited, it is known that the Inuit have long used the Arctic ice as both an area to hunt and live on at certain times of the year. A claim based on historic rights to fishing resources has been accepted previously in *The Grisbadarna Case* between Norway and Sweden and in the *Anglo-Norwegian Fisheries Case.* Yet, while such historic rights are useful in claims to fishing and exclusive economic zones, it is doubtful if they would carry much weight in a continental-shelf claim where non-renewable resources not previously exploited are at issue.
>
> Donald Rothwell (1988)[138]

Although the historical land use and occupancy of the Beaufort-Mackenzie Delta region has been well documented, there is little evidence of actual use of the waters of the disputed zone in the Beaufort Sea. The 141st meridian, however, serves as the western boundary of the Inuvialuit Settlement Region, created with the signing of the Inuvialuit Final Agreement on 5 June 1984. The description of the region includes the following:

> Commencing at the point of intersection between the Yukon Territory/Alaska boundary and the shore of the Beaufort Sea; *[lengthy description of the eastern and southern boundary follows]*…
>
> thence northerly along said longitude to its intersection with latitude 80°00'N; thence westerly along said parallel to its intersection with longitude 141°;
>
> thence southerly along said meridian of longitude to the point of commencement, without prejudice, however, to any negotiations or to

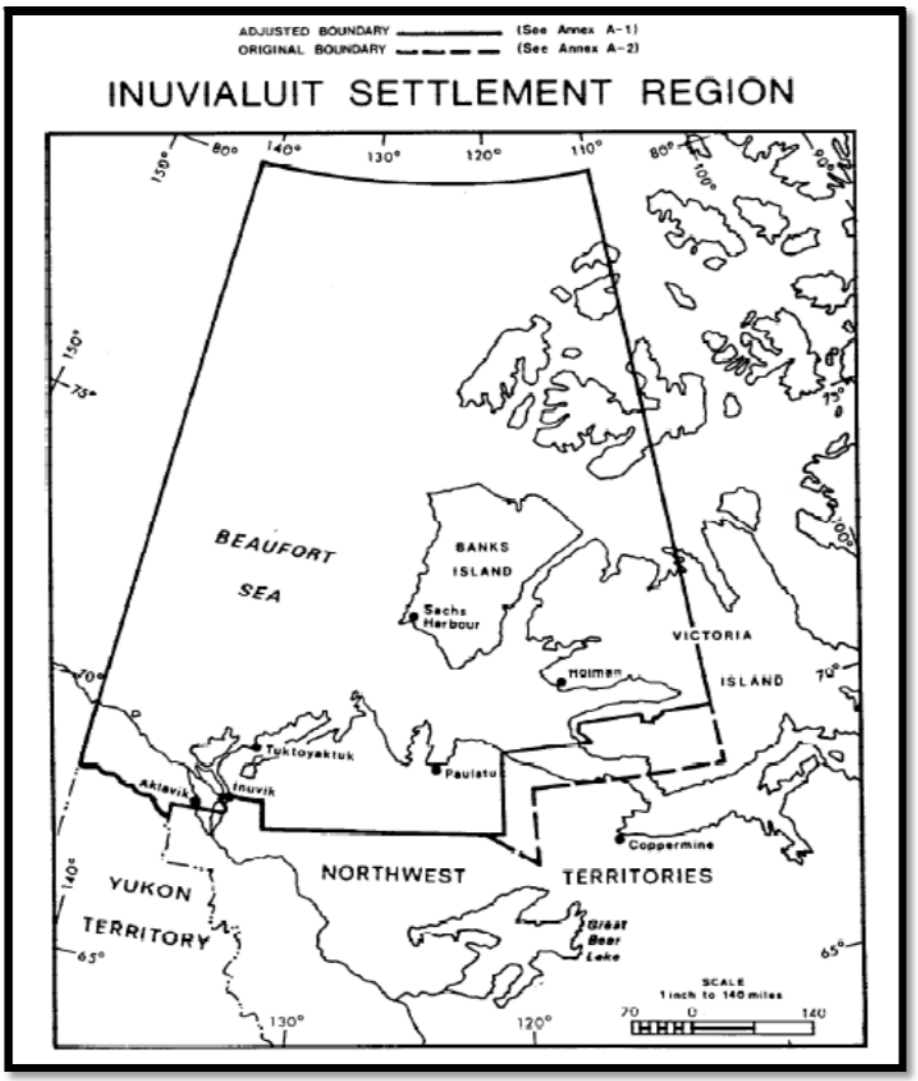

Figure 1-4: Inuvialuit Settlement Region. *Inuvialuit Final Agreement*, annex A, as amended 15 January 1987 (watershed boundary).

> any positions that have been or may be adopted by Canada respecting the limits of maritime jurisdiction in this area.[139]

In addition to granting title over land areas traditionally used and occupied by the Inuvialuit, Pharand notes that "the Canadian Government purported to grant certain rights in a considerable area of the Beaufort Sea extending along the 141st meridian up to the 80th

parallel of latitude. These include the exclusive right to harvest certain species of wildlife such as the polar bear and the preferential right to harvest other species of wildlife as well as marine mammals and fish."[140]

More recently, Peter Usher used comprehensive, census-type surveys and case studies of Inuvialuit harvesters in the Inuvialuit settlement region to document their use of the Beaufort Sea and its resources from 1960-2000. He finds that the geographical extent of harvesting remained quite consistent over the last four decades of the twentieth century, and that subsistence and commercial harvesting remain significant economic and cultural preoccupations in Inuvialuit life. In Usher's assessment, about one-third of the Inuvialuit harvesting area in the 1960s was associated with the normal maximum extent of the fast ice.[141] As Figure 1-5 depicts, there is little evidence of consistent Inuvialuit activity in the disputed zone.

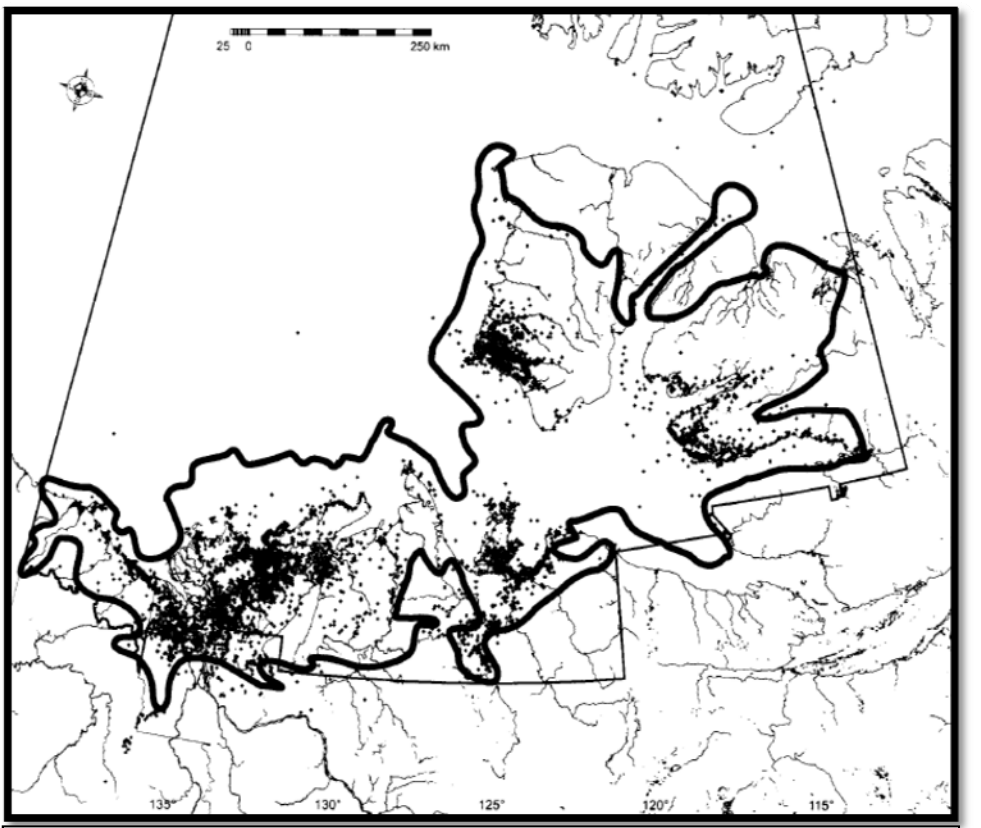

Figure 1-5: Inuvialuit Use of Land and Sea in the Inuvialuit Settlement Region, 1960s and 1990s. Peter Usher, "Inuvialuit Use of the Beaufort Sea and its Resources," 21.

In light of the salience of Crown-Indigenous relations and domestic constitutional imperatives in Canada, the country's *marge de manoeuvre* in negotiating a compromise solution for the Beaufort Sea may be severely restricted. In a recent study, political scientist Rob Huebert notes that Annex 1 of the Inuvialuit Final Agreement qualifies that the coordinates of the agreement are "without prejudice … to any negotiations or to any positions that have been or may be adopted by Canada respecting the limits of maritime jurisdiction in this area." Under international law, Canada is certainly at liberty to enter into a boundary treaty with the United States that would impinge upon the constitutionally-protected rights of the Inuvialuit. Nevertheless, "it is entirely possible that in the event that a settlement was reached between Canada and the United States that the Inuvialuit Regional Corporation or other related bodies could challenge the Canadian Government's right to surrender any territory contained in the settlement region regardless of the 'without prejudice' clause."[142] In short, the Canadian government would be vulnerable to domestic legal action if an international agreement conflicted with its duty under Canadian law to consult with the Inuvialuit, to limit any infringement of Aboriginal rights as much as possible, to make any such limitations clear through an Act of Parliament, and to provide compensation.

Recent Developments

The established debate, discussed extensively in this chapter, relates to the Beaufort Sea boundary within 200 n.m. of the U.S. and Canadian coastlines, producing a pie-shaped disputed area of approximately 6,250 n.m.^{2}. As Elizabeth Riddell-Dixon explains in the following chapter, the legal acknowledgement of coastal States' rights to extended continental shelves expands the aperture, with the UN *Convention on the Law of the Sea* setting out a process for States to determine where they may exercise their sovereign rights and secure international recognition for the outer limits of their extended continental shelves. In the Beaufort, the continental shelves of Canada and the U.S. are certain to overlap outside 200 n.m. Although the extent and location of this overlap is not yet known, it will be larger than the disputed area inside 200 n.m.

Although Canada reached out to the United States in 2010 to seek a negotiated settlement in the Beaufort,[143] reports indicate that the U.S.

wished to resolve the maritime boundary within 200 n.m. as well as the extended continental shelf boundary concurrently. Accordingly, government experts from both countries met over the next two years to evaluate the scientific data collected and discuss the technical aspects involved in establishing the outer limit of their respective continental margins.[144] Michael Byers and Andreas Østhagen note that:

> negotiations over the Beaufort Sea boundary resumed in 2010 because of the emergence of a possible win-win outcome as a result of the addition of an extended continental shelf to the dispute, combined with the fact that the equidistance line makes a significant change in direction just beyond 200 nautical miles from shore. Canada could now accept the application of the equidistance principle while retaining a large portion of the newly expanded disputed area. Alternatively, the United States could accept Canada's interpretation of the 1825 treaty and, thus, the 141-degree-west meridian and still gain a very large portion of extended continental shelf.[145]

In this light, cost-benefit analysis related to resources in the broader Beaufort Sea could change the political calculus. Building on Pharand's earlier geographical assessment, Byers and James Baker observe that "while neither Canada nor the United States has recently articulated its position on the boundary beyond 200 nautical miles from shore, it would—curiously and significantly—not necessarily benefit either of them to simply extend their present claimed lines on the same bases they use to justify them within 200 nautical miles."[146] When the equidistance line is extended beyond 200 n.m., it changes direction and begins tracking towards the northwest owing to the shape of the Canadian coastline on the eastern side of the Mackenzie River delta and to Banks Island, the latter of which pushes the line towards the maritime boundary between the United States and Russia. "This leaves a large and as-yet-unspoken-for area of extended continental shelf to the west of the 141-degree-west meridian and east of the equidistance line, essentially the reverse of the disputed sector farther south," Byers and Østhagen observe. "In simple spatial terms, the U.S. line appears to favour Canada beyond 200 nautical miles and vice versa." This changes "what appeared to be a zero-sum negotiating situation" into one that "now offers opportunities for creative trade-offs."[147]

Completing seabed mapping to determine the actual extent of continent shelf in the Beaufort is the first step to determining what can be negotiated. To back up Canada's continental shelf submission, Natural Resources Canada (Geological Survey of Canada) and the Department of Fisheries and Oceans (Canadian Hydrographic Service) conducted scientific and technical work in the Beaufort Sea from 2008-2011, often in joint surveys with their American counterparts. Law professor Betsy Baker suggests that the model of cooperative seabed mapping to gather regional data can serve as a "foundation for joint ecosystem-based, integrated management of the triangle—a principle that is already central to each country's approach to oceans

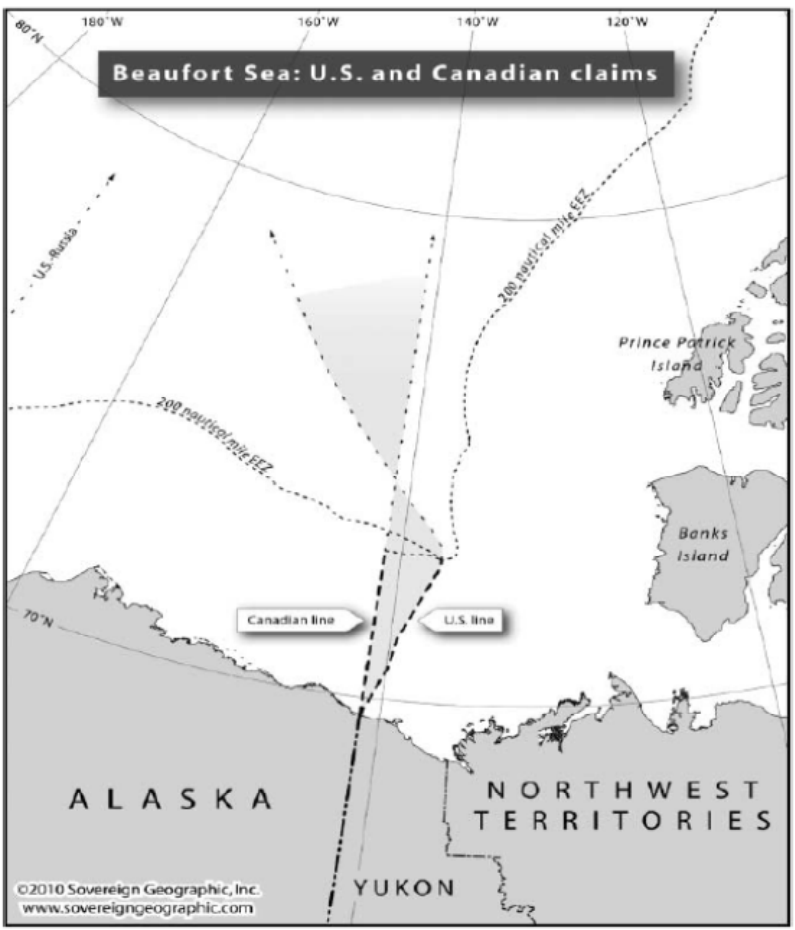

Figure 1-6: Beaufort Sea: U.S. and Canadian claims. Sovereign Geographic in Baker and Byers, "Crossed Lines," 73.

management." In her assessment, collaborative research can strengthen both countries' sovereign rights over their respective maritime zones while confirming international law and filling gaps in Arctic governance and regulation.[148] This annual partnership of two icebreakers (one American, one Canadian) gathering data about the shape of the ocean floor and the character and thickness of seabed sediments proved fruitful, suggesting that the continental shelf in the Beaufort might stretch 350 n.m. or farther from the mainland shoreline.[149]

The next obvious variable in negotiating "trade-offs" is estimating the amount and location of hydrocarbon reserves. As noted earlier, seismic surveys and exploratory wells drilled during the 1970s and 1980s found 1.5 billion barrels of oil in the Beaufort seabed, and Devon Canada discovered a potential reserve of 240 million barrels of oil just east of the disputed zone in 2006. Over the following two years, with global oil and gas prices soaring, Imperial Oil, ExxonMobil Canada, and British Petroleum committed to spend nearly $1.7 billion in exploration activities. In the U.S. part of the Beaufort, Shell committed $7 billion dollars to exploration – another signal of burgeoning economic interest in the area.[150]

Although both Canada and the U.S. have issued oil and gas exploration licences and leases in the disputed zone, neither has allowed actual exploration or development in the area pending resolution of the maritime boundary. Industry pressure to settle the dispute dissipated, however, when world oil prices declined in 2011, the shale gas revolution opened up new sources of North American supply, and the Deepwater Horizon disaster in the Gulf of Mexico generated significant popular safety concerns about offshore oil and gas. Incentives to exploit offshore hydrocarbons in the Beaufort declined even more in subsequent years. A recent study observes:

> During the second half of 2014 the world's oil industry suffered a dramatic shock as Brent crude prices fell from over $100 to under $50 in only a few months. A combination of oversupply driven by the surge in American shale production and a refusal by Saudi Arabia (or other OPEC nations) to reduce production has upended industry projections and the economic viability of many oil fields – including those in the Arctic. Facing prices below the lifting costs of many fields, oil companies soon cut more than $150 billion in future projects in an effort to reduce costs and protect their balance sheets. The projects being cut are those with high exploration and production costs – and

> there is nowhere in the world with higher costs than the Arctic offshore.[151]

In December 2014, Chevron put its Canadian Beaufort drilling plan on hold "indefinitely," and the following year Shell similarly terminated its exploration operations in the region.[152]

In the wake of these developments, President Barack Obama and Prime Minister Justin Trudeau issued a December 2016 joint statement that committed to suspend the issuance of new Arctic offshore oil and gas licences. "This is due to the irreplaceable value of Arctic waters for Indigenous and Northern communities' subsistence and cultures," a Canadian official statement explained. "The vulnerability of communities and the supporting ecosystems to an oil spill, as well as the unique logistical, operational, safety and scientific challenges to oil extraction and spill response in Arctic waters also represent unprecedented challenges."[153] Given that there was little to no offshore activity at the time of the announcement, it did not immediately affect local and regional economic interests. Nevertheless, Ottawa's failure to consult with territorial officials prior to the announcement upset the Northern premiers – particularly in light of the Trudeau government's messaging about the centrality of partnerships with territorial governments and Indigenous organizations in its new approach to intergovernmental relationships.[154] Although the Trump administration overturned the U.S. moratorium, and the Canadian moratorium is subject to review every five years, the oil industry appears to have lost interest in the Beaufort (and, by extension, in the boundary dispute) for the moment.

The possibility of a potential commercial fishery in the Beaufort Sea heightening bilateral tensions over the boundary dispute also appears remote. There is no commercial fishery in the Beaufort Sea, and both Canada and the U.S. have made unilateral moves to constrain such a fishery until science demonstrates that it would be sustainable. Pursuant to UNCLOS and the United Nations Fish Stocks Agreement, coastal States have responsibilities to manage living resources in their respective EEZs, including straddling fish stocks, and thus have authority to control fishing activities within these waters. As a precautionary measure, the United States implemented a moratorium on new commercial fisheries in its Arctic EEZ in December 2009, which supported a Senate resolution directing the government to negotiate a

new international agreement for managing migratory and transboundary fish stocks in the Arctic Ocean.[155] This included the disputed zone with Canada in the Beaufort. In October 2014, the Canadian federal government followed suit, announcing that it would not permit new commercial fishing in the Beaufort in advance of further scientific research. Bilaterally, a shared interest in preserving living marine resources prompted Prime Minister Trudeau to declare in a March 2016 joint statement with President Obama that "Canada commits to working with Northern and Indigenous communities to build world-leading and abundant Arctic fisheries – based on science – that firstly benefit Northern communities. Together, the United States' and Canada's actions will create the largest contiguous area of well-regulated fisheries in the world."[156]

Setting a maritime boundary in the Beaufort Sea ultimately will come down to political will. Given longstanding Canadian sensitivities about sovereignty and anxieties about U.S. encroachments since the days of the Klondike Gold Rush, there may be a limited appetite amongst political elites to engage in boundary negotiations requiring compromise without clear economic benefits to offset the risk of incurring blowback that Canada has "conceded" or "lost" to the Americans. Canadian statements that the Beaufort Sea boundary dispute is well managed by both countries and will be resolved peacefully in accordance with international law when both parties are ready to do so remain reasonable and proportionate to the actual situation. With the collapse of the offshore oil and gas industry in the North American Arctic since 2014, there is no acute pressure to resolve the Beaufort Sea dispute – and there is unlikely to be so until global energy markets command much higher prices. Any future initiatives to address the issue are likely to involve direct negotiations between the two parties rather than litigation to ensure they retain control over the sensitive boundary delimitation process. Ongoing scientific efforts to define the outer limits of the countries' continental shelves will clarify the extent of overlap in the Beaufort, and resource surveys indicating the extent of hydrocarbons and fish in and around the disputed zone should inform a peaceful, bilateral resolution in accordance with international law. For the time being, the dispute is unlikely to escalate between two neighbours who consider themselves each other's "premier partner" on Arctic issues.[157]

Notes

[1] See, for example, John Kirton, "Beyond Bilateralism: United States - Canadian Cooperation in the Arctic," in *United States Arctic Interests: the 1980s and the 1990s*, ed. William E. Westermeyer and K.M. Shusterich (New York: Springer-Verlag, 1984), 299-306; and Donald Rothwell, *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* (Calgary: Canadian Institute of Resources Law, 1988), 2, 25-26; Mike Blanchfield and Randy Boswell, "Bush takes final swing at Arctic sovereignty," *National Post*, 12 January 2009; and Rob Huebert, "Why Canada, U.S. must resolve their Arctic border disputes," *Globe and Mail*, 21 October 2014.

[2] Rothwell, *Maritime Boundaries and Resource Development*, 30-31.

[3] David H. Gray, "Canada's Unresolved Maritime Boundaries," IBRU *Boundary and Security Bulletin* (1997). Gray notes that the equidistance line departs from the land terminus in a N25°E direction for about the first 10nm and in a direction of N17°E for the remainder of the 200nm claim.

[4] Michel Frederick, "La délimitation du plateau continental entre le Canada et les États-Unis dans la mer de Beaufort," *Annuaire canadien de Droit international 1979*, ed. C.B. Bourne (Vancouver: UBC Press, 1979), 77-81.

[5] Donat Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: University of Ottawa Press, 1973).

[6] Gray, "Canada's Unresolved Maritime Boundaries," 63.

[7] James S. Baker and Michael Byers, "Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute," *Ocean Development & International Law* 43:1 (2012): 70-95.

[8] Gray, "Canada's Unresolved Maritime Boundaries," 63.

[9] Gordon W. Smith, *The Historical and Legal Background of Canada's Arctic Claims* (Waterloo: Centre on Foreign Policy and Federalism, 2016), 247.

[10] Karin L. Lawson, "Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Dispute," *Virginia Journal of International Law* 22:1 (1981): 243.

[11] Frederick, "La délimitation du plateau continental," 77.

[12] Frederick, "La délimitation du plateau continental," 78, 91; Pharand, *Law of the Sea of the Arctic*, 312, 317-18. Donald Rothwell notes that the "special circumstances" argument "could be very effectively relied upon to argue that equidistance is not a suitable delimitation criterion in this case, especially if it could be shown that its use would result in a delimitation which is not equitable. Recalling the manner in which the ICJ sought to achieve an equitable result in the Gulf *of Maine* case, the end result could be that this argument

would act as a very effective 'defence' to the American claim for an equidistance line." Rothwell, *Maritime Boundaries and Resource Development*, 40.
[13] *Convention ceding Alaska between Russia and the United States,* 30 March 1867, (1867) 134 C.T.S. 331,15 Stat 539, T.S. No. 301 [hereafter 1867 *Boundary Treaty*].
[14] 1867 *Boundary Treaty.*
[15] Lawson, "Delimiting Continental Shelf Boundaries," 230.
[16] Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North: Terrestrial Sovereignty, 1870-1939*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 184. Smith notes: "In the context of the treaty the only common-sense interpretation would appear to be that of Number (1) above (and also Number (4), of course, if it is taken to have the same meaning), but obviously any other interpretation would continue the 141st meridian as the boundary line some distance towards the North Pole." For a recent appraisal from a "legal geography perspective," see Kristen Shake, Karen Frey, Deborah Martin, and Philip Steinberg, "(Un) frozen spaces: Exploring the role of sea ice in the marine socio-legal spaces of the Bering and Beaufort Seas," *Journal of Borderlands Studies* 33:2 (2018): 239-53.
[17] Pharand suggests that "the demarcation line described in the 1825 Treaty was meant to apply to land only" based on "the introductory clause of Article III. That clause specifies that the line of demarcation is to be 'upon the *Coast* of the Continent, and the *Islands* of America to the Northwest'." He also notes that "the ordinary meaning of the term 'possessions' is limited to land territory, internal or inland waters and perhaps also territorial waters. This ordinary meaning seems to have been intended by the Parties to the 1825 Treaty since they specified in Article III that the 141st meridian was to be the limit 'entre les *Possessions* Russes et Britanniques *sur le Continent*'; in other words, the subject matter of the treaty was 'possessions on the Continent'. It might also have included territorial waters, but it is not at all certain that the concept was sufficiently well established in 1825 to be so included" [emphases in original]. Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), 20-22.
[18] See, for example, Lawson, "Delimiting Continental Shelf Boundaries," 229-32; C.B. Bourne and D.M. McRae, "Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-Examined," in *Canadian Yearbook of International Law: 1976*, ed. C.B. Bourne (Vancouver: UBC Press, 1976), 175-223. Ivan Head noted that Lakhine argued in favour of a more liberal interpretation of the 1825 treaty, based upon the wording of the 1867 sale of Alaska, to contend that this treaty justifies the 1926 Soviet Decree over its Arctic sector. Head also suggested that: "'Jusqu'à' is equivocal. Both David Hunter Miller … and Smedal … concede this. The P.C.I.J. considered the meaning of the word in its advisory opinion

with respect to *The Monastery of Saint-Naoum* [1924] … and found it impossible to affirm either the exclusive or inclusive interpretation." Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions," *McGill Law Journal* 9 (1963): 211. J.R.V. Prescott, *The Maritime Political Boundaries of the World* (London: Methuen, 1985), 268, rejected the Canadian interpretation and argues that "The words 'as far as the Frozen ocean' cannot be construed to mean that the meridian should continue to act as a boundary north of the coast. If it was argued that the line must continue until the ocean becomes frozen, then this view is rebuffed by the fact that the boundary would terminate at different points depending on the season. No one would suggest that negotiations would have produced such an uncertain and silly boundary."

[19] On 28 September 1945, President Truman proclaimed that the U.S. Government "regards the natural resources of subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." The proclamation made no attempt to delimit the continental shelf and declared that the character of the water above (as high seas) and the right to navigate them were "in no way" affected. The same day, Truman issued a proclamation declaring fishery conservation zones in areas of the high seas contiguous to the U.S. As with the continental shelf proclamation, it stated that the character of such waters as high seas was not affected. G.W. Smith, "Events and developments in the Law of the Sea, mainly during the years leading up to the beginning of the Third Law of the Sea Conference in 1973," unpublished manuscript in the possession of the author.

[20] Rothwell, *Maritime Boundaries and Resource Development*, 31-34.

[21] Frederick, "Délimitation du plateau continental," 82-83.

[22] Rothwell, *Maritime Boundaries and Resource Development*, 32-33. See also Camille M. Antinori, "The Bering Sea: A Maritime Delimitation Dispute between the United States and the Soviet Union," *Ocean Development & International Law* 18 (1987): 34. Nevertheless, the American assessment is supported by several legal experts. Pharand concluded that "*there is no indication whatever throughout the treaty that the parties contemplated any part of the Arctic Ocean*" and that "*the meridians in question are merely used to establish the geographical area within which the land and islands forming the object of transfer were located*" [emphasis in original]. As such, neither it nor the 1867 *Boundary Treaty* can serve as a legal basis for the sector theory in terms of title to sea areas. Pharand, *Canada's Arctic Waters in International Law*, 24-26.

[23] David Hunter Miller, "Political Rights in the Polar Regions," in *Problems of Polar Research* (New York: American Geographical Society, 1928), 247-48, as encapsulated by Smith, *Historical and Legal Background of Canada's Arctic Claims*,

150.
[24] Smith, *Historical and Legal Background of Canada's Arctic Claims*, 220.
[25] General Staff, Department of National Defence, "Canadian Political Rights in the Arctic," 12, Library and Archives Canada (LAC), Record Group (RG) 25, file 9057-40 pt.2. The rights to which the document referred were to "ownership by Canada of contiguous Arctic lands." There was no claim to continental shelf or water rights.
[26] Lawson, "Delimiting Continental Shelf Boundaries," 233; and Antinori, "Bering Sea: A Maritime Delimitation Dispute," 34.
[27] U.S. Department of State, *International Boundary Study No. 14 (Revised): U.S.-Russia Convention Line of 1867* (1 October 1965), http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS014.pdf.
[28] Gordon W. Smith, "The Transfer of Arctic Territories from Great Britain to Canada in 1880, and some related matters, as seen in official correspondence," *Arctic* 14:1 (1961): 55-56.
[29] Pharand, *Canada's Arctic Waters in International Law*, 12-27.
[30] Quoted in Smith, "Transfer of Arctic Territories," 60, 64.
[31] Smith, "Transfer of Arctic Territories," 63, 64.
[32] Smith, "Transfer of Arctic Territories," 64-65.
[33] H.R. Holmden, Memo re the Arctic Islands (1921), 12, quoted in Smith, "Transfer of Arctic Territories," 69.
[34] Dominion Order in Council, 18 December 1897, cited in Smith, *Historical and Legal Background of Canada's Arctic Claims*; V.K. Johnston, "Canada's Title to the Arctic Islands," *Canadian Historical Review* 14:1 (1933): 29-30; and Norman L. Nicholson, *The Boundaries of Canada, its Provinces and Territories* (Ottawa: Department of Mines and Technical Surveys, 1954), 37-38. Pharand notes that a map (attached to the Order in Council and incorporated by reference in the description) extends to 78½°N, which is well above the disputed zone with the United States. Pharand, *Canada's Arctic Waters in International Law*, 5.
[35] Yukon Territory Act, S.C. 1898, schedule.
[36] W.F. King, *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (Ottawa: Government Printing Bureau, 1905), 17-19 and Smith, *Historical and Legal Background of Canada's Arctic Claims*, 105.
[37] The Alaska Boundary Dispute between Great Britain (Canada) and the United States, which was settled by arbitration in 1903, affected only the southern Panhandle. Throughout the hearings it was clear that all parties accepted the 141st meridian as the eastward limit of Alaska. John A. Munro, *The Alaska Boundary Dispute* (Toronto: Copp Clark Pitman, 1970). The wording of the 1825 treaty (i.e. "as far as the Frozen Ocean") did not appear to precipitate any dispute over the northward extension of this line at this time. K.

Beauchamp et al, "Jurisdictional Problems in Canada's Offshore," *Alberta Law Review* 11 (1973): 441. As such, the offshore boundary was not settled by these negotiations.

[38] Gray, "Canada's Unresolved Maritime Boundaries."

[39] International Boundary Commission, *Joint Report Upon the Establishment of the Boundary Between the United States and Canada along the 141st Meridian* (Washington: Department of State, 1918); Frederick, "Délimitation du plateau continental," 84.

[40] Quoted in "To Seek North Pole," *L'Abeille de la Nouvelle-Orleans*, 20 decembre 1905, available online at http://nobee.jefferson.lib.la.us/Vol-143/12_1905/1905_12_0144.pdf.

[41] "Notes, Supplementary to Dr. King's Memorandum, Re Later Explorations in the Canadian Arctic Archipelago," attached to L.S. Amery to Governor General, 20 October 1925, LAC, RG 25, file 9057-40 pt.1.

[42] *New York Tribune*, 6 September 1907; "Mikkelsen Part is Safe – May Report Finding New Continent," *Topeka Daily Capital*, 11 September 1907, 1.

[43] [illegible], Director, Dominion Observatory, Department of the Interior, to Sir Joseph Pope, Under-Secretary of State for External Affairs, 26 October 1920, and attached notes from the Geographical Board Office, October 1920, LAC, RG 25, file 9057-40 pt.1.

[44] Head, "Canadian Claims to Territorial Sovereignty," 203.

[45] Pharand also notes that "the practice was continued in 1952 when, for the first time, the government published a map of Canada for the general public showing all of the Arctic regions, and the practice still continues to-day." Pharand, "Historic Waters in the Arctic," in *Law of the Sea of the Arctic*, 134-35. See also Edgar Dosman, "Northern Sovereignty and Foreign Policy," in *The Arctic in Question*, ed. E. Dosman (Toronto: Oxford University Press, 1976).

[46] Atlas of Canada, no.1, 1906, reproduced in Pharand, *Canada's Arctic Waters in International Law*, 9.

[47] Frederick, "Délimitation du plateau continental," 85.

[48] Quoted in Head, "Canadian Claims to Territorial Sovereignty," 203-4; Pharand, *Canada's Arctic Waters in International Law*, 9-10.

[49] I concur with Smith, *Historical and Legal Background of Canada's Arctic Claims*, on this point.

[50] Head, "Canadian Claims to Territorial Sovereignty," 203-4; Pharand, *Canada's Arctic Waters in International Law*, 10-11.

[51] Gordon W. Smith, "Sovereignty in the North: The Canadian Aspect of an International Problem," in *The Arctic Frontier*, ed. R. St. J. MacDonald (Toronto: University of Toronto Press, 1966), 215.

[52] Johnston, "Canada's Title to the Arctic Islands," 33.

[53] J.E. Bernier, *Master Mariner and Arctic Explorer* (Ottawa: Le Droit, 1939), 344. For more on this era, see Janice Cavell's articles: "'As far as 90 north': Joseph Elzéar Bernier's 1907 and 1909 sovereignty claims," *Polar Record* 46:4 (2010): 372-3; "'A little more latitude': explorers, politicians, and Canadian Arctic policy during the Laurier era," *Polar Record* 47:4 (2011): 289-309; "Further evidence and reflections on Joseph Elzéar Bernier's 1907 and 1909 sovereignty claims," *Polar record* 49:4 (2013): 406-8; and "Sector claims and counter-claims: Joseph Elzéar Bernier, the Canadian government, and Arctic sovereignty, 1898–1934," *Polar Record* 50:3 (2014): 293-310.

[54] Pharand observes that "the sector theory never did receive specific application to water and ice areas by the responsible ministers or the Prime Minister of Canada." Pharand, *Law of the Sea*, 141.

[55] Vilhjalmur Stefansson, *The Friendly Arctic: The Story of Five Years in Polar Regions* (New York: Macmillan, 1921), 142-226, and appendix "Drifting in the Beaufort Sea" by S.T. Storkerson, 715-29; Robert Bartlett, *Last Voyage of the Karluk* (Boston: Small, Maynard, 1916), 306; see also Trevor H. Levere, "Vilhjalmur Stefansson, the Continental Shelf, and a New Arctic Continent," *British Journal for the History of Science* 21:2 (1988), 238, 240. Although the Canadian government instituted the regular Eastern Arctic Patrol in 1922, as well as RCMP patrols which extended over most of the Arctic islands by 1929, I have found no evidence of such practices in the disputed zone of the Beaufort Sea.

[56] Stefansson (1914) quoted in Trevor H. Levere, *Science and the Canadian Arctic: A Century of Exploration, 1818-1918* (Cambridge: Cambridge University Press, 1993), 406-7.

[57] Smith, *Historical and Legal Background of Canada's Arctic Claims*, 107. The map is "Map of Canada, Showing Proposed Limits of Provisional Districts," to accompany *Report of the Minister of the Interior*, 14 March 1918.

[58] C.T. Pedersen to O.S. Finnie, 29 November 1924, and reply, 10 February 1925, LAC, RG 85, reel T-13256, vol. 747, file 4244. On Pederson, see Kitikmeot Heritage Society, "C.T. Pedersen and Canalaska," http://www.kitikmeotheritage.ca/ Angulalk/ctpeders/ctpeders.htm.

[59] R.M. Anderson to O.D. Skelton, 15 June 1925, LAC, RG 25, file 9057-40 pt.1.

[60] O.D. Skelton to R.M. Anderson, 20 June 1925, LAC, RG 25, file 9057-40 pt.1.

[61] The Hydrographic Department of the Admiralty in London, when asked to comment on Canada's claims to the territories lying north of the Canadian mainland as far as the North Pole, called into question Canada's possible claim to the "inland seas" between the islands of the Arctic Archipelago and downplayed the importance of the sector claim territories in the west:

> It may be pointed out that it is at least d[oubt]ful whether any

> land larger than a small island exist[s] in the Beaufort Sea – that land of continental character exists there is very improbable. In any case, it would be just as likely to lie to the W. of meridian 141°W – and, hence, to be prima facie American – as to the E, while the ice conditions of that region render the existence of land in it a point of no commercial importance.

"Notes on the Governor-General's Despatch to Washington No. 104 of June 4th 1925," attached to L.S. Amery to Governor General, 20 October 1925, LAC, RG 25, file 9057-40 pt.1.

[62] James White to O.D. Skelton, 25 May 1925, and attached "Memorandum Respecting Macmillan Expedition to the Canadian Arctic," p. 14, LAC, RG 25, vol. 4252, file 9057-40 pt.1.

[63] White, "Memorandum Respecting Macmillan Expedition to the Canadian Arctic," 2-3.

[64] House of Commons *Debates*, 1 June 1925, 3773; 10 June 1925, 4069, 4084.

[65] Pharand, *Law of the Sea of the Arctic*, 136-37.

[66] *Documents on Canadian External Relations* (*DCER)*, vol. 3: 1919-1925, doc. 542.

[67] Pharand, *Canada's Arctic Waters in International Law*, 51, and 1929 map on 52; see also LAC, RG 25, file 9057-40 pts.1-2. Pharand notes that the Arctic Islands preserve was extended southward on 20 September 1945, and the northward limits were still described in sector form. *Ibid*, 53. For a recent assessment suggesting that Canadian state practice employing the sector principle in the 1920s "was pragmatic and successful," see Janice Cavell, "The Sector Theory and the Canadian Arctic, 1897–1970," *International History Review* 41:6 (2019): 1168-1193.

[68] Charles Camsell to O.D. Skelton, 22 March 1937, and enclosures, *DCER*, vol. 6: 1936-1939, doc. 121.

[69] House of Commons *Debates*, 20 May 1938, 3081. Pharand noted that "the statement is broad enough to cover water as well as land, but an examination of the whole exchange seems to indicate that the members of Parliament and the Minister were thinking of land and islands, and not of water." Pharand, *Law of the Sea of the Arctic*, 138.

[70] See Peter Kikkert and P. Whitney Lackenbauer, "The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955,'" in *International Law and Politics of the Arctic Ocean: Essays in Honour of Donat Pharand*, ed. Suzanne Lalonde and Ted McDorman (Leiden: Brill, 2014), 216-39.

[71] General Staff, Department of National Defence, "Canadian Political Rights in the Arctic," 8, 11, LAC, RG 25, file 9057-40 pt.2.

[72] Letter from the Secretary of the Navy (Adams) to the Secretary of State

(Stimson), 23 September 1929, M.S. Department of State, file 840.014 Arctic/26, quoted in Pharand, *Law of the Sea of the Arctic*, 142.

[73] Smith, *Historical and Legal Study of Sovereignty in the Canadian North*, 369-78. See also LAC, RG 85, Series D-1-A, vol. 268, file 1003-6-1 pt.1 for confirmation of this observation; P. Whitney Lackenbauer and Shelagh Grant, eds., *"The Adventurous Voyage":* St. Roch *and the Northwest Passage, 1940-42 and 1944* [Arctic Operational History Series, vol. 7] (Antigonish: Mulroney Institute on Government, 2019); and Peter Kikkert and P. Whitney Lackenbauer, "'On Hallowed Ground': *St. Roch*, Sovereignty, and the 1944 Northwest Passage Transit," *Northern Mariner* 29:3 (2019): 1-20.

[74] Memo by R.A.J. Phillips for file, 24 May 1946, attaching extract of recommendations from U.S. document of 6 November 1945, LAC, RG 25, vol. 3347, file 9061-A-40, pt.1, quoted in Gordon W. Smith, "Weather Stations in the Canadian North and Sovereignty," ed. P. Whitney Lackenbauer, *Journal of Military and Strategic Studies* 11:3 (2009): 1-63.

[75] *DCER*, vol. 12 (1946), 1562-63; Pharand, *Canada's Arctic Waters in International Law,* 53. More generally, see Shelagh Grant, *Sovereignty or Security: Government Policy in the Canadian North, 1936-1950* (Vancouver: UBC Press, 1988).

[76] Wrong to Abbott, 13 June 1946, enclosing copy of Pearson's letter, LAC, RG 25, vol. 3347, file 9061-A-40, pt.1. For more on this issue, see Kikkert and Lackenbauer, "Let Sleeping Dogs Lie," and Peter Kikkert, Adam Lajeunesse, and P. Whitney Lackenbauer, "Lester Pearson, the United States, and Arctic Sovereignty: A Case of Un-Pearsonian Diplomacy?" in *Mike's World: Lester Pearson and Canadian External Relations, 1963-1968*, ed. Asa McKercher and Galen Perras (Vancouver: UBC Press, 2017), 149-68.

[77] Speaking about the cooperation associated with the operation of the Joint Arctic Weather Stations, Minister of National Defence Brooke Claxton noted that "everything that has been done has been in recognition of our sovereignty, which up to recent years was questioned only in view of the United States uncertainty about the sector theory." House of Commons *Debates*, 24 May 1954, 5042-43.

[78] L.B. Pearson, "Canada Looks 'Down North,'" *Foreign Affairs* 24:4 (July 1946): 638-9. Pearson goes on to describe how the 1944 Arctic Manual of the U.S. War Department describes the Western Arctic as "the Arctic mainland coast from Demarcation Point to Boothia Peninsula and the islands to the north" (639) which indicates an obvious awareness that the U.S. did not consider the Beaufort Sea beyond the Canadian territorial sea to be "Canadian Arctic territory."

[79] H.L. Keenleyside, "Recent Developments in the Canadian North," *Canadian Geographical Journal* 39:4 (October 1949): 7, quoted in Smith, "Sovereignty in the

North," 222-23.
[80] House of Commons *Debates*, 8 December 1953, 700, quoted in Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions," 209.
[81] This echoes the assumption by Vincent G. Macdonald in his 1950 report which states that the sector "principle is restricted apparently in that it applies only to land-areas…." "Canadian Sovereignty in the Arctic," 22, Department of National Defence, Directorate of History and Heritage (DHH) file 122.3M2.009 (D248), reprinted in Peter Kikkert and P. Whitney Lackenbauer, eds., *Legal Appraisals of Canada's Arctic Sovereignty: Key Documents, 1904-58* [Documents on Canadian Arctic Sovereignty and Security (DCASS) No. 2] (Calgary and Waterloo: Centre for Military and Strategic Studies/Centre on Foreign Policy and Federalism, 2014), 280-313. On the 1825 treaty, Macdonald notes that if the description of the 141st meridian "jusqu'a la mer glaciale … was understood to mean that a division of the Arctic regions was made by the Treaty (and it seems that this was not the case) the division was a matter between Great Britain and Russia which foreign states are not bound to respect if they have not consented to it" (24) [emphasis in original].
[82] Proceedings of the Special Committee on Estimates, 23 March 1955, 446, quoted in Pharand, *Canada's Arctic Waters in International Law*, 55-56.
[83] House of Commons *Debates*, 3 August 1956, 6955, quoted in part in Pharand, *Law of the Sea*, 139; Pharand, *Canada's Arctic Waters in International Law*, 56; J.L. Granatstein, "The North to 1968," in *The Arctic in Question,* ed. Edgar Dosman (Toronto: Oxford University Press, 1976), 27-28; and Head, "Canadian Claims to Territorial Sovereignty," 209.
[84] House of Commons *Debates*, quoted in Head, "Canadian Claims to Territorial Sovereignty," 209.
[85] Pharand, *Law of the Sea of the Arctic*, 139.
[86] Exchange in Pharand, *Canada's Arctic Waters in International Law*, 57-58.
[87] Under-Secretary of State for External Affairs (USSEA) to R.G. Robertson, 17 December 1958, LAC, RG 25, vol. 7118, file 9057-40 pt.8. General Charles Foulkes, the Chairman, Chiefs of Staff, also raised concerns about foreign "sector" claims that could deny Canada "freedom of passage by sea to parts of our northland and Arctic reconnaissance would be very limited." Draft, Foulkes to Chairman, Advisory Committee on Northern Development, 12 December 1958, LAC, RG 25, vol. 7118, file 9057-40 pt.8.
[88] G.W. Rowley, Memorandum for the Advisory Committee on Northern Development, "Canadian Sovereignty in the Arctic Basin and the Channels Lying Between the Islands of the Arctic Archipelago," 16 September 1958, LAC, RG 25, vol. 7118, file 9057-40, pt.9-2.

[89] DEXAF Legal Division to Acting USSEA, 23 February 1954, LAC, RG 25, vol. 6510, file 9057-40 pt.4.

[90] Memorandum for file 500-370-40, "U.S. Request for Permission to Make Submarine Installations off Cape Dyer, Baffin Island in connection with the BMEWS Cable to Thule," 29 July 1958, LAC, RG 25, vol. 6510, file 9057-40 pt.7. Since no study on the status of the Arctic waters (particularly those in the archipelago) had been completed, Gilles Sicotte of the Legal Division at DEXAF noted on 30 April 1956 that "no formal action should be taken regarding possible Canadian claims to waters in the Arctic at the present time." He recommended, however, that no department should take any action which could compromise an eventual Canadian internal waters claim. "For present purposes," he noted, "these waters might be taken as those lying within a line commencing at Resolution Island, south east of Baffin Island and running from headland to headland in a rough triangle north to the top of Ellesmere Island and thence south west to Banks Island and the Arctic coast of Canada." Sicotte for USSEA to Canadian Embassy, Copenhagen, Denmark, 30 April 1956, RG 25, vol. 6510, file 9057-40 pt.6-2. The Beaufort Sea is not mentioned.

[91] Minutes of the 52nd Meeting of the ACND, 20 April 1959, in P. Whitney Lackenbauer and Daniel Heidt, eds., *The Advisory Committee on Northern Development: Context and Meeting Minutes, 1948-66* [Documents on Canadian Arctic Sovereignty and Security no. 4] (Calgary: Centre for Military and Strategic Studies/Arctic Institute of North America, 2015), 610-11; and Adam Lajeunesse, ed., *Documents on Canadian Arctic Maritime Sovereignty: 1950-1988* [DCASS no. 12] (Calgary: CMSS/AINA, 2018), 143-44.

[92] Maxwell Cohen, "Some Main Directions of International Law: A Canadian Perspective," in *Canadian Yearbook of International Law: 1963,* ed. C.B. Bourne (Vancouver: UBC Press, 1963), 23.

[93] Canada, House of Commons, *Debates*, 4 September 1964, 7657.

[94] Quoted in Pharand, *Canada's Arctic Waters in International Law*, 58.

[95] Nicholson, *The Boundaries of Canada*, 42, quoted in Pharand, *The Law of the Sea of the Arctic*, 140-41. The same statement was made in the 1954 edition of Nicholson's book.

[96] *Territorial Sea and Fishing Zones Act*, 22, 1964-65 S.C. 153 (1964); Smith, "Sovereignty in the North," 236-37; Granatstein, "North to 1968," 29; and Elizabeth B. Elliot-Meisel, *Arctic Diplomacy: Canada and the United States in the Northwest Passage* (New York: Peter Lang, 1998), 140; Ted McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (Toronto: Oxford University Press, 2009); and Adam Lajeunesse, *Lock, Stock, and Icebergs: A History of Canada's Arctic Maritime Sovereignty* (Vancouver: UBC Press, 2016).

[97] American opposition to "sector claims" is clear in U.S. Department of State, *International Boundary Study No. 14 (Revised): U.S.-Russia Convention Line of 1867* (1 October 1965).

[98] Pharand, *Law of the Sea of the Arctic*, 141.

[99] The *Escamilla* case of 1970-71 raised questions of Canadian jurisdiction over criminal activities on ice islands in its "sector," and Canada's decision to reserve its position and to waive its jurisdiction so as to facilitate American legal proceedings (as well as the court's decision to ignore the sector principle as a basis to dismiss charges against the accused) tried to avoid prejudicing its legal claim. Pharand, "State Jurisdiction over Ice Island T-3: The Escamilla Case," *Arctic* 24:2 (1971): 83-89.

[100] Smith, "Sovereignty in the North," 221-22, notes that as of 1966:

> The sector principle has aroused a mixed reaction among legal and other authorities. In general it may be said that while some have endorsed it, a large majority either have been doubtful or have firmly refused to concede that it has any force in law. Among those who have approved it, in more or less extreme form, are a group of Russians including L. Breitfuss, W. Lakhtine, E. A. Korovin, and S. V. Sigrist, and, at least by implication, the Canadian V. K. Johnston. Its validity has been denied by many including Gustav Smedal, T. A. Taracouzio, John C. Cooper, Elmer Plischke, C. H. M. Waldock, John J. Teal Jr., and Oscar Svarlien, although some of these, including Taracouzio and Svarlien, have expressed the view that it might have limited applicability if used simply as a means of marking out land territory. Others who have expressed qualified approval of it in this or a similarly limited sense are René Waultrin, Paul Fauchille, David Hunter Miller, W. L. G. Joerg, and M. F. Lindley.

[101] Smith, "Sovereignty in the North," 254-55. Pharand, a strong critic of the sector principle, concurs that it "has no validity as a legal root of title, whether it be in respect to 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." Pharand, "Canada's Arctic Jurisdiction in International Law," 324.

[102] Pharand, *Canada's Arctic Waters*, 58.

[103] The companies' conservative estimates of combined recoverable reserves totaling five to ten billion barrels prompted increased exploration activity in the region. Lawson, "Delimiting Continental Shelf Boundaries," 224; Frederick, "Délimitation du plateau," 30-33.

[104] Erik G. Wang, "Canada-United States fisheries and maritime boundary negotiations: diplomacy in deep water," *Behind the Headlines* 38:6 (1981): 21.
[105] Lawson, "Delimiting Continental Shelf Boundaries," 224-25.
[106] Allen Milne, *Oil, Ice and Climate Change: The Beaufort Sea and the Search for Oil* (Ottawa: Department of Fisheries and Oceans, 1978), 3-4; Nigel Tucker, "Facility Siting in a Resource Frontier: A Case Study of Port Development in the Beaufort Sea-Mackenzie Delta Region" (unpublished Ph.D. thesis, York University, 1987), 128; D.A. Taylor et al, *Arctic Industrial Activities Compilation, vol. 1, Beaufort Sea: Marine Dredging Activities, 1959 to 1982*, Canadian Data Report of Hydrography and Ocean Sciences no. 32 (Ottawa: Fisheries and Oceans, 1985).
[107] R.W. Stewart and L.M. Dickie, *Ad Mare: Canada Looks to the Sea - A Study on Marine Science and Technology* (Ottawa: Canada Science Council, 1971), 84.
[108] Milne, *Oil, Ice and Climate Change*, 4.
[109] Gordon W. Smith, "Canadian Hydrography and Oceanography in Arctic Waters Since 1959," unpublished manuscript in the possession of the author.
[110] Frederick, "Délimitation du plateau continental," 85. Pharand notes that Ged Baldwin, the Progressive Conservative House leader, attempted "at the time of the enactment to include a saving clause covering the sector theory" which proposed the amendment that: "Nothing in this Act shall in any way be construed to be inconsistent with Canada's rightful claim of sovereignty in and over water, ice and land areas of the Arctic regions between the degrees of longitude 60 and longitude 141." The President of the Privy Council, Donald Macdonald, argued against it, explaining that "the bill does not deal with the question of sovereignty in any sense.... It is purely a question of pollution control jurisdiction. The bill does not say that Canada claims sovereignty over an area of the high seas a hundred miles beyond Canadian territorial waters...." The proposed amendment was ruled out of order on procedural grounds, and thus did not speak to the government's position on sovereignty. Pharand, *Canada's Arctic Waters in International Law*, 60.
[111] Trevor Lloyd, "Canada's Arctic in the Age of Ecology," *Foreign Affairs* 48 (1970): 737.
[112] Donat Pharand, "Canada's Arctic Jurisdiction in International Law," *Dalhousie Law Journal* 7:3 (1983): 324-25, 336.
[113] Shipping Safety Control Zones Order, C.R.C., c. 356, http://www.canlii.org/en/ca/laws/regu/crc-c-356/latest/crc-c-356.html.
[114] Rothwell, *Maritime Boundaries and Resource Development*, 38.
[115] Lloyd, "Canada's Arctic in the Age of Ecology," 738.
[116] Theodore T. Eliot, Jr., "Information Memorandum for Mr. Kissinger, the White House – Subject: Imminent Canadian Legislation on the Arctic," 12

March 1970, declassified and amended 12 July 2005, United States Department of State, *Foreign Relations of the United States, 1969-1976*, volume E-1, Documents on Global Issues, 1969-1972, available online at http://www.state.gov/r/pa/ho/frus/nixon/e1/53180.htm.

[117] Frederick, "Délimitation du plateau continental," 85.

[118] S.C. 1974-75-76, c. 55, as am. SOR/81-721. The ODCA was repealed in 1988 and replaced by Part VI of the Canadian Environmental Protection Act (CEPA). See Elaine L. Hughes, "Ocean Dumping and its Regulation in Canada," *Canadian Yearbook of International Law: 1988*, ed. C.B. Bourne (Vancouver: UBC Press, 1988), 163.

[119] Frederick, "Délimitation du plateau continental," 85.

[120] Quoted in Pharand, *Canada's Arctic Waters in International Law*, 61. Pharand notes that "to include the waters north of the Archipelago between the 141st and 60th meridians as falling within the definition of 'territories' is simply unwarranted and constitutes a reliance on the sector theory."

[121] American political scientist Christopher Kirkey has furnished a useful overview of the proceedings, which I summarize in the next few paragraphs. Please consult his article for detailed notes. Kirkey, "Delineating Maritime Boundaries: The 1977-78 Canada-U.S. Beaufort Sea Continental Shelf Delimitation Boundary Negotiations," *Canadian Review of American Studies* 25:2 (1995): 49-66.

[122] Lawson, "Delimiting Continental Shelf Boundaries," 242; Kirkey, "Delineating Maritime Boundaries," 50, 52.

[123] "Order Prescribing as Fishing Zones of Canada Certain Areas of the Sea Adjacent to the Coast of Canada" (1976) 15 *International Legal Materials* 1372; "Announcement on Maritime Boundaries Between the United States and Canada," United States Department of State, 1 November 1976, (1976) 15 *International Legal Materials* 1435.

[124] Wang, "Canada-United States fisheries and maritime boundary negotiations," 4.

[125] Pharand, *Canada's Arctic Waters*, 62.

[126] Susan J. Rolston and T.L. McDorman, "Maritime Boundary Making in the Arctic Region," in *Ocean Boundary Making: Regional Issues and Developments*, ed. D.M. Johnston and P. Saunders (London: Croom Helm, 1987), 48; and United States, Department of the Interior, *Decisions of the United States Department of the Interior*, vol. 92, ed. Rachael Cubbage (Washington: U.S. Government Printing Office, 1985), 494.

[127] Lawson, "Delimiting Continental Shelf Boundaries," 241, 242.

[128] Lawson, "Delimiting Continental Shelf Boundaries," 245.

[129] Frederick, "Délimitation du plateau," 80-81, 92-94.

[130] This paragraph (and quotes herein) is based on Kirkey, "Delineating Maritime Boundaries."
[131] Kirkey, "Delineating Maritime Boundaries." See also Wang "Canada-United States Fisheries," 8.
[132] Kirkey, "Delineating Maritime Boundaries," 58-59.
[133] Kirkey, 62-63
[134] Rothwell, *Maritime Boundaries and Resource Development*, 36-37.
[135] Frederick, "Délimitation du plateau continental," 86-87.
[136] Lawson, "Delimiting Continental Shelf Boundaries," 244, 246.
[137] Pharand, *Law of the Sea*, 86.
[138] Rothwell, *Maritime Boundaries and Resource Development*, 37.
[139] *The Western Arctic Claim: Inuvialuit Final Agreement*, Annex A-1: Description of the Inuvialuit Settlement Region (Adjusted Boundary), 82, http://www.irc.inuvialuit.com/publications/pdf/Inuvialuit%20 Final%20Agreement.pdf.
[140] Pharand, *Canada's Arctic Waters in International Law*, 62.
[141] Peter J. Usher, "Inuvialuit Use of the Beaufort Sea and its Resources, 1960-2000," *Arctic* 55, supp. 1 (2002): 20.
[142] Rob Huebert, "Drawing Boundaries in the Beaufort Sea: Different Visions/Different Needs," *Journal of Borderlands Studies* 33:2 (2018): 213.
[143] Randy Boswell, "Arctic Native Leaders Say They've Been Left Out of Summit," Canwest News Service, 15 February 2010.
[144] In accordance with UNCLOS, coastal states' sovereign rights over the natural resources of the seabed and subsoil of the extended continental shelf already exist and do not need to be "claimed."
[145] Michael Byers and Andreas Østhagen, "Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?," *Canadian Yearbook of International Law: 2017* (Cambridge: Cambridge University Press, 2017), 17.
[146] Baker and Byers, "Crossed Lines," 70.
[147] Byers and Østhagen, "Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?," 12-15; NOAA, "U.S.-Canada Arctic Ocean survey partnership saved costs, increased data" (18 December 2011), http://www.noaanews.noaa.gov/stories2011/20111215_arctic.html.
[148] Betsy Baker, "Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian–U.S. Cooperation in the Beaufort Sea," *Vermont Law Review* 34 (2009): 58, 59.
[149] Byers and Østhagen, "Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?," 12.
[150] *Ibid*, 15-16; Tom Kennedy, *Quest: Canada's Search for Arctic Oil* (Edmonton: Reidmore, 1988); and Graham Chandler, "Stranded Gas," *Up Here Business* (June 2008).

[151] P. Whitney Lackenbauer, Adam Lajeunesse, James Manicom, and Frédéric Lasserre, *China's Arctic Ambitions and What They Mean for Canada* (Calgary: University of Calgary Press, 2018), 120.
[152] Guy Quenneville, "Chevron puts Arctic Drilling Plans on Hold Indefinitely," *CBC News*, 18 December 2014; "Oil giant's U.S. president says hugely controversial drilling operations off Alaska will stop for 'foreseeable future' as drilling finds little oil and gas," *The Guardian*, 28 September 2015; and Betsy Baker, "The Arctic offshore hydrocarbon hiatus of 2015: An opportunity to revisit regulation around the pole," in *Governance of Arctic Offshore Oil and Gas*, ed. Cécile Pelaudieux and Ellen Magrethe Basse (New York: Routledge, 2017), 148-66.
[153] Indigenous and Northern Affairs Canada, "FAQs on Actions being taken under the Canada-U.S. Joint Statement," 20 December 2016, https://www.aadnc-aandc.gc.ca/eng/1482262705012/1482262722874.
[154] See, for example, Peter Taptuna's comments in John Van Dusen, "Nunavut, N.W.T. premiers slam Arctic drilling moratorium," CBC News North, 22 December 2016, http://www.cbc.ca/news/canada/north/nunavut-premier-slams-arctic-drilling-moratorium-1.3908037. See also Rob Huebert, "Trudeau's Arctic Oil Decision a Fresh Example of Canada Ignoring the North," *Globe and Mail*, 6 January 2017; "Northern Premiers want a say in Trudeau's New Arctic Policy," *Nunatsiaq News*, 30 January 2017; and Heather Exner-Pirot, "Six Takeaways from this Week's U.S.-Canada Joint Arctic Statement," *Arctic Deeply*, 22 December 2016, https://www.opencanada. org/features/six-takeaways-weeks-us-canada-joint-arctic-statement/.
[155] NOAA, "Secretary of Commerce Gary Locke approves fisheries plan for Arctic" (2009), http://www.noaanews.noaa.gov/stories2009/ 20090820_ arctic.html. The moratorium covers finfish, molluscs, crustaceans, and other forms of marine animal and plant life other than marine mammals and birds. It does not apply to Pacific salmon and Pacific halibut, which are managed under other legal authorities, or to sport fishing and subsistence fishing/hunting within territorial waters. The U.S. desire to secure a pre-emptive moratorium was primarily rooted in concerns about potential unregulated fishing of migratory, transboundary, and straddling stocks on the high seas bordering the Bering Sea and to avoid its experience in the North Pacific high seas, where the pollock fishery collapsed before a 1994 regulatory regime was put in place. See Kevin Bailey, "An Empty Donut Hole: The Great Collapse of a North American Fishery," *Ecology and Society* 16:2 (2010): 28-41; and Leilei Zou and Henry Huntington, "Implications of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea for the Management of Fisheries in the Central Arctic Ocean," *Marine Policy* 88 (2018):

132-38.

[156] Government of Canada, "United States-Canada Joint Arctic Leaders' Statement," 20 December 2016, https://pm.gc.ca/eng/news/2016/12/20/united-states-canada-joint-arctic-leaders-statement. On Inuvialuit rights and commercial fishing restrictions, see Huebert, "Drawing Boundaries in the Beaufort Sea." On subsequent international agreements to control unregulated high seas fishing in the Central Arctic Ocean, see Mathieu Landriault, Andrew Chater, Elana Wilson Rowe, and P. Whitney Lackenbauer, *Governing Complexity in the Arctic Region* (London: Routledge, 2019), 28-38.

[157] P. Whitney Lackenbauer and Rob Huebert, "Premier Partners: Canada, the United States and Arctic Security," *Canadian Foreign Policy Journal* 20:3 (2014): 320-33.

2

Canada's Arctic Submission to the Commission on the Limits of the Continental Shelf

Elizabeth Riddell-Dixon[1]

On 23 May 2019, Canada made its long-awaited submission to the Commission on the Limits of the Continental Shelf (hereafter the Commission) pertaining to the Arctic Ocean.[2] While full submissions remain confidential, the coastal State must provide an executive summary of its submission, which includes charts and certain pertinent information, to the United Nations secretary-general, who is required to publicize it. Although this information is much more limited than the extensive data, charts, and analysis contained in a State's submission to the Commission, the executive summary provides sufficient information to identify the main features of the extended continental shelf (ECS) being delineated.

Canada, the Kingdom of Denmark together with Greenland, and the Russian Federation have now all made submissions to the Commission pertaining to the Arctic Ocean, but important unknowns remain. When will Canada's third Arctic neighbour, the United States, make a submission pertaining to the Arctic Ocean? Will the States Parties to the *United Nations Convention on the Law of the Sea* (UNCLOS) allow the Commission to accept a submission from the United States, if the latter continues to be a non-Party?[3] To what extent will the United States' ECS overlap with those of its Arctic neighbours? When will the Commission complete its reviews and issue its recommendations to the submitting States? What recommendations will the Commission make regarding each of the Arctic submissions? Will Greenland have attained full sovereignty by the time the Commission has reviewed the submissions pertaining to the Arctic Ocean and, if so, what effect will the change in

foreign policy leadership have on bilateral and multilateral negotiations?

While answers to these questions will not be available in the near future, there are important questions arising from the three submissions that warrant examination now:

1) To what extent do the submissions reinforce each other by providing similar assessments of the geology and morphology of the seabed of the Arctic Ocean, particularly as they pertain to the controversial issue of seafloor highs?
2) To what extent do the ECSs delineated in the Arctic Ocean by Denmark/Greenland and by the Russian Federation overlap with that of Canada?
3) What are the implications of the submissions for the international seabed (the seabed beyond national jurisdiction) that is designated the common heritage of humankind?
4) What is being done to ensure that the balance is respected between Article 76, which gives coastal States rights to develop seabed resources on their ECSs, and Article 82, which requires these States to make payments in compensation for resource exploitation on their ECSs?

The chapter begins with an overview of the international regime governing the continental shelf beyond 200 n.m. from shore. It then discusses former Prime Minister Stephen Harper's December 2013 announcement that Canada would not be filing a submission pertaining to the Arctic Ocean at that point as well as the aftermath of this decision. Thereafter the submission of Denmark/Greenland (2014),[4] the revised submission of the Russian Federation (2015),[5] and Canada's submission pertaining to the Arctic Ocean (2019) are introduced sequentially. As full submissions remain confidential, these discussions are based on the executive summaries, which are in the public domain.

In its respective submission, each country refers to the directions of the compass as one looks beyond its land territory towards the North Pole. For example, what Russia terms its eastern outer limit (beyond the Alpha Ridge and Mendeleev Rise) appears in what for Canada and Greenland is the western Arctic. To avoid confusion, this paper uses the directions appropriate when measuring out from the Canadian and Greenlandic landmasses; thus, the Alpha Ridge and Canada Basin are considered to be in the western Arctic.

This chapter explains how the submissions' findings are, for the most part, mutually reinforcing on the important issue of seafloor highs. There are extensive overlaps in the areas of ECS delineation of the three Arctic States that will necessitate maritime boundary delimitation, but these overlaps will be resolved peacefully and in accordance with international law. Extended continental shelves, as currently delineated, leave very little of the Arctic seabed outside of national jurisdiction, which has consequences for the common heritage of humankind. Accordingly, negotiations to clarify the Article 82 provisions are needed at the national and international levels. Although no resource development will take place on the Arctic ECSs in the foreseeable future, exploitation will soon be a reality off Canada's east coast; hence, a consistent, workable regime is needed.

The International Legal Regime

The international regime to delineate the outer limits of the continental shelf beyond 200 n.m. and the rights and responsibilities of coastal States in this area are specified in Part VI (Articles 76 to 85) and Annex II of UNCLOS. These provisions have been further clarified by the States Parties to UNCLOS and by the Commission.

UNCLOS gives the coastal State sovereignty over a 12-nautical mile territorial sea.[6] Beyond the territorial sea, the coastal State has an exclusive economic zone extending from the seaward edge of the territorial sea up to "200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[7] Within the exclusive economic zone, the coastal State exercises sovereign rights to explore, exploit, conserve, and manage the living and non-living resources in the water column and seabed.[8] Beyond 200 n.m. from shore (i.e., beyond the exclusive economic zone), a coastal State has an extension where the continental shelf extends as a natural prolongation of its land territory.[9] "Prolongation" means that there must be unbroken continuity from the land mass to the continental margin's outer edge.[10]

On its continental shelf, the coastal State has sovereign rights to explore and exploit "the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to seden-

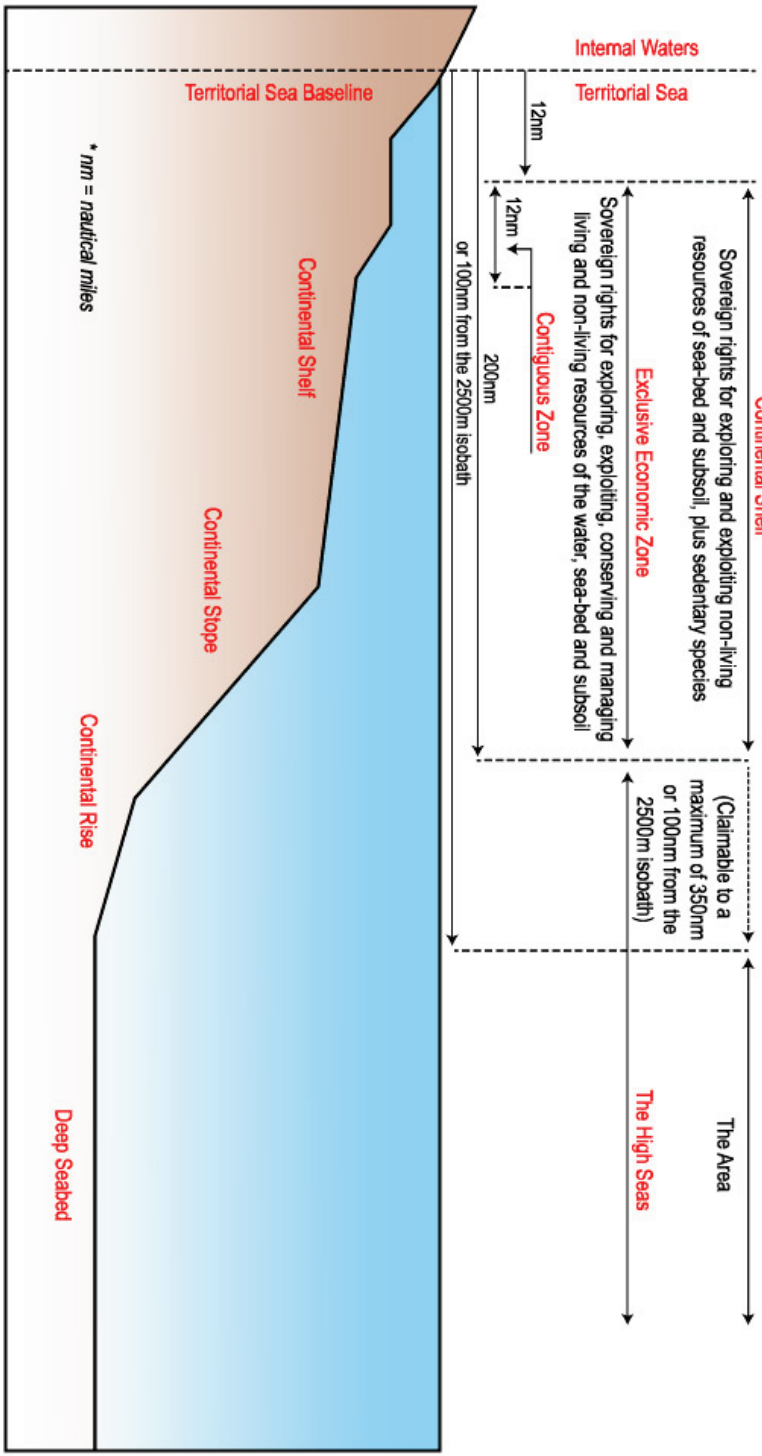

Figure 2-1: Maritime Zones. *Fisheries and Oceans Canada*

tary species."[11] The water column above the ECS is classified as "high seas," meaning that all States enjoy freedom of navigation and overflight, and the right to fish, conduct scientific research, construct artificial islands and other legal installations, and lay submarine cables and pipelines.[12]

Scientists and lawyers define the continental shelf quite differently. In scientific terms, the continental shelf makes up one part of the continental margin, which is a geological formation that includes the continental shelf, continental slope, and continental rise. In juridical (or legal) terms, the continental shelf is a submerged prolongation of a coastal State's land territory that can be narrower or wider than the continental margin or encompass all the latter. The term "continental shelf" is used in this article in accordance with its juridical definition.

Responsibility for defining its continental shelf rests with the coastal State, which must conduct scientific research to determine if its continental shelf extends beyond 200 n.m. and, if so, the limits of its outer edge in accordance with UNCLOS provisions. UNCLOS outlines both enabling criteria and constraints. The process of determining whether or not the natural prolongation of a coastal State's submerged land territory actually extends beyond 200 n.m. is called the test of appurtenance. For this purpose, a coastal State may use either the distance or the depth enabling formulae, both of which require the same first step: identifying the foot of the continental slope. As a general rule, the foot of the slope is the point of maximum change in gradient within the base of the slope. The base of the slope is where the lower slope merges with the continental rise or deep ocean floor where no rise exists.

Measuring from the foot of the continental slope, the coastal State may use either enabling formulae. The thickness criterion allows the coastal State to measure seawards from the foot of the slope until the sediment thickness is equal to one percent of the distance traveled;[13] thus one kilometre of sediment depth enables the coastal State to measure out 100 km (54 n.m.). The distance formula involves determining an outer limit point at a distance not exceeding 60 n.m. from the foot of the slope.[14]

If the above-mentioned enabling criteria show that the continental shelf extends beyond 200 n.m., it is then necessary to establish the outer limit. To limit unchecked incursions into the international seabed area

which (as discussed later in this chapter) is designated the common heritage of humankind, UNCLOS imposes constraints on the area of the continental shelf over which the sovereign rights of the coastal State apply. Again it provides coastal States with two options: the outer limits "shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured" or extend beyond "100 nautical miles from the 2,500 meter isobath."[15] A State may use combinations of the enabling and constraint criteria to maximize the area of its continental shelf. The process of precisely defining the outer limits of a country's ECS, in accordance with UNCLOS provisions, is called delineation. Delimitation refers to the process of establishing political boundaries when the maritime zones of two or more States overlap.

After gathering and analyzing the scientific data and relating the findings to the legal requirements of the ECS regime, the coastal State makes a submission to the Commission.[16] The international regime specifies a ten-year deadline from the date of ratification or accession for making submissions. Countries, such as the Russian Federation, that ratified or acceded to UNCLOS prior to 1999, had until 2009 to make their submissions, while States, such as Canada and Denmark, that became Parties after 1999, had ten years from the time of ratification or accession. Having ratified on 7 November 2003 and become a Party to UNCLOS on 7 December 2003, Canada's original deadline for presenting its documentation to the Commission was 6 December 2013; however, this requirement was amended before that date. By 2008, it was clear that many countries – particularly developing States – would have problems making their submission deadlines. Therefore, States Parties to UNCLOS agreed that countries could fulfill their obligations by filing preliminary information indicating that they intend to make a submission, the status of the preparatory work, and when they expect to submit.[17]

Along with its submission, the coastal State must provide the "charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf" to the UN secretary general, who makes this information public.[18] At least three months must elapse between the date the submission is received and the start of its review,[19] which gives other States time to examine the executive summary to determine if the area included in it overlaps with what they

consider to be their own ECSs. In the case of an overlap, the other country can register a dispute.

Commissioners review the coastal State's submission, assess whether the coastal State has appropriately applied the criteria prescribed in Article 76, evaluate the scientific evidence used by the coastal State in support of the delineation of the outer limits of its continental shelf, and make recommendations to the State regarding the establishment of the outer limits of its continental shelf. According to UNCLOS, "[t]he limits of the shelf established by a coastal State on the basis of these [the Commission's] recommendations shall be final and binding."[20] The Commission serves as the legitimator in the ECS delineation process:

> Where a coastal State and the Commission are generally in accord with the location of an outer limit this will provide great legitimacy to that boundary and make challenges of the boundary more difficult. A coastal State outer limit not in accord with Commission recommendations will be less legitimate and more open to challenge by other States or perhaps even the International Seabed Authority.[21]

Nonetheless, it is the coastal State – not the Commission – that establishes the outer limits of the continental shelf.

UNCLOS is clear that the coastal State does not have to exercise sovereignty over the continental shelf in order to enjoy its rights: "The Rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."[22] These rights are exclusive; if a coastal State does not explore or exploit the resources of its extended continental shelf, no other State may engage in such activities without the former's express consent.[23] Russia planting a flag on the Arctic seabed beneath the North Pole in August 2007 was a symbolic gesture that had no legal ramifications for any Arctic country. Delineating the outer limits of the continental shelf is not governed by the "use it or lose it" maxim.[24] A State's continental shelf either meets UNCLOS criteria for an ECS or it does not.

Prime Minister Stephen Harper's December 2013 Announcement

Until December 2013, Canada was expected to make a full and comprehensive submission pertaining to the extended continental shelves off its Atlantic and Arctic coasts.[25] It therefore came as a shock to Canada's UNCLOS team, neighbouring Arctic countries, and the

attentive public when on 4 December 2013, just two days before the submission was due in New York, Prime Minister Stephen Harper announced that Canada would only be making a partial submission to the Commission pertaining to the Atlantic ECS – rather than to both its Atlantic and Arctic ECS – and that more research was required so that Canada's Arctic ECS could be expanded to include the North Pole.[26] Two days after the announcement, Canada filed its partial submission, pertaining only to the Atlantic Ocean, and preliminary information for a future submission regarding the Arctic Ocean, with the Commission.[27]

Prior to Harper's 2013 announcement, Canada had enjoyed highly cooperative relations with its Arctic neighbours throughout the delineation process. In 2007, Canadian, Danish, and Russian scientists began holding annual meetings to discuss scientific and technical matters pertaining to the Arctic ECSs. By 2010, the meetings involved

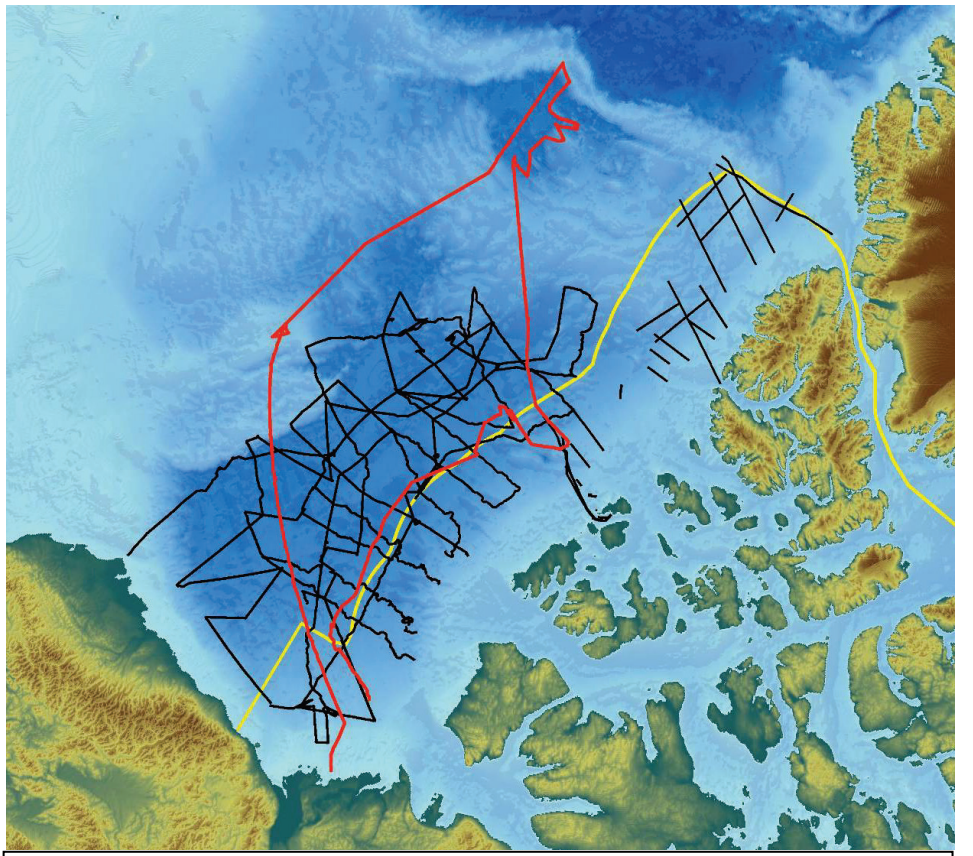

Figure 2-2: Data Collection in the Arctic Ocean, 2006-11. *Global Affairs Canada*

legal advisors as well as scientists from all five Arctic coastal States (Canada, Denmark, Norway, the Russian Federation and the United States).

The commitment to peaceful cooperation is not only evident in meetings but it was also formalized. In the 2008 *Ilulissat Declaration*, Canada, Denmark, Norway, the Russian Federation, and the United States recalled the extensive legal framework that applies to the Arctic Ocean, pledged to strengthen their existing close cooperation in the delineation of their respective Arctic ECSs, and committed themselves to the orderly settlement of any possible overlapping claims.[28]

The commitment to cooperate was also exemplified in practice. Canadian and Danish scientists conducted seven joint surveys (2006–09) in which they collected and analyzed data pertaining to the area north of Greenland and Ellesmere Island. Canadian and American scientists conducted four surveys together in the Canada Basin and Arctic Ocean (2008–11). Such collaborations resulted in numerous joint publications and joint presentations at scientific conferences. As commissioners review submitted information, having the data and analysis accepted by the international community in peer-reviewed scientific publications is strong evidence of their validity.

Accordingly, Harper's 2013 announcement "caught Canada's polar neighbours totally by surprise" and "triggered the immediate termination of co-operation with Russia and Denmark."[29] Denmark and Canada had reached an agreement that Canada would not delineate an area that included the North Pole.[30] Scientific data would allow Canada's ECS to stretch east of the Lomonosov Ridge and Denmark's ECS to extend west of the Lomonosov Ridge; however, the two countries agreed that Canada's submission would not extend east of the Lomonosov Ridge and Denmark's ECS would not extend west of the Lomonosov Ridge. The agreement was consistent with the pledges made by the two countries in the 2008 *Ilulissat Declaration*. Prior to December 2013, Denmark had collected the data in the North Pole area needed for its submission. Canadian scientists, who had been so conscientious in their decade-long research program, had not. Well before December 2013, Denmark had made clear its intention to include the North Pole in its submission.[31] Canada had not.

There is no doubt that the Prime Minister's decision to include the North Pole in Canada's ECS submission alienated the Danes. Once the

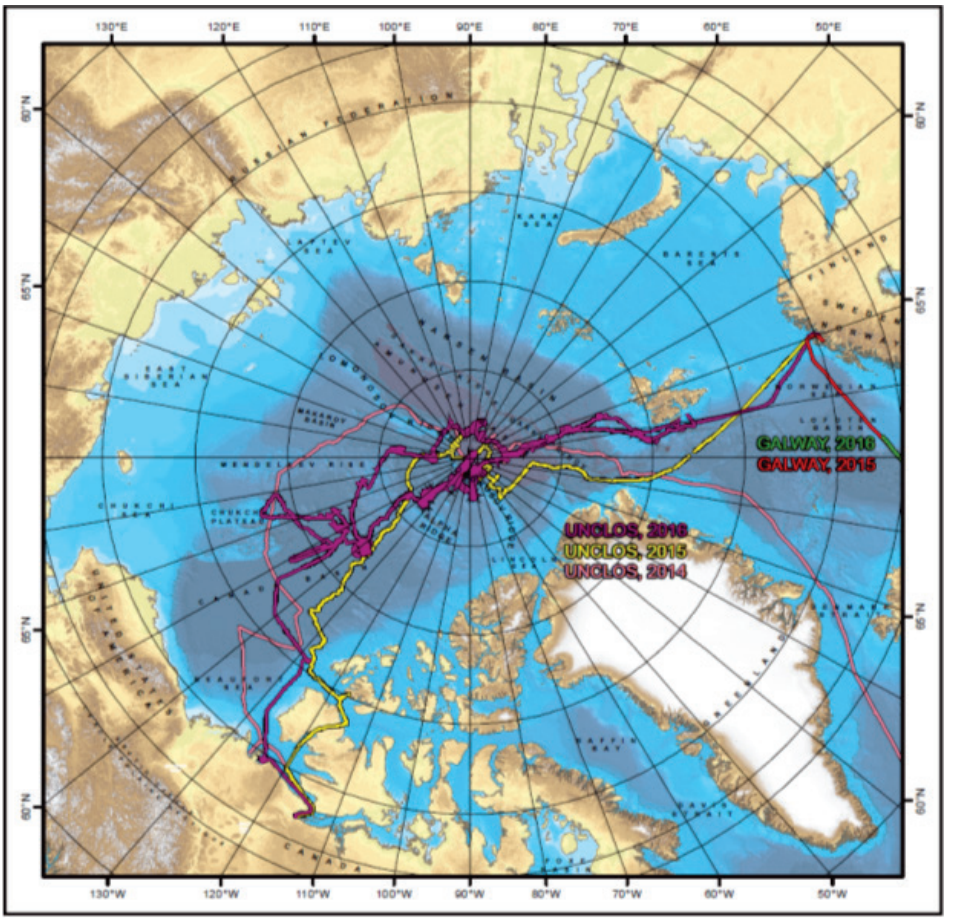

Figure 2-3: Canadian Arctic Ocean Surveys, 2014-16. *Global Affairs Canada*

Prime Minister had decided to include the North Pole in Canada's Arctic submission, Ottawa sought to buy mapping data pertaining to the area from Denmark; however, the Danes made clear that "the data were not for sale."[32] As such, Canada had to mount its own missions to survey the area in 2014, 2015, and 2016.

Denmark/Greenland's Submission

When Denmark made its own submission pertaining to the area north of Greenland, it included the North Pole, as expected; however, its proposed ECS area was over 150,000 square kilometres larger than originally anticipated.[33] The outer limits of its continental shelf were expected to stop at the equidistant line; however, the 895,000 square

kilometre[34] area includes the Lomonosov Ridge from the 200 n.m. exclusive economic zones north of Greenland and Ellesmere Island all the way to Russia's exclusive economic zone and westward to include portions of the Alpha Ridge. Applying the scientific criteria outlined in Article 76 makes this extensive delineation possible. The decision to include the larger area in its submission is said to have resulted from the coming together of two sets of political pressures.[35] Prior to December 2013, the Greenlandic and Danish governments had differing views on the size of area to be included in their joint submission, with the former advocating for a larger area and the latter in favour of restricting the area of their ECS in light of political considerations. Greenland's government pressured the Danish government to include a more extensive area than that foreseen in the agreement between Denmark and Canada, which was premised on a provisional delimitation based on an equidistance line. Canada's decision to include the North Pole contravened the agreement, causing Denmark to rethink its strategy and to defer to the Greenlandic preference, delineating all the way to Russia's exclusive economic zone and westwards onto the Alpha Ridge. Overlaps in the ECS areas of Canada, Denmark, and Russia were expected. The Danish/Greenlandic submission ensured they were larger than anticipated.

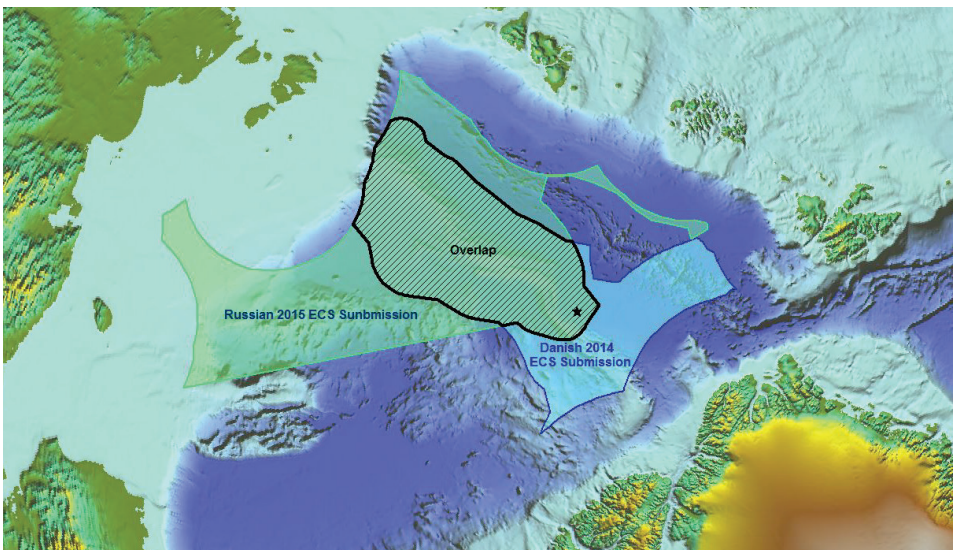

Figure 2-4: Danish 2014 and Russian 2015 ECS submissions. *Global Affairs Canada*

Russia's Submission

In spite of Canada's contravention of its bilateral agreement with Denmark, Denmark/Greenland's expansive submission, and tensions between the Russian Federation and the West over the Ukraine, Russia was remarkably restrained when it made its 2015 submission regarding the Arctic Ocean. It delineated an area slightly beyond the North Pole but stopped well short of its neighbours' exclusive economic zones.

On 20 December 2001, the Russian Federation had become the first country in the world to present its submission to the Commission.[36] Because the Commission found the Russian information pertaining to the Arctic Ocean insufficient to support its proposed outer limit of its continental shelf, Russian scientists conducted "a wide range of geological and geophysical studies" in the area between 2005 and 2014 and presented a revised submission on 3 August 2015.[37] Russia's Partial Revised Submission delineates 1,191,347 square kilometres in the Arctic Ocean.[38]

Submissions are generally reviewed in the order in which they are received by the Commission.[39] As Russia's 2015 submission was a revised version of part of its 2001 submission, the former went to the head of the queue.[40] In August 2016, a subcommission began its review of Russia's 2015 submission, which is still in progress.

Canada's Submission

On 23 May 2019, after 10 years of scientific surveying in the toughest ice conditions in the Arctic and years of data analysis, Canada filed its 2,100 page submission regarding its ECS in the Arctic Ocean. Like Denmark, Canada delineated an ECS that was considerably larger than envisaged prior to 2013. In 2008 Canada's Arctic ECS was estimated to be 750,000 square kilometres,[41] whereas the 2015 submission delineated an area of 1.2 million square kilometres that includes the North Pole.[42] It stretches from the outer limits of the exclusive economic zones of Greenland, Canada, and the United States towards Russia, stopping about two-thirds of the distance to Russia's EEZ. It extends eastwards about halfway between the Lomonosov and Gakkel Ridges and westward beyond Alpha Ridge towards the Chukchi Borderlands.

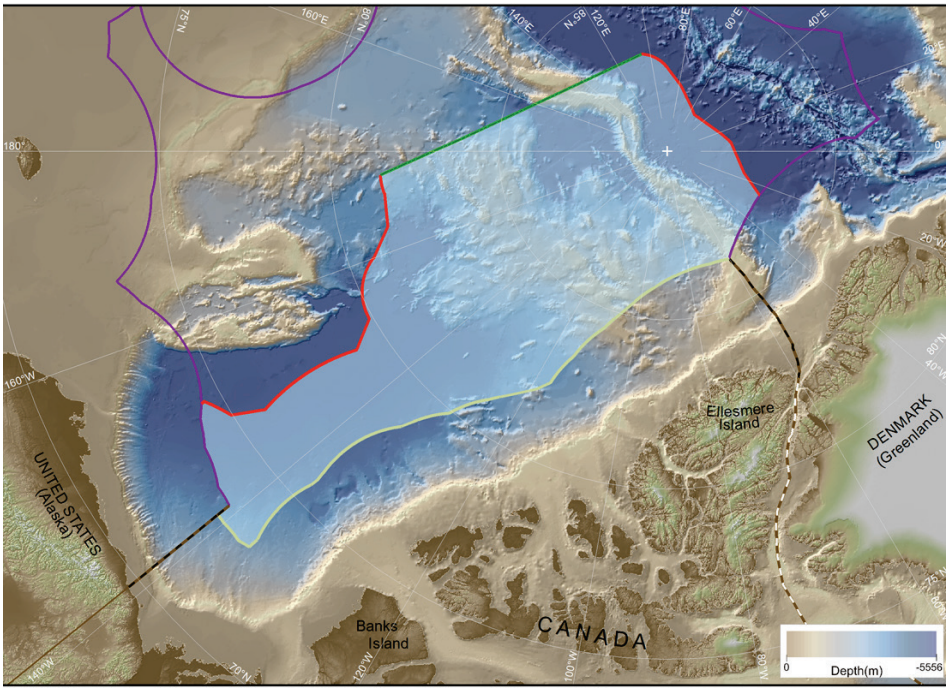

Figure 2-5: Canada's 2019 Arctic ECS submission. *Global Affairs Canada*

Canada's executive summary provides considerably less information and specificity than does that of the Russian Federation and, to a lesser extent, that of Denmark/Greenland. A possible explanation for this brevity is that, after their experience in December 2013, Canadian public servants were determined to get full cabinet approval of the executive summary well before the 2019 Arctic submission was filed. Getting cabinet approval before the fall 2019 election, and the possible change of government, may have influenced the timing of the submission. To allow adequate time to secure the approval, so that the submission could be filed in the spring of 2019, the executive summary may have been written and submitted to cabinet before the precise outer limits of the ECS had been determined and, once approved, no additional information could be added to the executive summary.

Assessing the Implications of the Three Submissions

Now that the three Arctic neighbours have filed their submissions pertaining to the Arctic Ocean, we have a basis for addressing several important questions:

1) To what extent do the submissions reinforce each other by providing similar assessments of the geology and morphology of the seabed of the Arctic Ocean, particularly as they pertain to the controversial issue of seafloor highs?
2) To what extent do the ECSs delineated by Denmark/Greenland and the Russian Federation in the Arctic Ocean overlap with that of Canada and what do the overlaps mean for maritime boundary delimitation?
3) What are the implications of the submissions for the international seabed (the seabed beyond national jurisdiction) that is designated the common heritage of humankind?
4) What is being done to ensure that the balance between Article 76 and Article 82 is respected?

To What Extent Do the Submissions Reinforce Each Other?

If Arctic States present similar understandings of the geology and morphology of areas of mutual interest, each country's case will be stronger. As Russia's 2015 submission will be reviewed long before those of Denmark/Greenland and Canada, the commissioners' assessment of Russia's data and analysis will establish important precedents for the subsequent reviews. The littoral Arctic States have spent more time and resources collecting and analyzing data pertaining to the seabed of the Arctic Ocean than any other countries; hence, reaching similar conclusions helps to legitimize the findings they present to the Commission. In addition, the Commission's task will be easier if there is consistency in the data and analyses submitted.

The Arctic features of greatest importance in the delineation of Canada's ECS are the Lomonosov and Alpha Ridges. In their executive summaries, Canada, Denmark/Greenland and the Russian Federation all agree that the Lomonosov and Alpha Ridges are seafloor highs, the classification of which is one of the most contentious issues in the ECS regime. Article 76 of UNCLOS mentions three types of seafloor highs: oceanic ridges of the deep ocean floor, submarine ridges, and submarine elevations.[43] As Ron Macnab points out, the terms are not defined in either UNCLOS or the *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, which relegate sea floor highs to the role similar to that played by wild cards in a poker game and leaves the coastal State facing much uncertainty: a "coastal state might base its

entire argument on the understanding that a particular ridge or elevation formed an integral part of its continental margin, only to have the CLCS [Commission] disallow that interpretation and thereby force a costly and time-consuming reassessment."[44] The Commission shies away from concrete definitions, instead advising that ridges must "be examined on a case-by-case basis."[45] When the State and the Commission have differing interpretations of whether a feature qualifies as a ridge or a submarine elevation, Article 76 and Annex II of UNCLOS appear to give preference to the Commission's position.[46]

Oceanic ridges of the deep ocean floor lack geomorphological continuity with the land territory (i.e., their origin, evolution and configuration differs from that found on land). As such, they cannot be considered part of the continental margin.[47] Submarine ridges and submarine elevations have geomorphological continuity with a State's land territory; hence, they are considered submerged natural prolongations of the landmass and may be used to build a case for an ECS. In the case of submarine ridges, "the outer limit of the continental shelf shall not exceed 350 n.m. from the baselines from which the

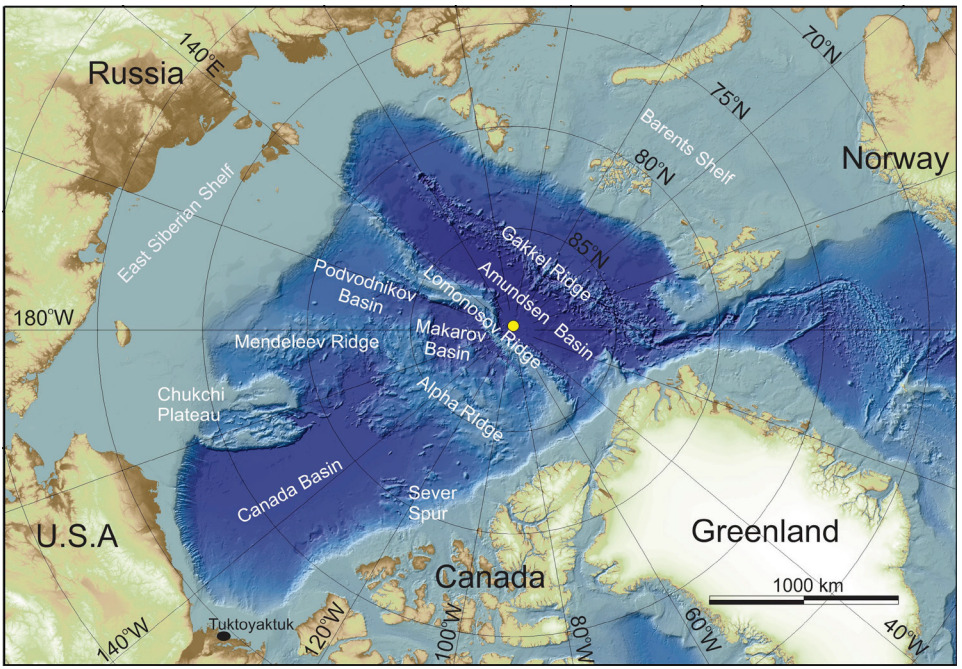

Figure 2-6: Arctic submarine elevations. *David Mosher*

breadth of the territorial sea is measured."[48] Submarine elevations have not only morphological continuity but also geological continuity with the land territory. As such, they confer greater legal entitlement, allowing the coastal State to use either of the constraint formulae: 350 n.m. from the baselines or 100 n.m. from the 2,500 meter isobath.

While the legal entitlements are clear, neither UNCLOS nor the Commission's *Scientific and Technical Guidelines* provide definitions for the seafloor highs or distinctions based on crustal types, without which it is hard to distinguish submarine ridges from submarine elevations.[49] The Commission accords importance to the processes by which continental margins form and continents evolve.[50] From all points of view, distinguishing among oceanic ridges, submarine ridges, and submarine elevations is a complex process.

There is consensus that the Lomonosov Ridge, which stretches "almost 1,800 km across the entire Arctic Ocean from the Lincoln Shelf to the East Siberian Shelf,"[51] is a submarine elevation, on the grounds that it is geologically and morphologically continuous with their respective landmasses and thus it is a natural component of their continental margins.[52] This classification enables all three countries to use either of the constraint formulae. The 2,500 isobath runs along the ridge, enabling the coastal States to measure out 100 n.m. which takes them well beyond 350 n.m. from their respective baselines. The North Pole is over 350 n.m. from the respective baselines of all three countries, so classification of the Lomonosov Ridges as a submarine elevation is critical in order to justify a delineation that includes the North Pole.

The Alpha Ridge is a large igneous province (volcanic plateau).[53] Canada and Russia agree that the Alpha Ridge is a submarine elevation,[54] a classification that allows the coastal State maximum entitlement. Denmark/Greenland consider the Alpha Ridge to be a submarine ridge, describing it as being "morphologically continuous with the landmass of Greenland," and an integral part of Greenland's northern continental margin, but conclude that, at the time of their submission, they had insufficient data to classify it as a submarine elevation.[55] Although the lack of complete consensus on the classification of the Alpha Ridge somewhat weakens the positions of all three countries, several factors militate in favour of the Canadian and Russian positions. Denmark based its stance on data already in the public domain, while Canada and Russia conducted their own research

in the area. Canadian scientists demonstrated that the volcanic material of the Alpha Ridge matches that of Axel Heiberg and Ellesmere Islands and that the Alpha Ridge was once above the water (a volcanic island which later eroded); hence it was not part of the ocean seabed. It is volcanic rock intruded into and on top of continental crust – not oceanic crust. Having two out of three States in agreement strengthens the argument that the Alpha Ridge is a submarine elevation. Furthermore, Denmark did not disagree with this classification; it merely offered no opinion on it. Most importantly, according to Yevgeny Kisselyov, head of the Russian agency in charge of natural resources exploitation, the subcommission reviewing Russia's submission has accepted Russia's arguments pertaining to the geological continuity between the country's landmass, on one hand, and the Alpha and Lomonosov Ridges and Mendeleev Rise, on the other.[56] This news clearly benefits all three Arctic States.

To What Extent do the ECSs Overlap?

In their submissions pertaining to the Arctic Ocean, Canada, Denmark/Greenland, and Russia all note the presence of overlaps with adjacent or opposite States. A comparison of the maps included in their respective executive summaries reveals large areas of overlap. Canada, Denmark/Greenland, and the Russian Federation all delineate substantial parts of the Lomonosov Ridge and the Amundsen Basin, including the area around the North Pole. Maritime boundary delimitation will be required between Denmark and Russia pertaining to the Lomonosov and Alpha Ridges and the Amundsen, Makarov and Podvodnikov Basins; between Canada and Russia regarding the Lomonosov and Alpha Ridges and the Amundsen and Makarov Basins; and between Canada and Denmark concerning the Lomonosov and Alpha Ridges and the Amundsen and Makarov Basins. The overlaps are extensive, but identifying overlaps is not the same as saying that there is a dispute, conflict, or the threat of violence. There are no maritime boundary disputes over Arctic ECSs. There is a legal regime in place and its rules are being observed by all States involved.

The Commission is a scientific body responsible for providing recommendations pertaining to the outer limits of the continental shelf. It was never intended to be a court of law and it has no mandate to re-

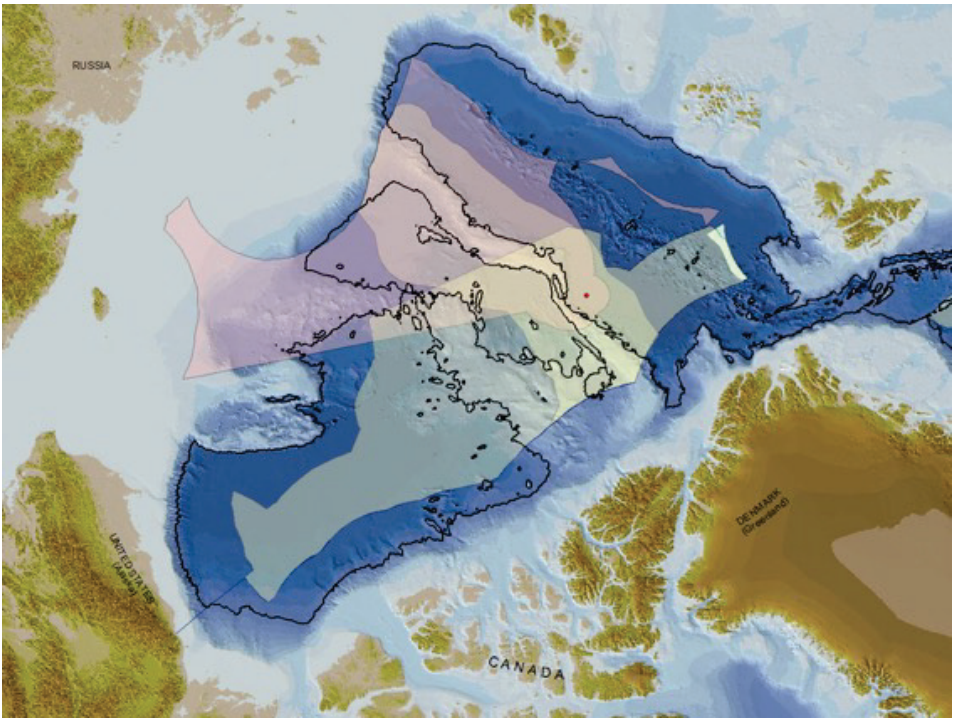

Figure 2-7: Areas of overlap in the Canadian, Russian, and Greenland/Denmark continental shelf submissions. *David Mosher*

solve overlapping maritime boundaries.[57] Submissions to the Commission "are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."[58] When making a submission, the coastal State is required to inform the Commission of any outstanding maritime boundary disputes pertaining to the ECS area it has delineated.[59] Responsibility for resolving overlapping ECS areas rests with the States involved, which can use a variety of mechanisms including bilateral negotiations, multilateral negotiations, arbitration, mediation, and taking a case to the International Tribunal for the Law of the Sea or to the International Court of Justice (ICJ).[60]

The Commission does not review a submission involving one or more boundary disputes unless all the States directly involved in the dispute give their prior consent.[61] When making their submissions in 2014, 2015, and 2019, respectively, Denmark/Greenland, Russia, and Canada secured bilateral assurances from their neighbours, in which the

latter acknowledged the existence of overlaps and stated that they did not object to the reviews going ahead, while, at the same time, declaring that the Commission's recommendations would not prejudice either the delineation or the delimitation of their own ECSs.[62] The diplomatic notes and assurances are consistent with the cooperation pledged by the Arctic coastal States in the *Ilulissat Declaration* and allow the Commission to proceed with the reviews. When the full Commission first meets to consider a submission, it not only hears the oral presentation by officials from the submitting State but also considers information pertaining to any maritime boundary issues and overlapping submissions, including *notes verbales* received from neighbouring coastal States.[63] This information is a key determinant of whether the review goes ahead.[64]

Several factors facilitate delimitation in this case. Russia and Canada both chose not to delineate to the other's exclusive economic zone. The criteria in UNCLOS would allow Denmark/Greenland, the Russian Federation, and Canada all to delineate from their exclusive economic zones across the Arctic Ocean to the exclusive economic zones of their neighbours, but only Denmark did. In light of Denmark/Greenland delineating to Russia's exclusive economic zone, Putin's reputation for bullying and aggressive tactics in the Ukraine, and domestic pressure within Russia, it would not have been surprising if Russia had delineated all the way to the exclusive economic zones of Canada and Greenland. Russia, however, chose not to do so.

Since Canada considers the Lomonosov Ridge to be a natural component of Canada's continental margin,[65] it could also have delineated its ECS to Russia's exclusive economic zone, as done by Denmark/Greenland. Instead Canadian officials ceased delineation at a point where they had no further scientific information and little likelihood of delimitation. Their points furthest towards the Siberian Shelf were measured 100 n.m. from the 2,500 isobath of the Alpha Ridge on the Amerasia side of the Arctic Ocean and of the Lomonosov Ridge on the Eurasia side. An arbitrary line that represents the limit of their delineation connects the two points. The northern line runs through the "Cooperation Gap," which is located between the Alpha Ridge and Mendeleev Rise, and is the maximum extent of Canada's delineation – NOT the maximum extent of Canada's entitlement. There are clear benefits to using this strategy. It allowed Canada to rely on its own

scientific data and analysis. Furthermore, it is a reasonable boundary. Making a huge claim in what would clearly fall on the Russian side of an equidistance line would likely result in embarrassment for the country and its government down the road when the latter had to cede large areas in delimitation negotiations. Canada's northern line is a practical solution.[66] The Canadian and Russian decisions to limit their ECSs for political reasons mean that the area of overlap is considerably smaller than could otherwise have been the case.

A second factor facilitating delimitation is that when Russia delineated its ECS, it deferred to its 1990 agreement between the United States and the Soviet Union delimiting their respective territorial seas and exclusive economic zones in the Bering and Chukchi Seas as well as in parts of the Arctic Ocean.[67] This agreement establishes a maritime boundary that extends "along the 168° 58′ 37″ W. meridian through the Bering Strait and Chukchi Sea into the Arctic Ocean as far as permitted under international law."[68] "International law" includes UNCLOS norms pertaining to "sovereignty, sovereign rights or jurisdiction with respect to the waters or seabed and subsoil."[69] The agreement was ratified by the United States but not by the Soviet Union, which collapsed shortly after the agreement was negotiated; hence, it is not a treaty in force. Nonetheless, Russia abided by its provisions in delineating its ECS and used the "sector" line to which the United States and the Soviet Union agreed in 1990 (rather than scientific evidence) north of the Bering Strait to set its outer limit in Russia's eastern Arctic Ocean.[70]

Russia's deference to the sector line is conducive to delimitation in several regards. It respects a boundary previously agreed upon with the United States, and it results in a smaller area of overlap with Canada's ECS than would otherwise have been the case. Russia's submission is practical and reasonable, which makes it easier for its Arctic neighbours to compartmentalize Russia's foreign policy, viewing it as cooperative regarding the ECS regime while remaining critical of its behaviour regarding the Ukraine.

A third factor facilitating delimitation was the decision by Canada and Denmark to resolve other outstanding maritime boundaries. In May 2018, Canada and Denmark established a Joint Task Force on Boundary Issues to address outstanding boundary issues in three areas: Hans Island, the Labrador Sea, and the Lincoln Sea.[71] The ownership of Hans

Island has no implications for ECS delineation or delimitation. In 1973 the two countries ratified a treaty delimiting the continental shelf within 200 n.m. between Greenland and Canada in the Labrador Sea.[72] The agreement was negotiated before the United Nations Third Conference on the Law of the Sea began; hence before the provisions for a twelve-nautical mile territorial sea and the exclusive economic zone were negotiated. Although revisions have been made to the 1974 agreement,[73] a more comprehensive, legally-binding maritime boundary treaty is needed to delimit ECSs in the Labrador Sea. Regarding the Lincoln Sea, Denmark and Canada signed a non-legally binding agreement in 2012 pertaining to maritime boundaries north of Ellesmere Island and Greenland to the outer limits of the exclusive economic zones;[74] however, a legal treaty is needed to finalize maritime boundaries in this area.

The work of the Joint Canada-Denmark Task Force on Maritime Boundary Delimitation is important to the future delimitation of Arctic ECSs on several scores. The legal principles it employs may establish precedents for delimiting ECSs in the Arctic Ocean. The collaboration should help to rebuild relations between Canada and Denmark that were damaged by the 2013 decision to include the North Pole in Canada's Arctic submission – a decision that violated their previous agreement. Re-establishing cooperative patterns of maritime boundary delimitation is important. Finally, the task force is mandated to settle three long-standing issues, thus leaving only the delimitation of ECSs in the Arctic Ocean to be resolved. Having four maritime boundaries to establish concurrently would be challenging.

UNCLOS requires States to seek "equitable solutions" in cases where their continental shelves overlap.[75] In international jurisprudence, there is an increasing trend towards the use of the equidistance/relevant circumstances method of delimiting maritime boundaries between neighbouring countries with overlapping maritime zones.[76] As international legal experts Ted McDorman and Clive Schofield point out, a three-step approach has become customary law as the result of numerous international adjudications of maritime boundary disputes.[77] First, a provisional equidistance line is drawn. Second, the provisional line is examined in light of relevant case-specific circumstances to determine if the line needs to be adjusted to ensure an equitable outcome. Third, a test of equitability is applied to ensure that the

delimitation line defined using the first two criteria does not yield inequitable results.[78] In 2009, the ICJ clearly outlined the three step approach,[79] and it has been applied in subsequent maritime boundary delineation cases before that court and the International Tribunal for the Law of the Sea.

While arbitration is an option, the Arctic neighbours are likely to engage in bilateral negotiations, which enable them to retain control of the process and to keep the details of their submissions confidential. Although equidistance/relevant circumstances have been used in recent legal cases, UNCLOS does not mandate their use in delimitation. From an examination of the equidistance lines between the land territories of Canada, Greenland and the Russian Federation,[80] it is reasonable to expect that Denmark/Greenland will advocate the use of equidistance lines, which put the seabed at the North Pole clearly within Greenland's ECS. In contrast, Canada and Russia may want to bring in other factors to argue that their respective ECSs extend beyond the equidistance lines to include the North Pole. There are grounds for arguing that the ECS is not like other maritime zones. First, in contrast to the territorial sea and exclusive economic zone, the "rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."[81] Second, the other maritime zones are defined in terms of distance measurements, whereas the ECS relies on geology and morphology.

Past experience has shown that resolving maritime boundary disputes can be difficult and protracted. In the 1970s, Canadian and US negotiators worked for years to reach an agreement on fishing rights in the Gulf of Maine, only to have the settlement rejected in the US Senate. The maritime boundary dispute was then referred to the ICJ, which deliberated for a further three years before issuing its judgment in 1984.[82] The Canada-United States boundary dispute in the Beaufort Sea has dragged on for years and it is an irritant in bilateral relations.[83] These examples indicate that resolving disputes over maritime boundaries can be difficult and time consuming; however, political and legal channels have been used in the past and they will be used in the future, as evidenced by the 2010 agreement between the Russian Federation and Norway that ended their bitter 40-year maritime boundary dispute in the Barents Sea.[84] Their agreement serves as an encouraging example of maritime boundary dispute settlement,

involving interests important to both Parties (petroleum resources and fish) and a significant power imbalance between the two countries. Neither the Soviet Union nor the Russian Federation that succeeded it resorted to their vastly superior military might to take control of the area. Instead, the slow process of negotiation ultimately resulted in pacific settlement.

Delimitation in the western Arctic will need to involve the United States as well as the three States discussed in this chapter. The Arctic littoral States may wait until the Commission has issued recommendations on each of their respective submissions before finalizing the borders between their ECSs, although there is no legal requirement to defer the delimitation process. In the 2012 *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh/Myanmar), Myanmar challenged the jurisdiction of the International Tribunal for the Law of the Sea to delimit beyond 200 n.m. before the outer limits of the ECSs had been established on the basis of the Commission's recommendations.[85] The Tribunal ruled that the delimitation process, as outlined in UNCLOS, does not have to be completed before the adjudication of maritime boundaries beyond 200 n.m. takes place. It concluded that it not only had jurisdiction but that it also had a responsibility under UNCLOS to rule on the delimitation of the Parties' continental shelves beyond 200 n.m. in the Bay of Bengal. A caveat was added, noting that such "delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention."[86] In 2017 the International Tribunal for the Law of the Sea ruled in the *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean*, although the Commission has not yet issued its recommendations pertaining to the Côte d'Ivoire's submission.

Thus, there are precedents for maritime boundary delimitation occurring before the Commission issues its recommendations. At the same time, delimitation is not a prerequisite for a coastal State exercising its rights on the ECS. In the *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean*, the International Tribunal for the Law of the Sea ruled

> that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an

> international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.[87]

In short, international law accords coastal States considerable flexibility in the timing of delimitation.

Settling the overlaps amicably is clearly in everyone's best interest as well as being consistent with the pledges made in the 2008 *Ilulissat Declaration*. Legal experts and scientists from all five Arctic coastal States continue to meet to discuss ECS matters. While the overlaps in the ECSs delineated in the Arctic Ocean are considerable, they will be resolved peacefully and in accordance with international law.

What are the Implications of the Submissions for the International Seabed and the Common Heritage of Humankind?

The provisions in UNCLOS pertaining to the ECS represent a compromise, agreed to at the Third United Nations Conference on the Law of the Sea, between States whose continental shelves extend beyond 200 n.m. as natural prolongations of their land territories and countries, particularly the members of the Group of 77, which wanted the international seabed to be as large as possible because its resources are to be developed to benefit humanity as a whole, giving special consideration to the needs and interests of Southern countries.[88] The international seabed ("the Area") refers to "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[89] and its resources are designated the common heritage of humankind. The filing of Canada's Arctic submission, along with the previous submissions of Denmark/Greenland and the Russian Federation, prompt the question: do any parts of the Arctic Ocean remain beyond national jurisdiction? Does the Area exist in the Arctic?

The Arctic Ocean, like the Mediterranean Sea, is almost entirely surrounded by land belonging to States. The ECSs delineated by the three countries in the eastern Arctic leave only about 153,000 square kilometres of the Gakkel Ridge outside national jurisdiction. The extent to which the Area exists in the Canada Basin will not be known until the United States files its submission. Furthermore, the Commission may not agree with the scientific reasoning behind all the delineations, and the final ECS of each State will be established on the basis of the

Commission's recommendations. Yet if the full Commission concurs with the subcommission reviewing Russia's submission and thereby accepts Russia's arguments that the seafloor highs are submarine elevations, there will be little seabed beyond national jurisdiction left for the common heritage of humankind in the Arctic Ocean.[90] While the UNCLOS ECS provisions are highly beneficial for coastal States with wide continental shelves, their gains have been at the expense of what would otherwise have been the common heritage of humankind. This fact makes it all the more important to address our final question.

What is being Done to Ensure that the Balance between Article 76 and Article 82 is Respected?

In recognition of the fact that ECSs reduce the area otherwise considered the common heritage of humankind, Article 82 requires coastal States to make monetary payments or contributions in kind related to the exploitation of nonliving seabed resources beyond 200 n.m. The Group of 77 would not have accepted Article 76, which gives coastal States rights to develop seabed resources on their ECSs, without Article 82, which requires ECS States to make payments in compensation for resource exploitation beyond 200 n.m. Together the articles balance rights and responsibilities. Under Article 82, the obligation to make payments or contributions in kind begins in the sixth year of production at a rate of one percent of the value or volume of production from a site. From the seventh to the twelfth year, the rate increases by one percent annually and, thereafter, it remains at seven percent. The monetary payments or contributions in kind are made through the International Seabed Authority, which distributes them "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them."[91] Consistent with the desire to assist developing countries, a Southern country is exempt from making payments or contributions in kind regarding a mineral produced on its ECS when it is a net importer of that particular commodity.

The provisions in Article 82 are imprecise, leaving many important questions unanswered.[92] How will payments and contributions in kind be calculated? The coastal State must make payments or contributions of one to seven percent after the sixth year of production, but one to seven percent of what? How is value to be assessed, especially for mining

operations? Does the term refer to the gross or the net value of production? How is volume of production to be measured? Who will determine the value or volume of production? Both value and volume fluctuate according to market conditions, economies of scale in production, and technological innovation. Will the payments be recalculated each year to take price fluctuations into account, as well as changes in other relevant factors? If a coastal State chooses to base the payments on value, must it continue to use this basis of assessment or can it switch in subsequent years to calculations predicated on volume? Can an ECS State select the type of payments to be paid (i.e., monetary payments or contributions in kind) on an annual basis or must it choose one form and stick with it? Payments are due annually, but does this mean on the basis of a calendar year or a government's budgetary year? What currencies may be used to make payments? What period of time may elapse between setting the amount of the payment or contribution in kind and its delivery?

The provision to allow contributions in kind was included to provide State beneficiaries with access to resources; however, it is fraught with uncertainties.[93] At what point will the share of resources be transferred to the recipient? Will the payments in kind be given directly to the recipient country or will the resources first be sold and the cash generated passed on to the beneficiary? Who will handle the logistics and pay the costs of transporting, storing and marketing the resources being transferred? Who will set the market price, which can vary from region to region? In light of all the complexity and problems associated with contributions in kind, experts at an international workshop on the subject recommended that ECS States fulfill their legal obligations by making monetary payments rather than transferring natural resources.[94]

While extracting resources from the seabed is always challenging and potentially hazardous, the difficulties and risks are much greater in the Arctic as a result of harsh climatic conditions; short seasons; geographic remoteness; huge exploration, exploitation, transportation, and insurance costs; inadequate infrastructures; and the fragility of the environment. Will Article 82's one-size-fits-all approach to ECS development work in the Arctic? Will the initial five-year period of grace, during which no payments or contributions are made, be sufficient to allow operators to recover exploration and start-up costs?

The drafters of UNCLOS were thinking of exploitation in open waters rather than in ice covered regions.

Article 82 not only imposes obligations on ECS States but it also puts demands on the International Seabed Authority and adds yet another level of complexity to their relationship. What administrative procedures are needed to ensure consistency, efficiency, transparency, predictability, and convenience? How are States expected to notify the International Seabed Authority that production has been started, suspended, or terminated? What rules and procedures are necessary to ensure that the distribution is indeed equitable? How will disputes between the International Seabed Authority and ECS States be handled? Are there also security considerations? What balance should be struck between the International Seabed Authority's need for details about a production site and the coastal State's need to protect politically, economically, and commercially sensitive information? How will the International Seabed Authority treat confidential information?

While oil, gas and mineral development on the Arctic ECSs will not be economically viable in the foreseeable future, such is not the case in more southerly waters including those off Canada's east coast. The Bay du Nord and Baccalieu discoveries in the Flemish Pass are approximately 300 n.m. from shore and together they are estimated to contain 300 million barrels of recoverable oil reserves.[95] Equinor Canada (formerly Statoil Canada) and Husky Oil Operations have already invested $6.8 billion in the project to develop these resources and production is expected to begin in 2025.[96] Thus there is a pressing need to address the ambiguities in Article 82. Sadly little has been done, either at the international level by the States Parties to UNCLOS or domestically by the Canadian government, to facilitate the implementation of Article 82. The States Parties, for their parts, have not clarified the ambiguities, and the prospects of progress on this issue are not encouraging. Article 82 was not even mentioned in the provisional agenda for the June 2019 meeting of the States Parties to the Law of the Sea Convention or in the reports of their January 2019 and June 2018 meetings.[97]

Canada may become the first country in the world required to make payments worth millions of dollars to the International Seabed Authority, yet the Canadian government has made little progress in establishing a domestic regime to manage its ECSs; hence, it is ill-

prepared to fulfill its legal obligation pertaining to Article 82.[98] In addition to all the problems inherent in Article 82 (discussed above), which apply to all Arctic coastal States, Canada faces its own unique challenges. Its federated political system adds another set of considerations to an already complicated scenario.[99] Arctic governance involves diverse sets of actors, including the national government, territorial governments, and aboriginal land claims bodies, all of which have rights and responsibilities pertaining to natural resources. Furthermore, their respective sets of responsibilities are evolving. A process of devolution, whereby the control and administration of lands and resources is being transferred from the federal government to territorial and aboriginal governments, has been under way for decades in Canada's Arctic. The degree to which devolution has taken place and the specific forms it takes vary from territory to territory, as each negotiates separately with the federal government.[100] At present, Arctic offshore resources remain largely under federal jurisdiction. The question is: where will Canada be in the devolution process by the time commercial production is into its sixth year of operation? Who will benefit from this production and who will make the payments or contributions? Will the federal government, which is responsible for upholding the country's obligations under international law, pay, or will it pass on some – or all – of the costs to other entities such as the territorial government(s), aboriginal governance bodies, private corporations engaged in resource extraction on the ECS, or some combination of these other actors? Inuit Circumpolar Council (Canada) commended the Canadian government for defending Inuit sovereignty by filing the Arctic ECS submission.[101] Nonetheless Indigenous people expect to participate fully in the establishment of a regime to manage Canada's ECS resources, to be involved in its implementation, and to benefit from any resource development.[102]

Since resource development on Canada's Arctic ECS will not occur for decades, it is extremely difficult – if not impossible – to address questions whose answers depend on having precise, detailed information about exploration and exploitation. This situation encourages the deferral of decision making until commercial production actually begins in the Arctic Ocean; however, the Canadian government cannot afford to delay establishing positions pertaining to Article 82 since resource exploitation is about to begin on its Atlantic ECS. The

1987 *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* provides for joint federal-provincial management of offshore resources but gives the government of Newfoundland and Labrador responsibility for negotiating and implementing royalty agreements. Royalties go to the province as part of the national equalization program, rather than to the federal government, although the latter bears the legal responsibility for implementing Article 82.[103] The Flemish Pass area is regulated by the Canada-Newfoundland and Labrador Offshore Petroleum Board, and the government of Newfoundland will have a ten percent equity interest in the Bay du Nord project.[104] Yet the issue of who should pay remains contentious.[105] If the private sector pays the royalties, production may not be viable, but having the federal or provincial governments foot the bill, jointly or individually, could well be seen as a subsidy of over $100 million to big oil companies. Canada has no legislative structure "to establish the meaning of 'total production,' or any mechanism in existing licenses by which Canada can recover payments from licensees."[106] Until 2013, the government did not provide official notice of the Article 82 obligations to companies applying for licenses to explore beyond 200 n.m.[107]

Is it necessary and/or desirable to have the same rules, regulations, and procedures governing the Atlantic and the Arctic ECSs? What agreements will the federal government, territorial governments and Indigenous governance bodies negotiate to govern exploration and exploitation on the Arctic ECS and revenue sharing from the resulting production? Are decisions about who pays irreversible or can they be altered as circumstances pertaining to a site change?

The issue of consistency again arises in the context of production from areas governed by different regimes. Should Canada seek to ensure that the payment and contribution arrangements it makes through the International Seabed Authority pertaining to the ECS are consistent with those it has established in its exclusive economic zone, so that commercial production within 200 n.m. is not privileged over that from the ECS? What happens when a Canadian resource project straddles the exclusive economic zone and ECS? Canadian ECS sites that overlap with the exclusive economic zones or ECSs of other countries or the international seabed raise further challenging questions. Should Canada and its Arctic neighbours adopt common methods for calculating the payments and contributions?

There is no doubt that the Canadian government has been lax in addressing the issues arising from Article 82, but they can no longer be ignored: a domestic regime for the implementation of Article 82 is needed. As is so often the case with implementing international treaty obligations, the devil is in the details and how the UNCLOS provisions are interpreted domestically and in international venues will have serious implications for the development of Canada's resources beyond 200 n.m. and for all the stakeholders in this process.

Conclusion

Contrary to the fear-mongering that is all too common in media stories, depicting Arctic countries engaged in a highly competitive scramble to stake claims to resources beyond 200 n.m. from shore,[108] the delineation of Arctic ECSs has overall involved high levels of bilateral and multilateral cooperation. This bodes well for ECS delimitation. The recent commitment on the parts of Canada and Denmark to tackle long-standing maritime boundaries issues is a further cause for optimism. While the overlaps in ECSs delineated in the Arctic Ocean are sizeable, they will be resolved peacefully and in accordance with international law. The facts that Canada, Russia, and Denmark/Greenland agree that the Lomonosov Ridge is a submarine elevation, and that Canada and Russia both classify the Alpha Ridge as a submarine elevation, help to legitimize their respective analyses. Reports that the subcommission reviewing Russia's 2015 submission has accepted the latter's classification of seafloor highs as submarine elevations is further good news.

UNCLOS includes checks and balances and reflects trade-offs. Coastal States that meet the prescribed geomorphological and geological criteria have ECSs. The Commission provides scientific checks on coastal States' submissions. While a coastal State has sovereign rights to the non-living resources and sedimentary organisms on or under its ocean floor, it also has responsibilities, including being required to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment" resulting from seabed activities within its jurisdiction.[109] ECS countries are responsible for payments or contributions in kind as compensation for having extended their jurisdiction beyond 200 n.m. Negotiations to clarify the Article 82 provisions are needed at the national and international levels, both

because resource exploitation is set to begin soon off Canada's east coast and because revenue-sharing is a responsibility to compensate for having the right to develop ECS resources.

As of December 2019, Canada's Arctic submission is 84th on a list of 85. In its press release announcing the submission, Global Affairs Canada estimated that it will be ten years before the review process is complete.[110] The figure seems optimistic. Since 2001 the Commission has reviewed 33 full and partial revised submissions and it is in the process of reviewing another 14 full and partial revised submissions. As such, it currently faces a backlog of 58 submissions, not considering revised submissions that may yet be submitted.[111] In each of its most productive years (2009, 2012, and 2016), the Commission completed four reviews; however, in 2010, 2015, and 2018 only one or two reviews were finalized and none was finished in 2013. At the current rate, it will be many years before a subcommission is established to review Canada's Arctic submission. Then it will take additional years to complete the review, to have the recommendations approved by the full Commission, and to present them to Canada. If Canada accepts the recommendations, it will proceed to establish its outer limits on the basis of these recommendations, in concert with delimitation efforts of adjacent or opposites States where required. If Canada disagrees with the Commission's recommendations, the former must present a new or revised submission to the Commission within a reasonable period of time.[112] The process of submission, review, and resubmission could conceivably go on for decades and has been described as "a narrowing down 'ping-pong' procedure" which should ultimately result in the coastal State and the Commission being in agreement over the former's ECS.[113] In the meantime, Canadian scientists are continuing to publish their data and analysis in international journals, thereby enhancing the credibility of their findings before the international community.

Notes

[1] My thanks to David Mosher for his insightful comments on the final draft of this article. The discussions of the legal regime, Prime Minster Stephen Harper's December 2013 announcement and its aftermath, and the ambiguities of Article 82 draw heavily on my book, *Breaking the Ice: Canada, Sovereignty, and*

the Arctic Extended Continental Shelf (Toronto: Dundurn, 2017).

[2] See, *Partial Submission of Canada to the Commission on the Limits of the Continental Shelf Regarding its Continental Shelf in the Arctic Ocean: Executive Summary* (Ottawa, 23 May 2019).

[3] *U.N. Convention on the Law of the Sea*, 16 November 1994, U.N.T.S. (United Nations Treaty Series) 1833, 397. The five Arctic coastal States – Canada, Denmark, Norway, Russia and even the United States which is not a party to UNCLOS – are defining – or have defined – their ECSs, in accordance with the norms enshrined in UNCLOS. International legal scholars differ as to whether the United States, as a non-Party, is entitled to make a submission. For examples see Bjarni Már Magnússon, "Can the United States Establish the Outer Limits of its Extended Continental Shelf Under International Law?," *Ocean Development & International Law* 48:1 (2017): 1-16; and Alexei A. Zinchenko, "Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf," in *Legal and Scientific Aspects of Continental Shelf Limits,* ed. Myron H. Nordquist, John Norton Moore, and Thomas H. Heidar (Leiden: Martinus Nijhoff, 2004), 234–40. Although beyond the scope of this paper, the United States' ECS is likely to overlap with those of the Russian Federation, Canada and Greenland.

[4] Kingdom of Denmark, *Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf: The Northern Continental Shelf of Greenland: Executive Summary* (Copenhagen, 2015), https://www.un.org/Depts/los/clcs_new/submissions_files/dnk76_14/dnk2014_es.pdf.

[5] Russian Federation, *Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Russian Federation in the Arctic Ocean: Executive Summary* (Moscow, 2015), https://www.un.org/Depts/los/clcs_new/submissions_files/rus01_rev15/2015_08_03_Exec_Summary_English.pdf.

[6] UNCLOS, Articles 2 and 3(3).

[7] UNCLOS, Article 57.

[8] UNCLOS, Article 56(1)(a).

[9] UNCLOS, Article 76(1). For a more detailed discussion of the regime, see Larry Mayer and David Mosher, "Setting the Context, The Scientific Aspects of Article 76," in *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 2017), 251-68.

[10] Tomas Heidar, "Legal Aspects of Continental Shelf Limits," in *Legal and Scientific Aspects of Continental Shelf Limits*, ed. Myron Nordquist, John Norton Moore, and Tomas Heidar (Leiden: Brill, 2004), 24.

[11] UNCLOS, Article 77.

[12] UNCLOS, Article 87(1).
[13] UNCLOS, Article 76(4)(a)(i). The sediment thickness criterion is often referred to as the Gardiner formula in recognition of the fact that it was first proposed by the Irish geologist, Piers R.R. Gardiner.
[14] UNCLOS, Article 76(4)(a)(ii). The distance criterion is frequently called the Hedberg formula, after the American geologist, Hollis D. Hedberg, who proposed it.
[15] UNCLOS, Article 76(5). The 2,500 meter isobath is a straight line connecting parts of the seabed at that depth.
[16] UNCLOS, Article 76(8). The Commission was set up under Annex II of UNCLOS for two purposes: first and most importantly, to review the submissions and make recommendations to coastal States; and secondly, to provide coastal States with scientific and technical advice, as requested. (Annex II Article 3(1)). Every five years, States Parties to UNCLOS elect the 21 members of the Commission. The commissioners are chosen individually for their expertise in geology, geophysics, or hydrography, and collectively to ensure due regard for the UN rules on geographic representation. (Annex II, Article 2(1)).
[17] Meeting of States Parties, 18th Meeting, *Decision Regarding the Workload of the Commission on the Limits of the Continental Shelf and the Ability of States, Particularly Developing States, to Fulfil the Requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, As Well as the Decision Contained in SPLOS/72, Paragraph (A)*, 20 June 2008, SPLOS/183, http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm.
[18] UNCLOS, Article 76(9).
[19] Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Rule 51(1), 18.
[20] UNCLOS, Article 76(8).
[21] Sara Cockburn, Sue Nichols, Dave Monahan, and Ted McDorman, "Intertwined Uncertainties: Policy and Technology on the Juridical Continental Shelf," paper presented at the 2001 Advisory Board on the Law of the Sea (ABLOS) Conference: Accuracies and Uncertainties in Maritime Boundaries and Outer Limits, Monaco, 15-17 October 2001, 7. See also McDorman, "The Role of the Commission on the Limits of the Continental Shelf" and "The Continental Shelf," in *The Oxford Handbook of the Law of the Sea*, ed. Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens (Oxford: Oxford University Press, 2015), 192.
[22] UNCLOS, Article 77(3).
[23] UNCLOS, Article 77(2).
[24] It is not a case of "use it or lose it," as former Prime Minister Stephen Harper

asserted in 2007: "Canada has a choice when it comes to defending our sovereignty over the Arctic. We either use it or lose it." Office of the Prime Minister, "Prime Minister Stephen Harper Announces New Arctic Offshore Patrol Ships," *News Release*, 9 July 2007, http://news.gc.ca/web/article-en.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndVl=&nid=335789&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtVl=2008&crtr.kw=&crtr.dyStrtVl=26&crtr.aud1D=&crtr.mnthStrtVl=2&crtr.yrndVl=&crtr.dyndVl=.

[25] In numerous documents, the Canadian government had stated its commitment to mapping the extended continental shelf in both the Arctic and the Atlantic and its intention to make a comprehensive submission in December 2013 as exemplified by the following government news release: "Canadian scientists are conducting mapping surveys to establish with certainty where the country's continental shelf begins and ends. Particulars of the outer limits of these continental shelves will be submitted to the UN Commission on the Limits of the Continental Shelf by the end of 2013 – 10 years after Canada ratified the convention." Government of Canada, "Government Commemorates 25th Anniversary of UN Convention on the Law of the Sea," *News Releases*, 10 December 2007, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=3&nid=366839&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11. See also Government of Canada, "Northern Strategy— Backgrounder," *News Releases*, 10 March 2008, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=4&nid=384529&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11; Government of Canada, "Minister Cannon Concludes Arctic Visit and Holds Media Availability," *News Releases*, 7 April 2010, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=2&nid=523209&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11; Lawrence Cannon, "Address by Minister Cannon at Launch of Statement on Canada's Arctic Foreign Policy," *News Releases*, 20 August 2010, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=6&nid=554739&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11; Government of Canada, "Canada Holds Bilateral Talks with Russia," *News Releases*, 16 September 2010, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=4&nid=560449&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11; Government of Canada, "Canadian Coast Guard Ship Louis S. St-Laurent Departs for Arctic Support Science and Northern Shipping," *News Releases*, 10

July 2011, http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=4&crtr.mnthStrtVl=1&crtr.page=2&nid=610769&crtr.yrndVl=2014&crtr.kw=continental+shelf&crtr.yrStrtVl=2002&crtr.dyStrtVl=1&crtr.dyndVl=11. No references were made to partial submissions.

[26] The *Globe and Mail*'s front-page story on 4 December 2013 announced that Prime Minister Stephen Harper had "ordered government bureaucrats back to the drawing board to craft a more expansive international claim for seabed riches in the Arctic after the proposed submission they showed him failed to include the geographic North Pole." Steven Chase, "Harper Orders Redraft of Arctic Claim: Bureaucrats Told to Revise Proposed UN Submission So That It Protects Geographic North Pole Against Rival Russian, Danish Assertions," *Globe and Mail,* 4 December 2013. The report was subsequently corroborated in a speech given by then Minister of Foreign Affairs John Baird. "Address by Minister Baird to Media Concerning Canada's Continental Shelf Submissions" (Ottawa: Foreign Affairs, Trade and Development Canada, 9 December 2013).

[27] The full submission is confidential and not publicly available; however, the executive summary of the "Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Atlantic Ocean" (Ottawa, December 2013) is found at http://www.international.gc.ca/arctic-arctique/assets/pdfs/continental_shelf_summary-plateau_continental_resume-eng.pdf.

[28] They further agreed that the existing international legal regime governing the Arctic Ocean was sufficient; hence that there was "no need to develop a new comprehensive international legal regime to govern the Arctic Ocean." Arctic Ocean Conference, *Ilulissat Declaration*, 28 May 2008, 2, https://cil.nus.edu.sg/wp-content/ uploads/2017/07/2008-Ilulissat-Declaration.pdf.

[29] Ron Macnab, "How Harper Froze Out Scientists and Triggered an Arctic Debacle," *Chronicle Herald*, 17 June 2015. After retiring from Natural Resources Canada, Ron Macnab did consulting work with both Danish and Russian scientists on continental shelf matters; thus, he was well positioned to know their views.

[30] Martin Breum, "Is Harper's Pole Claim an Arctic Deal-Breaker?," *Arctic Journal Opinion*, 19 December 2013, and *Cold Rush: The Astonishing True Story of the New Quest for the Polar North* (Montreal & Kingston: McGill-Queen's University Press, 2018), 207. See also Mikå Mered, "Editor's Briefing: A Polar Play," *The Arctic Journal*, 16 December 2014.

[31] See Kingdom of Denmark, *Strategy for the Arctic 2011–2020* (Copenhagen, 2011), http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Greenland-and-The-Faroe-Islands/Arctic%20strategy.pdf.

[32] Alex Boutilier, "Canada Scrambled for Data to Back North Pole Claims, Documents Show," *Toronto Star*, 13 August 2014, http://www.thestar.com/news/canada/2014/08/13/canada_scrambled_for_data_to_back_north_pole_claims_documents_show.html.
[33] See Marc Lanteigne, "Arctic Sovereignty: More Lines on the Ice," *Arctic Journal*, 16 December 2014. See also Macnab, "How Harper Froze out Scientists," and Mered, "Editor's Briefing," 2.
[34] Kingdom of Denmark, "The Continental Shelf Project." (Copenhagen, 11 December 2014). http://a76.dk/lng_uk/main.html.
[35] See, Breum, *Cold Rush*, 206–08.
[36] Russian Federation, *Russian Federation Submission to the Commission on the Limits of the Continental Shelf: Executive Summary* (Moscow, 2001).
[37] Russian Federation, *Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Russian Federation in the Arctic Ocean: Executive Summary* (Moscow, 2015), 13.
[38] *Ibid.*, 20.
[39] Commission on the Limits of the Continental Shelf, Twenty-first Session, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Rule 51(4ter), 18.
[40] Commission on the Limits of the Continental Shelf, Twenty-sixth Session, *Statement by the Chairperson of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, CLCS/68, 17 September 2010, par. 57, 13–14.
[41] Jacob Verhoef, Director of the Geological Survey of Canada and Director of the UNCLOS Program, Department of Natural Resources, and Richard MacDougall, Director, Law of the Sea Project, Canadian Hydrographic Service, Department of Fisheries and Oceans, Interview, Halifax, 8 February 2008, as cited in Riddell-Dixon, *Breaking the Ice*, 51.
[42] Global Affairs Canada, "Canada's Arctic Ocean Continental Shelf Submission" (Ottawa, 23 May 2019).
[43] For more detailed examinations of seafloor highs, see Harald Brekke and Philip Symonds, "Submarine Ridges and Elevation of Article 76 in Light of Published Summaries of Recommendations of the Commission on the Limits of the Continental Shelf," *Ocean Development & International Law* 42:4 (2011): 289–306; and Brekke and Symonds, "The Ridge Provisions of Article 76," in *Legal and Scientific Aspects of Continental Shelf Limits*, 169–197; Jianjun Gao, "The Seafloor High Issue in Article 76 of the UNCLOS: Some Views from the Perspective of Legal Interpretation," *Ocean Development & International Law* 43:2 (2012): 119–45; and Ron Macnab, "Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76," *Ocean Development &*

International Law 39:2 (2008): 223–34.
[44] Macnab, "Submarine Elevations and Ridges," 224.
[45] United Nations, Commission on the Limits of the Continental Shelf, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, par. 7.2.11, 37.
[46] Macnab, "Submarine Elevations and Ridges," 224.
[47] UNCLOS, Article 76(3).
[48] UNCLOS, Article 76(6).
[49] Heidar, "Legal Aspects of Continental Shelf Limits," 28.
[50] United Nations, Commission on the Limits of the Continental Shelf, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, par. 7.3.1 a and b, 37.
[51] *Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf: Executive Summary*, 12.
[52] Ibid.; *Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Russian Federation in the Arctic Ocean: Executive Summary*, 6; and *Partial Submission of Canada to the Commission on the Limits of the Continental Shelf Regarding its Continental Shelf in the Arctic Ocean: Executive Summary*, 7.
[53] In essence, it is a mega-volcano. See Canada's Extended Continental Shelf Program, *Meet the People Video Gallery*, Science, 2015, http://www.science.gc.ca/default.asp?lang=En&n=80703280- 1.
[54] *Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Russian Federation in the Arctic Ocean: Executive Summary*, 6; and *Partial Submission of Canada to the Commission on the Limits of the Continental Shelf Regarding its Continental Shelf in the Arctic Ocean: Executive Summary*, 7.
[55] *Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf: Executive Summary*, 12, 14.
[56] As cited in Levon Sevunts, "Russia scores scientific point in quest for extended Arctic continental shelf," *Eye on the Arctic*, 4 April 2019, http://www.rcinet.ca/eye-on-the-arctic/2019/04/04/russia-continental-shelf-arctic-ocean-science/. See also "Kobylkin: UN commission to vote on limits of the Russian continental shelf in August 2019," *The Arctic*, 9 April 2019, https://arctic.ru/forumarctica/20190409/845543.htm; and Paul. A. Goble, "Moscow close to UN recognition that its continental shelf extends far into the Arctic," *Euromaidan Press*, 6 April 2019, http://euromaidanpress.com/2019/04/06/moscow-close-to-un-recognition-that-its-continental-shelf-extends-far-into-

the-arctic/.
[57] Zinchenko, "Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf," 225. For more detailed examinations of the delimitation of Arctic ECSs, see Monique Andree Allain, "Canada's Claim to the Arctic: A Study in Overlapping Claims to the Outer Continental Shelf," *Journal of Maritime Law and Commerce* 42:1 (2011): 1–48; Michael Byers and James S. Baker, "Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute," *Ocean Development & International Law* 43:1 (2012): 70–95; Alex G. Oude Elferink and Constance Johnson, "Outer Limits of the Continental Shelf and 'Disputed Areas': State Practice concerning Article 76(10) of the LOS Convention," *International Journal of Marine and Coastal Law* 2:4 (2006): 461–87; Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Leiden: Brill Nijhoff, 2015), chapter 5; and Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Berlin, Heidelberg: Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V, 2008), 223–38.
[58] UNCLOS, Article 76(10).
[59] Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Annex 1, 22.
[60] UNCLOS, Article 287(1).
[61] Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Annex 1, par. 5(a), 22.
[62] Canada, Norway, the Russian Federation and the United States sent diplomatic notes regarding Denmark/Greenland's submission pertaining to the area north of Greenland. See, Permanent Mission of Canada to the United Nations, Note No. 1361, New York, 29 December 2014; Permanent Mission of Norway to the United Nations, New York, 17 December 2014; Permanent Mission of the Russian Federation to the United Nations, No. 2764/N, New York, 21 July 2015; and United States Mission to the United Nations, Diplomatic Note, New York, 30 October 2015. Although the Russian Federation was angry that Denmark/Greenland had claimed all the way to its exclusive economic zone, it nonetheless signed the non-objection agreement. In the case of the Russian Federation's 2015 submission, diplomatic notes were sent by Canada, Denmark, and the United States. See, Permanent Mission of Canada to the United Nations, Note No. 2328, New York, 30 November 2015; Permanent Mission of Denmark to the United Nations, Ref. No. 2015-14962, New York, 7 October 2015; and United States Mission to the United Nations, Diplomatic Note, New York, 30 October 2015. All these diplomatic notes are available at http://www.un.org/depts/los/clcs_new/commission_submissions.htm. Canadian officials visited the capitals of Canada's Arctic neighbours prior to

making their submission and received similar bilateral assurances from Denmark, Russia and the United States. The formal documents were not available on the Commission's website at the time of writing this article but Canada's executive summary refers to them. See pages 10–11.

[63] Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf,* Annex III, Part II, par. 2(a)(iv and v), 27.

[64] *Ibid*.

[65] Canada, *Partial Submission of Canada to the Commission on the Limits of the Continental Shelf Regarding its Continental Shelf in the Arctic Ocean: Executive Summary*, 7.

[66] Canada's northern line is drawn between fixed points; however, these fixed points are a great deal farther apart than the 60 n.m. specified in Article 76(7).

[67] *Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary* (Washington, signed 15 June 1990), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/USA-RUS1990MB.PDF.

[68] *Ibid*., Article 2(1).

[69] *Ibid*., Article 4.

[70] On 15 June 1990, Russia and the United States not only signed the boundary agreement but they also pledged to abide by the terms of the treaty even if it did not come into force and both have complied with this commitment. The commitment to abide by the terms is appended to the *Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary.*

[71] See, Global Affairs Canada, "Canada and the Kingdom of Denmark (with Greenland) announce the establishment of a Joint Task Force on Boundary Issues," *News Release*, Ilulissat, 23 May 2018.

[72] See *Agreement Between the Government of Canada and the Government of the Kingdom of Denmark Relating to the Delimitation of the Continental Shelf Between Greenland and Canada*, Ottawa, 17 December 1973, *International Legal Materials* 13:3 (May 1974): 506–11.

[73] *Exchange of Notes Constituting an Agreement to Amend the Agreement Between the Government of Canada and the Government of the Kingdom of Denmark Relating to the Delimitation of the Continental Shelf Between Greenland and Canada Done at Ottawa on 17 December 1973,* Canada Treaty Series 2009/27 (Copenhagen, 5 and 20 April 2004), http://publications.gc.ca/site/eng/396630/publication.html.

[74] See Canada, Foreign Affairs and International Trade, "Canada and Kingdom of Denmark Reach Tentative Agreement on Lincoln Sea Boundary," *News Release*, Ottawa, 28 November 2012, https://www.canada.ca/en/news/archive/2012/11/canada-kingdom-denmark-reach-tentative-agreement-lincoln-sea-boundary.html.
[75] UNCLOS, Article 83. Unfortunately "equitable" is not defined.
[76] This trend is noted in many recent cases of maritime boundary delimitation. For example see International Tribunal for the Law of the Sea, *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean* (Ghana/Côte D'Ivoire), Case No. 23, Judgment, 23 September 2017, par. 265, www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf.
[77] Ted L. McDorman and Clive Schofield, "Maritime Limits and Boundaries in the Arctic Ocean: Agreements and Disputes," in *Handbook of the Politics of the Arctic*, ed. Leif Christian Jensen and Geir Hønneland (Cheltenham: Edward Elgar Publishing, 2015), 208. See also Millicent McCreath and Zoe Scalon, "The Dispute Concerning the Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire: Implications for the Law of the Sea," *Ocean Development & International Law* 50:1 (2019): 1-22; and Ted McDorman, *Salt Water Neighbours: International Ocean Law Relations between the United States and Canada* (New York: Oxford University Press, 2009), especially 155–63 and 197–206.
[78] The International Court of Justice was concerned to ensure that the ratio of the respective coastal lengths was roughly proportional to the ratio between the delimited maritime area of each State. *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), International Court of Justice Reports, 3 February 2009, par. 122.
[79] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), par. 115–22.
[80] International Boundaries Research Unit, Centre for Borders Research, "Maritime jurisdiction and boundaries in the Arctic region," 4 August 2015, https://www.dur.ac.uk/resources/ibru/resources/Arcticmap04-08-15.pdf.
[81] UNCLOS, Article 77(3).
[82] *Gulf of Maine Case* (Canada v. United States), International Court of Justice Report 246 (1984).
[83] See McDorman, *Salt Water Neighbours*, 181–90.
[84] *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, Murmansk, September 2010, https://www.regjeringen.no/en/topics/foreign-affairs/international-law/innsikt_delelinje/treaty/id614006/

[85] For the arguments pertaining to the Tribunal's jurisdiction to delimit the continental shelf beyond 200 n.m., see Case No. 16, Judgment, 14 March 2012, par. 341-94, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf.
[86] *Ibid*., par. 394.
[87] *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean*, par. 592.
[88] UNCLOS, Article 140(1).
[89] UNCLOS, Article 1(1).
[90] See "Maritime Jurisdiction and Boundaries in the Arctic Region."
[91] UNCLOS, Article 82(4).
[92] The discussion of these questions draws on insights from Dr. Jacob Verhoef, Richard MacDougall and Professor Ted McDorman, as well as from a detailed examination of reports of the International Seabed Authority and scholarly papers assessing the challenges posed by Article 82 for both ECS States and the International Seabed. See, Wylie Spicer and Elizabeth McIsaac, *A Study of Key Terms in Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 15 (Kingston, Jamaica: International Seabed Authority, 2016); *Implementation of Article 82 of the United Nations Convention on the Law of the Sea: Report of an International Workshop convened by the International Seabed Authority in collaboration with the China Institute for Marine Affairs in Beijing the People's Republic of China, 26–30 November 2012*, ISA Technical Study No. 12 (Kingston, Jamaica: International Seabed Authority, 2012); *Non-Living Resources of the Continental Shelf beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 5 (Kingston, Jamaica: International Seabed Authority, 2010); and *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 4 (Kingston, Jamaica: International Seabed Authority, 2009). See also Aldo Chircop, "International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore," *Dalhousie Law Journal* 26 (2003): 273–302, and "Operationalizing Article 82 of the United Nations Convention on the Law Sea: A New Role for the International Sea Bed Authority?," in *Ocean Yearbook* 18:1 (2004): 395–412; Michael W. Lodge, "The International Seabed Authority and Article 82 of the UN Convention on the Law of the Sea," *International Journal of Marine and Coastal Law* 21 (2006): 323–33; Lodge, "The International Seabed Authority – Its Future Direction," in *Legal and Scientific Aspects of Continental Shelf Limits*, 403–09; Cleo Paskal and Michael Lodge, *A Fair Deal on Seabed Wealth: The Promise and Pitfalls of Article 82 on the Outer Continental Shelf* (London: Royal Institute of International Affairs, 2009); Wylie Spicer, "Canada,

the Law of the Sea and International Payments: Where Will The Money Come From," *SPP Research Papers* 8:31 (2015): 1–24; and Rowland J. Harrison, "Offshore Oil Development in Uncharted Legal Waters: Will the Proposed Bay du Nord Project Precipitate Another Federal-Provincial Conflict," *Energy Regulation Quarterly* 6:4 (2018): 1-7.

[93] International Seabed Authority, *Implementation of Article 82 of the United Nations Convention on the Law of the Sea,* 20.

[94] International Seabed Authority, *Implementation of Article 82 of the United Nations Convention on the Law of the Sea,* Annex 3, par. 4, 31.

[95] Harrison, "Offshore Oil Development in Uncharted Legal Waters," 1.

[96] *Ibid.*

[97] States Parties to the Law of Sea Convention, Twenty-ninth Meeting, *Provisional Agenda*, SPLOS/29/L.1 (New York, 1 April 2019); Twenty-eighth Meeting, *Report of the Twenty-eighth Meeting*, SPLOS/324 (New York, 9 July 2018); and Twenty-eighth Meeting (resumed), *Report of the Twenty-eighth Meeting of States Parties resumed to elect two members of the Commission on the Limits of the Continental Shelf*, SPLOS/327 (New York, 31 January 2019). These documents are available at https://www.un.org/Depts/los/meeting_states_ parties/ twentyninthmeetingstatesparties.htm.

[98] Spicer, "Canada, the Law of the Sea and International Payments."

[99] Canada is the only Arctic country where jurisdiction over ECS resources is shared between the federal government and subnational governments.

[100] For a more in-depth treatment of these issues, see Frances Abel, Thomas J. Courchene, F. Leslie Seidle, and France St-Hilaire, eds., *Northern Exposure: Peoples, Power and Prospects in Canada's North* (Montreal: Institute for Research on Public Policy, 2009), 354–72.

[101] Inuit Circumpolar Council (Canada), "The ICC Canada Commends Government of Canada for UNCLOS Submission Defining Arctic Canada's Extended Continental Shelf," *Press Release*, Ottawa, 24 May 2019. https://www.inuitcircumpolar.com/press-releases/icc-canada-commends-government-of-canada-for-unclos-submission-defining-arctic-canadas-extended-continental-shelf/.

[102] "Inuit want a say in Canadian offshore seabed claim," *Nunatsiaq News*, 12 August 2014, https://nunatsiaq.com/stories/article/65674inuit_want_input_ on_canadian_UNCLOS_claim/; and Peter W. Hutchins, Monique Caron, Bianca Suciu and Robin Campbell, *Setting Out Canada's Obligations to Inuit in Respect of the Extended Continental Shelf in the Arctic Ocean*, paper commissioned by Senator Charlie Watt (Montreal, 2015). Bob McLeod, Premier of the Northwest Territories, expressed similar sentiments, supporting Canada's submission while at the same time saying that the people of his territory "look forward to

having a role in the management of their Arctic waters." Nick Pearce, "Premier backs Arctic sovereignty claim," *NWT News/North,* 17 June 2019, https://nnsl.com/nwtnewsnorth/premier-backs-arctic-sovereignty-claim/.
[103] Spicer, "Canada, the Law of the Sea and International Payments," 13. See Government of Canada, *Canada- Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, http://laws-lois.justice.gc.ca/eng/acts/c-7.5/.
[104] Harrison, "Offshore Oil Development in Uncharted Legal Waters," 1.
[105] Harrison, "Offshore Oil Development in Uncharted Legal Waters," and "Article 82 of UNCLOS: The Day of Reckoning Approaches," *Journal of World Energy Law and Business* 10 (2017): 488–504.
[106] Wylie Spicer, "Pacing off the Continental Shelf: UN Convention Governs Canadian Claims on Extending Oil and Gas Rights," *The Lawyers Weekly*, 17 January 2014, http://www.lawyersweekly.ca/articles/2054.
[107] Spicer, "Canada, the Law of the Sea and International Payments," 16.
[108] For example, Mark Galeotti, "Cold Calling: Competition Heats Up for Arctic Resources," *Jane's Intelligence Review* (October 2008): 8–15; Chris Windeyer, "Resource Grab Risks Arctic Arms Race, Study Says," *Nunatsiaq News*, 5 April 2010, http://www.nunatsiaqonline.ca/stories/article/050410_resource_grab_risks_arctic_arms_race_study_says/; Greg Flakus, "Arctic Draws International Competition for Oil," *Voice of America*, 26 August 2015, http://www.voanews.com/content/arctic-draws-international-competition-for-oil/2933283.html; Andrey Gubin, "International competition over Arctic resources imminent," *Russia Beyond*, 25 April 2014, http://in.rbth.com/opinion/2014/04/25/international_competition_over_arctic_resources_imminent_34803; Tristin Hopper, "A New Cold War: Denmark gets aggressive, stakes huge claim in Race for the Arctic," *National Post*, 15 December 2014, http://news.nationalpost.com/news/a-new-cold-war-denmark-gets-aggressive-stakes-huge-claim-in-race-for-the-arctic; and "Arctic Resources: The fight for the coldest place on Earth heats up," *Russia Today*, 15 April 2014, https://www.rt.com/news/arctic-reclamation-resources-race-524.
[109] *United Nations on the Convention of the Law of the Sea*, Article 208(1), 74.
[110] Global Affairs Canada, "Canada's Arctic Ocean Continental Shelf Submission," 23 May 2019, https://www.canada.ca/en/global-affairs/news/2019/05/canadas-arctic-ocean-continental-shelf-submission.html.
[111] The list of the full and partial submissions and the dates they were submitted, a review subcommission was established, and recommendations adopted, are available at https://www.un.org/Depts/los/clcs_new/commission_submissions.htm. For a discussion of the challenges facing the Commission, see Ted L. McDorman, "Revisiting the Commission the Limits of the Continental Shelf: A Technical Body in a Political World," in *Legal Order in*

the World's Oceans, 288-301. See also Harald Brekke, "Towards Establishing a Stable Regime for Seabed Jurisdiction: The Role of the Commission," in *Legal Order in the World's Oceans*, 269–87; Anna Cavnar, "Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor," *Cornell International Law Journal* 43:3 (2009): 387–440; Ron Macnab, "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76," *Ocean Development & International Law* 35:11 (2004): 1–17; and Surya P. Subedi, "Problems and Prospects for the Commission on the Limits of the Continental Shelf in Dealing with Submissions by Coastal States in Relation to the Ocean Territory Beyond 200 Nautical Miles," *International Journal of Marine and Coastal Law* 26:13 (2011): 413–31.

[112] UNCLOS, Annex II, Article 8, 113.

[113] Piers R.R. Gardiner, "The Limits of the Area Beyond National Jurisdiction – Some Problems with Particular Reference to the Role of the Commission on the Limits of the Continental Shelf," in *Maritime Boundaries and Ocean Resources,* ed. G. Blake (London: Croom Helm, 1987), 69.

3

The Northwest Passage

Suzanne Lalonde[*]

There has been much written in recent years about existing and potential disputes in the Arctic, and Canada has featured prominently in such reports. Canada is, in fact, involved in maritime boundary disputes with the United States (Beaufort Sea) and Denmark/Greenland (Lincoln Sea) and has claimed an extended continental shelf that overlaps with the American, Danish and Russian claims. Recent media attention has also focused on opposition to Canada's sovereignty over the Northwest Passage (NWP).

Much like the dispute over the boundary line in the Beaufort Sea, the debate over the Northwest Passage is not new. For decades, Ottawa and Washington have been agreeing to disagree on the question and experts from around the world have analyzed and criticized the case. As with the other Arctic files, what is new is the realization that the NWP can no longer be viewed as some sterile, arcane, or academic debate; climate change has transformed the issue into one of immediate and pressing concern for Canada and other stakeholders. Increased access to Canada's Arctic, thanks to a dramatic loss of sea-ice, has triggered a strong reaction among States, Indigenous organizations, and civil society – both from within the region and beyond – and has strengthened calls for responsible action to protect the natural wealth and cultural heritage of the region.

Ottawa and Washington's respective positions regarding the Northwest Passage are well established and have been for decades.

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[*] This chapter borrows from previously published papers including S. Lalonde, "Increased Traffic Through Canadian Arctic Waters: Canada's State of Readiness" (2004) 38:1 *Revue juridique Thémis* 49-124 and M. Byers and S. Lalonde, "Who Controls the Northwest Passage?" (2009) 42:4 *Vanderbilt Journal of Transnational Law* 1133-1210.

Successive Canadian governments have declared that all of the waters within Canada's Arctic archipelago, including the various routes that make up the NWP, are Canadian historic internal waters over which Canada exercises full and exclusive authority, including the power to govern access by foreign ships. The United States has long held the view that the different routes through the Northwest Passage constitute an international strait in which the ships and aircraft of all nations, both civilian and military, enjoy a right of transit passage. As a State bordering an international strait, Washington argues that Canada's prerogatives are severely curtailed (for instance only international pollution and safety standards can apply) and that it is prohibited from denying, hampering or impairing the right of transit passage.

While the legal arguments and political will of the two main protagonists have remained largely unchanged over the last fifty years, the Northwest Passage 'saga' can nevertheless be divided into distinct historical periods or perhaps more accurately, should be envisioned as an issue that has been influenced by a series of specific events and developments. This chapter discusses the evolution of the legal arguments and rules, both international and domestic, that lie at the heart of this seemingly intractable 'dispute.'

The Pre-*Manhattan* Period

Relying on the traditional modes of acquiring territorial sovereignty, such as acts of discovery, treaties of cession and effective occupation, Canada has been successful in asserting sovereignty over the land and islands lying off its northern coast.[1] According to R.R. Roth, a legal regime based on absolute sovereignty has existed since the 1930s when the last challenges to Canada's title over its Arctic islands were settled (Denmark with respect to Ellesmere Island in 1920 and Norway with respect to the Sverdrup Islands in 1928-30).[2] Indeed, according to the American scholar N.C. Howson, "[n]o nation, including the United States, challenges Canada's territorial sovereignty over the ice-covered islands of the Arctic archipelago."[3] Rather, the controversy surrounding Canada's claim has centered on the legal status of the channels and straits that cut between the islands of the archipelago.

The Canadian government's attention only began to shift to the waters of the Arctic archipelago once ownership of the lands had been resolved. Although some advances were made in developing a

Canadian policy during the 1940s and 50s, for the most part the legal regime pertaining to the waters remained unclear and uncertain.[4] In 1957, following an easterly crossing of the Northwest Passage by three U.S. ships involved in the construction of the Distant Early Warning (DEW) Line, Prime Minister St. Laurent declared to the House of Commons that "the Canadian government considers that these are Canadian *territorial* waters."[5] This position was not officially reaffirmed until a more specific claim was advanced by the Canadian government in the 1970s.[6] Indeed, until the mid-1960s, the only law applicable to the Canadian Arctic waters was the implicit definition of a 3-mile territorial sea in the *Criminal Code*,[7] supplemented by a definition of 'territorial waters' in the *Coastal Fisheries Protection Act*.[8]

During this same period, the United States' position, according to Luis Kutner, was that "no state could or should claim waters or ice as territory," beyond a narrow band of territorial sea.[9] It preferred, instead, to exploit the Arctic region in its entirety, regarding it as *res communes*—the property of all subject to the acquisition and appropriation of none.[10] This policy reflected the United States' enduring commitment to the concepts of freedom of the seas and navigation. Indeed, the U.S. has consistently fought against "the creeping offshore jurisdictional expansionism of coastal states" to the point, according to Ted McDorman, that it has become almost a reflex action.[11] Thus, in the absence of any clear policy on the part of the Canadian government, and in light of U.S. opposition to all and any jurisdictional claims beyond the territorial sea, the legal status of the waters remained unsettled during this period.

The *S.S. Manhattan* Crossing

In 1969, an American company, Humble Oil, sent an ice-strengthened super-tanker—the S.S. *Manhattan*—through the Northwest Passage. The voyage was designed to test whether the route could be used to transport Alaskan oil to the Atlantic seaboard.[12] The U.S. government dispatched the Coast Guard icebreaker *Northwind* to accompany the vessel and made a point of not seeking permission from Canada. The Canadian government responded by granting permission anyway. It sent one of its own icebreakers to help[13] and arranged for a Canadian government representative, Captain Thomas Charles Pullen, to be on board the *Manhattan* during the transit.[14]

Figure 3-1: The route of the S.S. *Manhattan* through the Northwest Passage, 1969. *Jennifer Arthur-Lackenbauer*

Although Washington's refusal to ask for prior authorization unleashed a political storm in Ottawa, it was based on the firm belief that the *Manhattan* would not sail through areas under Canadian jurisdiction. Since at the time Canada claimed only a 3-mile territorial sea, the Americans considered that there was a high seas corridor through the Northwest Passage. American officials had therefore intended that the *Manhattan* would remain on the high seas throughout its voyage, entering the Passage through Lancaster Sound and exiting through M'Clure Strait at the western end. Indeed, prior to the *Manhattan*'s voyage, the State Department had informed the Canadian government that it "had no intention of staking a claim to the Northwest Passage" and was merely undertaking a "feasibility study."[15]

On the night of 10-11 September 1969, while attempting to become the first vessel ever to make an east-to-west passage of M'Clure Strait, the *Manhattan* became trapped in the ice. "She escaped only when steam was diverted from heating the living spaces to squeeze an additional 7,000 horsepower from her 43,000 horsepower turbines," one narrative explained. "Even then, it was only with the assistance of her constant companion, the Canadian icebreaker, *John A. Macdonald*, that she was

able to escape."[16] The *Manhattan* was thus forced to turn back and use the narrow Prince of Wales Strait, where, as Donat Pharand explains, "it had to go through the territorial waters of Canada because of the presence of the small Princess Royal Islands."[17]

While the purpose of the *Manhattan*'s voyage was innocent enough, it did spark concern over the potential for massive oil spills in the delicate Arctic environment.[18] According to Donald Rothwell, this anxiety, combined with the disturbing realization that Canada's legal position regarding the Northwest Passage and the waters of the Canadian Arctic had not in fact been clearly established, "allowed the *Manhattan*'s voyage through these waters to be portrayed as a direct threat to Canadian sovereignty which required an immediate Canadian response."[19]

The Canadian government's response to the *Manhattan* crossing came by way of a policy statement by Prime Minister Pierre Elliott Trudeau before Parliament on 15 May 1969:

> With respect to the waters between the islands of Canada's Arctic archipelago, it is well known that in 1958 the then minister of northern affairs stated the Canadian position as follows:
>
> > The area to the north of Canada, including the islands and the waters between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is national terrain.
>
> It is also known that not all countries would accept the view that the waters between the islands of the archipelago are *internal* waters over which Canada has full sovereignty. The contrary view is indeed that Canada's sovereignty extends only to the territorial sea around each island. The law of the sea is a complex subject which, as can be understood, may give rise to differences of opinion. Such differences, of course, would have to be settled not on an arbitrary basis but with due regard for established principles of international law.[20]

Criticized for the weakness and ambiguity of its policy, the following year the Trudeau government adopted three fairly controversial measures destined to strengthen Canada's position in the Arctic.

First, the Federal government enacted the *Arctic Waters Pollution Prevention Act* (AWPPA) which created a 100-mile pollution prevention

zone around Canada's Arctic coasts.[21] This extended jurisdiction conferred on Canada the right to enforce pollution control regulations on all ships passing through the zone, including construction, equipment, and staffing standards for Arctic-going vessels. Under the Act, this broad assertion of jurisdiction was justified with reference to Canada's responsibility for the exploitation of the Arctic's natural resources as well as for the welfare of its inhabitants and the preservation of its unique ecological balance.[22] Failure to comply with these standards would result in the prohibition of passage by such vessels.[23]

At a press conference following the introduction of the AWPPA legislation, Prime Minister Trudeau explained Canada's position:

> [I]t is not an assertion of sovereignty, it is an exercise of our desire to keep the Arctic free of pollution by defining 100 miles as the zone within which we are determined to act, we are indicating that our assertion there is not one aimed towards sovereignty but aimed towards one of the very important aspects of our action in the Arctic.[24]

The next day, Mitchell Sharp, the Secretary of State for External Affairs, emphasized during a speech in the House of Commons the preventive aspect:

> The Arctic waters bill represents a constructive and functional approach to environmental preservation. It asserts only the limited jurisdiction required to achieve a specific and vital purpose. It separates a limited pollution control jurisdiction from the total bundle of jurisdictions which together constitute sovereignty.[25]

Despite these government pronouncements, the AWPPA and its 100-mile zone were denounced by several countries, most notably the United States, as contrary to international law.[26] Spokespersons for the State Department reiterated the basic policy of the United States: while the U.S. conceded ownership of the lands of the Arctic archipelago to Canada, it maintained that the waters around them were part of the high seas and that the Northwest Passage was an international waterway. As the Canadian 100-mile pollution zone predated the introduction of the 200-mile exclusive economic zone, the United States perceived the Canadian initiative as a dangerous precedent which might be imitated in other areas of the world and which could adversely affect its security and commercial interests.[27]

No doubt aware that the legislation extended beyond existing international rules, the Canadian government's second measure was to modify its acceptance of the compulsory jurisdiction of the International Court of Justice.[28] It made clear that Canada would not accept the Court's jurisdiction on issues arising out of its anti-pollution measures.[29]

In a third and final response to the voyage of the *Manhattan*, the Trudeau government proclaimed the extension of Canada's territorial waters (including those around the islands of the Arctic archipelago), from 3 miles to 12 miles.[30] Although the United States also officially protested against this measure,[31] the extension of Canada's territorial sea to 12 miles was far less controversial than the AWPPA since 60 other countries had already made similar claims.[32] Its immediate relevance lay in the fact that the Northwest Passage is less than 24 miles across at its narrowest points. It thus became impossible to travel through the Passage, as the captain of the *Manhattan* had planned, without passing through Canada's territorial sea at certain "geographical choke-points."[33] According to the Canadian government, the newly overlapping territorial seas entitled it to subject any transiting vessel to the full range of Canada's domestic laws.[34]

During the following decade, Canada expended considerable energy in ensuring that the international community recognized the legitimacy of its Arctic policy.[35] The Canadian government eventually succeeded in this quest with the inclusion of Article 234 in the 1982 *United Nations Convention on the Law of the Sea* [LOSC],[36] which provides that:

> 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 would 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.

According to Howson, Article 234 "explicitly legitimized the theory and scope of the AWPPA."[37] The international community also eventually

endorsed Canada's extension of its territorial sea from 3 to 12 miles. Indeed, the concept of the 12-mile territorial sea, which had been gaining international acceptance throughout the 1970s despite U.S. opposition, was codified in Article 3 of the LOSC.[38]

Transit by the USCGC *Polar Sea*

In May 1985, the Canadian government was informed that the U.S. Coast Guard icebreaker *Polar Sea* would sail through the Northwest Passage on her way home to Seattle from Thule, Greenland in August, and Canadian Coast Guard personnel were invited to participate in the exercise.[39] The telegram reiterated the official U.S. position that this transit "will be an exercise of navigational rights and freedoms not requiring prior notification. The United States appreciates that Canada may not share this position."[40] An American diplomatic note followed on 21 May 1985 stating that "the two countries should agree to disagree on the legal issues and concentrate on practical matters" and that this valuable opportunity for cooperation should "not be lost because of possible disagreements over the relevant juridical regime."[41]

Canada responded on 11 June 1985 with a diplomatic note reiterating its legal position that the waters of the Northwest Passage were Canadian internal waters but also informing Washington that it was "committed to facilitating navigation" through the Passage and "prepared to work toward this objective."[42] It was Canadian policy, as it remains today, to permit transits provided that the rigorous equipment and ship design standards specified in the AWPPA are met. A further American note on 24 June 1985 made it clear that, "although the United States is pleased to invite Canadian participation in the transit, it has not sought the permission of the Government of Canada, nor has it given Canada notification of the fact of the transit."[43] The note also stated, however, that the "United States considers that this transit … in no way prejudices the judicial position of either side regarding the Northwest Passage, and it understands that the Government of Canada shares that view."[44]

According to Rob Huebert, by the end of June 1985 the two governments felt they had worked out an acceptable arrangement regarding the political and legal implications of the *Polar Sea*'s upcoming transit of the Northwest Passage.[45] Yet on 31 July 1985, on the

Figure 3-2: The route of the US Coast Guard Cutter *Polar Sea* through the Northwest Passage, 1985. *Jennifer Arthur-Lackenbauer*.

eve of the voyage, the Canadian government sent a final communication to the United States in which it

> noted with deep regret that the United States remains unwilling, as it has been for many years, to accept that the waters of the Arctic archipelago, including the Northwest Passage, are internal waters of Canada and fall within Canadian sovereignty. … In this regard, the Government of Canada indeed shares the view of the United States, communicated in the State Department's Note No. 222 of June 24, 1985 that "the transit, and the preparations for it, in no way prejudice their juridical position of either side regarding the Northwest Passage."
>
> This information and these assurances have satisfied the Government of Canada that appropriate measures have been taken by and under the authority of the Government of the United States to ensure that the Polar Sea substantially complies with the required standards for navigation in the waters of the Arctic archipelago and that in all other respects reasonable precautions have been taken to reduce the danger of pollution arising from this voyage. Accordingly, the Embassy is now in a position to notify the United States that, in the exercise of Canadian sovereignty over

> the Northwest Passage, the Government of Canada is pleased to consent of the requested transit….[46]

In early August 1985, the *Polar Sea* completed its east-to-west transit of the Northwest Passage through Lancaster Sound, Barrow Strait, Viscount Melville Sound, and Prince of Wales Strait. Two Canadian Coast Guard captains were on board as "invited observers."[47]

Despite the diplomatic understanding between the two countries, the voyage "caused a rush of public anxiety in Canada."[48] Commentators of all political stripes denounced the government's response as weak and ineffective and felt that a valuable opportunity to strengthen Canada's legal position had been squandered.[49] The uproar caught the U.S. government off-guard. An unidentified "senior official" in Washington was reported as saying that there was "surprise and disappointment" at the State Department, for they had "tried to work it out so that nobody's legal rights were undercut," and it was "absolutely wrong" to characterize the trip as a confrontational challenge to Canadian sovereignty.[50]

Legal Developments Following the *Polar Sea* Transit

The drawing of baselines around the perimeter of the Arctic archipelago

The Canadian government's official response to the *Polar Sea* voyage came on 19 September 1985 in a comprehensive statement on Arctic sovereignty delivered to the House of Commons by Joe Clark, Secretary of State for External Affairs:

> 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. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land. 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.[51]

And to remove any doubts as to Canada's intentions with respect to the waters of the Canadian Arctic, Clark further added:

> The policy of this Government is to exercise full sovereignty in and on the waters of the Arctic Archipelago and this applies to the airspace above as well. We will accept no substitute.[52]

To consolidate its legal position, the Canadian government announced the drawing of baselines around the perimeter of its Arctic archipelago to take effect on 1 January 1986.[53] In making the announcement, Secretary of State Clark was at pains to emphasize that "these baselines define the outer limit of Canada's *historic* internal waters."[54] Under international law, internal waters are assimilated to land territory, thus conferring upon the coastal State full administrative, civil and criminal jurisdiction.

The Canadian Government received letters of protest from two countries in response to the proclamation of its Arctic baselines. The U.S. position was summarized in a 26 February 1986 letter from James W. Dyer, Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs to Senator Charles Mathias Jr., which stated in part:

> On September 10, 1985, the Government of Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines around its Arctic islands to establish its claim. The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate U.S. navigation rights through the Passage under international law.[55]

However, in an effort to advance their shared interests in the Arctic, the United States indicated its willingness to engage in bilateral discussions over the status of the Arctic waters.[56] As a result of these discussions, Canada and the U.S. signed a four-clause "Arctic Cooperation Agreement" on 11 January 1988.[57] Pursuant to clause 3 of the Agreement, the United States agreed to seek the consent of the Canadian government for transits of the NWP by U.S. icebreakers intending to conduct marine scientific research.[58] Under clause 4, however, both parties specifically reserved their respective positions concerning the question of sovereignty over the waterways of the Arctic archipelago.[59] Thus, no progress was made on the issue of the legal status of the Canadian Arctic waters.[60]

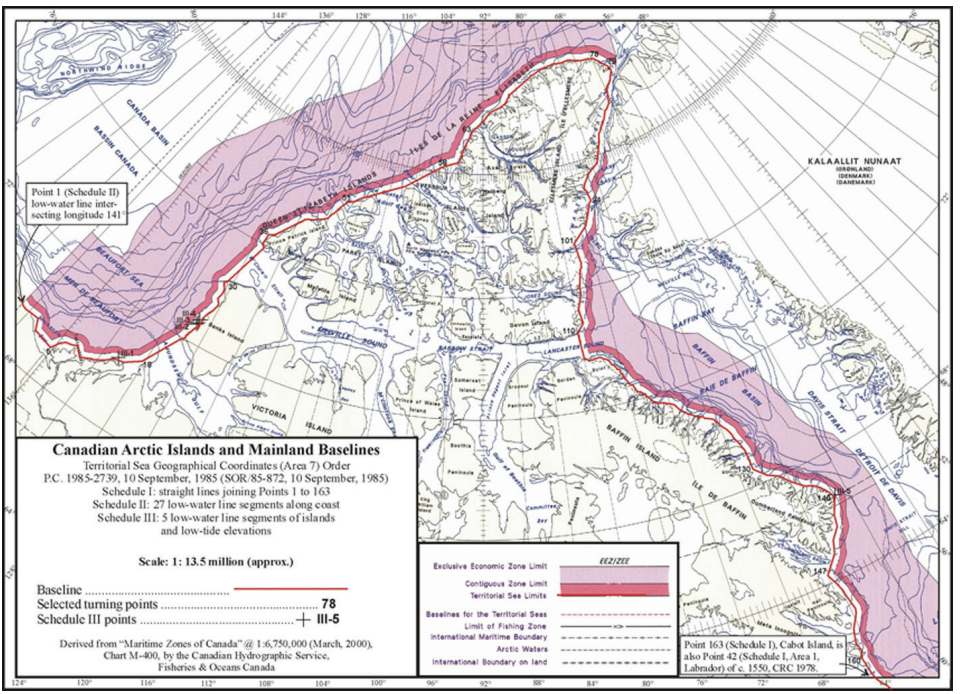

Figure 3-3: Canadian Arctic Islands and Mainland Baselines. *Canadian Council of Land Surveyors based on Canadian Hydrographic Service and Fisheries & Oceans Canada.*

The second protest over Canada's Arctic baseline system came from the Member States of the European Community through the British High Commission in Ottawa. The diplomatic note stated:

> The validity of the baselines with regard to other states depends upon the relevant principles of international law applicable in this case, including the principle that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast. The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.[61]

The European objection is clearly directed at both the Arctic baseline system in general and the historic title in particular.

Internal waters on the basis of an historic title

According to Pharand, the first official statement indicating that Canada might be claiming the waters of the Canadian Arctic archipelago as historic internal waters was made by Prime Minister Trudeau at the time of the *Manhattan* crossing in October 1969. The statement, included in a Speech from the Throne, read in part:

> Canadian activities in the northern reaches of this continent have been far-flung but pronounced for many years, to the exclusion of the activities of any other government. The Royal Canadian Mounted Police patrols and administers justice in these regions on land and ice, in the air and *in the waters*.[62]

Pharand goes on to state:

> Having specified that the Canadian Eskimos pursue 'their activities over the icy waters without heed as to whether that ice is *supported* by land or *by water*', the statement emphasizes the long duration of those activities and concludes by saying that 'Arctic North America has, for 450 years, progressively become the Canadian Arctic.'[63]

Pharand also refers to a December 1969 report prepared for the House of Commons by the Standing Committee on Indian Affairs and Northern Development in which it was stated: "Your Committee considers that the waters lying between the islands of the Arctic Archipelago have been, and are, subject to Canadian sovereignty *historically*, geographically and geologically."[64] Four years later, an official of the Department of Foreign Affairs, in replying to a letter enquiring as to the legal status of the Arctic waters, declared that "Canada … claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, *on a historical basis*, although they have not been declared as such in any treaty or by any legislation."[65] Pharand comments that "[t]his unquestionably constitutes the clearest and most precise statement as to the nature of and basis for Canada's claim over Arctic waters."[66]

Under international law, a country may validly claim title over waters on historic grounds if it can show that it has, for a considerable length of time, effectively exercised its exclusive authority over the maritime area in question. In addition, it must show that, during the same period of time, this exercise of authority has been acquiesced in by other countries, especially those directly affected by it.[67] Canada bases

its claim that the Northwest Passage constitutes historic internal waters on the fact that British explorers mapped the archipelago prior to the transfer of title in 1880[68] and that Canadian authorities have patrolled and policed the waters since that date.[69] Canadian governmental involvement in all Northwest Passage transits can also be cited as strong evidence of Canada's authority over the waterway.

Even if Canada has "effectively exercised its exclusive authority over the maritime area claimed,"[70] it still has to satisfy the acquiescence criterion. Pharand considers this to be a fatal flaw in Canada's historic waters argument, for none of the early governmental activity was coupled with an explicit claim to the waters of the archipelago and the United States opposed later, more explicit expressions of the claim.[71] It should be emphasized, however, that few officials or individuals were considering the legal status of the ice-choked Northwest Passage prior to the 1960s and, to the extent the NWP did garner any attention, it was likely by Government of Canada personnel involved in conducting sovereignty patrols on the water and sea-ice, legislating on whaling, or protecting marine mammals and fish on behalf of Canada's Indigenous maritime people.[72] Given the low level of commercial activity in Canada's Arctic waters for most of the 20th century, it could be argued that the need for an explicit claim did not arise and, further, that Canada did exercise governing authority commensurate with that reality with the acquiescence of all States concerned.

The strongest element in Canada's historic waters claim is the use and occupation of the sea-ice by the Inuit, who have hunted, fished, travelled, and lived on the Northwest Passage for millennia. In the late 1970s, Inuit from across the Arctic were interviewed about traditional hunting and travelling patterns. The resulting maps confirmed that the waters south of Ellesmere Island and the Sverdrup Islands—including Lancaster Sound and Barrow Strait—were virtual highways for the Inuit and their dog teams.[73] Relying on these and other published accounts of encounters with Inuit stretching back through the 19th and 20th centuries, as well as archival material, these routes and maps have now been updated and have been published online as an interactive atlas. First launched in 2014, the *Pan Inuit Trails* atlas provides a synoptic view of Inuit mobility and occupancy of Arctic waters, coasts and lands, including its icescapes.

> While Inuit occupancy of the Canadian Arctic can be established in many different ways, from oral history and archaeology to linguistics, cartographic sources that closely reflect Inuit historical experience are important for conveying Inuit occupancy and mobility. Inuit trails, in particular, reflect occupancy patterns over coastal and marine areas, including those along and across significant parts of the Northwest Passage.[74]

The Inuit Heritage Trust has also been interviewing elders about Inuktitut place names along the Northwest Passage;[75] the thousands of names confirm the centrality of the frozen waterway to Inuit language, culture, history, and identity.

It might therefore be possible to argue that Inuit acquired an historic title over the Arctic waters before the arrival of the Europeans, which they subsequently transferred to Canada.[76] To succeed with this argument, Canada would have to persuade other countries or a court or tribunal: (1) that sea ice can be subject to occupancy and appropriation like land;[77] (2) that under international law, Indigenous people can acquire and transfer sovereign rights;[78] and (3) that such rights, if they did exist, were in fact ceded to Canada.

The latter point is the easiest to prove, since the 1993 Nunavut Land Claims Agreement (NLCA) affirms the intent of Inuit to transfer to Canada any "claims, rights, title and interests based on their assertion of an aboriginal title" founded on "their traditional and current use and occupation of the lands, waters and land-fast ice."[79] As the preamble to the NLCA emphasizes, Canada's *Constitution Act of 1982* "recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada." Finally, Article 15.1.1(c) of the NLCA declares that "Canada's sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy." Article 15 was included at the insistence of the Inuit negotiators, and its existence makes Pharand's earlier dismissal of the historic waters argument less convincing.

Internal waters as a result of the drawing of straight baselines

While Canada's official position is that all of the waters within its Arctic archipelago are Canadian internal waters by virtue of an *historic title*, an alternative argument, for instance in the case of adjudicative proceedings, might be that the waters enclosed by the baselines are "non-historic internal waters," to borrow McDorman's description.[80] For

this alternative argument to succeed, Canada's Arctic baselines would have to satisfy the relevant international legal criteria governing the construction of such lines. Indeed, though the Canadian Government's intention in 1985 may have been to simply draw lines to better identify the extent of Canada's *historic* internal waters, most States and foreign commentators do not assess the Canadian lines in the context of such an historic claim; rather, the Canadian baselines are scrutinized against the precise set of legal rules governing the drawing of *straight* baselines.[81]

The straight baseline approach to coastal delimitation was first developed by Norway. Between 1812 and 1935, the Norwegian government established the inner boundary of its territorial sea by drawing straight lines along the outermost points of the islands off its fragmented and indented coastline.[82] In the *Norwegian Fisheries* case in 1951,[83] the International Court of Justice (ICJ) upheld Norway's delimitation system declaring that, under specified conditions, international law permitted a coastal State to draw straight baselines from which its territorial sea could be measured. All waters within these baselines would then be considered internal waters over which complete sovereignty could be exercised. However, in only two geographically-defined circumstances would international law sanction the use of the straight baseline method: "Where a coast is deeply indented and cut into, as is that of Eastern Finmark, or where it is bordered by an Archipelago such as the 'skjaergaard.'"[84] The Court also specified rules to be followed in constructing such straight baselines.[85]

The criteria elaborated in the *Norwegian Fisheries* case were generally approved by the international community and eventually codified in the 1958 Territorial Sea Convention[86] and the LOSC, though with some important changes. As both Conventions contain similar provisions, this analysis will focus on the most recent expression of the international rules. One of the most important changes made to the *Norwegian Fisheries* criteria is found in Article 7(1) of the LOSC, which defines the threshold geographical requirement as "where the coastline is deeply indented and cut into, or if there is a *fringe of islands along the coast in its immediate vicinity*." According to Mark Killas, the introduction of the word 'fringe' in the Convention makes the test somewhat more stringent than that articulated in the ICJ decision.[87] J. Bruce McKinnon also argues that the 'fringe of islands' criterion significantly narrows the customary law position as stated by the ICJ:[88]

> The northern mainland coast of Canada is deeply indented, but this fact would justify using straight baselines only along the coast… [I]t seems difficult to describe the islands of the Arctic archipelago as a 'fringe of islands' in the 'immediate vicinity' of the coast. The islands extend almost 1,000 miles north from the mainland. Moreover, the northern group of islands is separated by a wide body of water from the southern group. Thus, even if the southern group could be treated as a fringe of islands in the immediate vicinity of the mainland, it would be more difficult to include the northern group despite the existence of a few small islands in Barrow Strait linking the two groups of islands.[89]

Ashley Roach and Robert W. Smith also discuss the "fringe of islands" criterion in their 1996 study "United States Responses to Excessive Maritime Claims." According to the authors, who were both employed by the U.S. State Department at the time, "[t]he United States has taken the position that such a fringe of islands must meet all of the following requirements:

- the most landward point of each island lies no more than 24 miles from the mainland coastline;
- each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and
- the islands, as a whole, mask at least 50% of the mainland coastline in any given locality."[90]

State practice, however, does not reveal a general endorsement of the American three-part test. Douglas Johnston rightly points out that "the Convention does not provide precise guidelines as to when straight baselines may or may not be used, and to that extent concedes much to the discretion of the coastal State."[91] Indeed, the lack of a mathematical measure to limit the length of straight baselines under article 7(1) contrasts sharply with the precise limit of 24 nautical miles imposed as a closing line for bays under Article 10(5) of the LOSC.

Johnston's conclusions accord with a detailed study completed by the UN Office for Ocean Affairs and the Law of the Sea in 1989.[92] Given the importance and value of this source, a significant portion of the analysis relevant to article 7(1) is reproduced below:

> 35. In determining whether the conditions apply which would permit the use of straight baselines it is necessary to focus on the spirit as well as the letter of the first paragraph of article 7…
>
> 39. The spirit of article 7, in respect of indented coasts and fringing islands, will be preserved if straight baselines are drawn when the normal baseline and closing lines of bays and rivers would produce a complex pattern of territorial seas and when those complexities can be eliminated by the use of a system of straight baselines…
>
> 41. While the phrase 'deeply indented and cut into' travelled intact from the 1951 Anglo-Norwegian Fisheries case Judgment to the 1982 United Nations Convention via the 1958 Convention, the phrase 'a fringe of islands along the coast in its immediate vicinity' appears to be *a widening of the phrase used in the Judgement*: 'or where it (a coast) is bordered by an archipelago such as the 'skjaergaard.'
>
> 42. *There is no uniformly identifiable objective test* which will identify for everyone islands which constitute a fringe in the immediate vicinity of the coast…
>
> 44. There are generally two situations where a fringe of islands is likely to exist. The first, which is related closely to the 1951 Anglo-Norwegian Fisheries case Judgment, deals with islands which appear to form a unity with the mainland. Such islands appear to be dovetailed into the coast and on small-scale maps appear to be a continuation of the mainland…
>
> 45. The second situation occurs when islands which are some distance from the coast form a screen which masks a large proportion of the coast from the sea… However the coast may be screened by a swarm of small islands which by their number justify consideration as a fringe…
>
> 46. The descriptive phrase 'in its (the coast's) immediate vicinity' is a concept which has a clear meaning *but for which there is no absolute test*. While a fringe of islands three nautical miles from the coast may be considered as being in its immediate vicinity, a fringe 100 nautical miles distant would not. It is generally agreed that with a 12-mile territorial sea, a distance of 24 miles would satisfy the conditions. The distance that has been proposed in the literature as a general rule is 48 miles, which *could be exceeded in certain circumstances, but this figure is not necessarily widely agreed upon*…[93]

Pharand has argued that the Arctic archipelago presents two characteristics of fundamental importance in regards to the geographic

threshold: the proximity of the archipelago to the Canadian coast and the unity of the archipelago itself.[94] He explains:

> As for the proximity of the coast, there can be no question that this element is present, since not only are most of the islands, which form the base of the Archipelago located very close to the coast, but the coast itself, through its central peninsula, advances into the very core of the Archipelago…. The unity of the Archipelago itself is derived from the interpenetration of land formation and sea areas, and this close relationship is reinforced by the presence of ice most of the year. The geographic unity is further assured by the string of closely spaced islands across Parry Channel, linking the northern with the southern section and forming a single unit.[95]

Referring to the Court's statement in the *Norwegian Fisheries* case that the islands, islets, rocks and reefs off the Norwegian coast were "in truth but an extension of the Norwegian mainland,"[96] Killas argues that the islands of the Canadian Arctic archipelago are "in many places very close to the northern shore, and can reasonably be viewed as being 'but an extension' of the Canadian mainland."[97] And while acknowledging the existence of two distinct island groups, Killas maintains that when viewed on a large-scale chart, the Arctic archipelago does form a "coherent, triangular, frozen unity." He observes: "The whole is greater than the sum of the parts. A fringe is created by islands fringing other islands which in turn fringe the coast."[98] Both Killas[99] and Pharand[100] emphasize that nearly all the bodies of water in the archipelago are studded with countless islands, rocks and reefs.[101]

The 1958 Territorial Sea Convention and the LOSC also codified the three specific criteria elaborated by the Court in the *Norwegian Fisheries* case:

(i) "while … a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast"[102] (the general direction of the coast criterion now codified in Article 7(3) of the LOSC);

(ii) "the real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to

the regime of internal waters"[103] (the 'close link between land and sea' criterion now codified in Article 7(3) of the LOSC);

(iii) "[f]inally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"[104] (the economic interests criterion now codified in Article 7(5) of the LOSC).

As evidenced by the European Community's note of protest, Canada's Arctic baseline system is sometimes criticized for failing to satisfy the first "general direction" criterion. However, the Court cautioned in its judgment that this first criterion was "devoid of any mathematical precision"[105] and even specified that "the method of baselines … within reasonable limits, may depart from the physical line of the coast."[106] Still, as Pharand writes:

> [J]udging from the commonly used Lambert conic projection, it would be difficult to maintain that the first criterion of the general direction of the coast is complied with. Indeed, the northern coast of Canada runs in a general east-west direction, whereas the Archipelago *appears* to project itself in a general northerly direction.[107]

Various arguments can be marshalled to counter this criticism. Victor Prescott contends that the general direction criterion is not only concerned with the direction of the coast of the mainland and islands that are dovetailed into it. He insists that large islands can be fringed by smaller islands and points out that Article 121 of the LOSC provides that baselines for islands are to be determined in exactly the same way as for other land territory. On this basis, Prescott concludes that "a case could be made that the small islands totalling more than 18 000 provide a series of fringes to the large islands that interlock. This would lead irresistibly to the conclusion that to draw straight baselines *within* the archipelago rather than around its perimeter would violate the concept of fringing islands."[108]

For Killas, two important factors must be considered. First, the particular configuration of the Canadian coast, with its indentations and peninsulas, is such that a general direction cannot be discovered with any accuracy.[109] Second, the inherent ambiguity of the word

"coast" may entitle Canada to claim the seaward coast of the islands as the relevant coastline.[110] Pharand has also raised this argument: "What really constitutes the Canadian coastline is the outer line of the archipelago, and the straight baselines follow such an outer line."[111]

Pharand also argues that the best way of evaluating the general direction of the baselines in relation to Canada's northern coast might be to use a map with fewer distortions than a conic projection:

> [A]lthough this projection [conic projection] is a considerable improvement over the old Mercator, areas in high latitudes still present considerable distortions. Those areas appear larger as one approaches the North Pole and seem to point northward in a shape resembling a triangle. Fortunately, the distortion problem was solved in large measure on a world map published by the National Geographic Society in 1988, projecting the polar regions in a far more realistic manner. The map displays the Robinson projection… Of course, it does not pretend to completely solve the problem of presenting the globe on a flat surface… In spite of the remaining distortion at high latitude, the Archipelago is better represented. It is fully integrated in the mainland, and it is oriented east and west in the same general direction.[112]

The fulfillment of the general direction criterion is even more obvious on maps which are centred on the North Pole, with Canada, Alaska, Russia, Norway and Greenland all fringing a suddenly very large Arctic Ocean.[113] Indeed, Pharand insists that Canada's baseline system meets the stricter test formulated by the United States "that the general trend of the most distant islands not deviate more than 20° from coastline or its general direction."[114]

Canada's position is certainly strong with respect to the other two criteria. As the waters of the Arctic archipelago are frozen for a good part of the year, some scholars argue that they are more like land than water and that therefore Canada's baseline system meets the second "close link" requirement.[115] Of course, with the ice in the Arctic archipelago shrinking at an alarming rate, this may no longer be a persuasive argument. However, Pharand has proposed an alternative justification by quantifying the 'close link' criterion. Assimilating the 'close link' requirement to a sea to land ratio, Pharand observes that the Canadian archipelago, with a 0.822 :1 sea to land ratio, presents a much more compelling case than the Norwegian coast's 3.5 :1 ratio.[116] Killas has also argued that the 'ratio of sea to land' test, explicitly adopted by

consensus during the Third Conference on the Law of the Sea, is the most appropriate in interpreting article 7(3).[117]

The validity of Canada's baseline system is also reinforced by the economic interests of the local Indigenous populations. Indeed, the historic use and occupancy of the sea and ice by the Inuit and other Indigenous peoples help to justify not only the Canadian system as a whole, but also individual baselines.[118] Article 7(5) of the LOSC provides that: "Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage." In the 1951 *Fisheries Case*, the ICJ held that this economic criterion included "nutritional and cultural dependence."[119] In particular, the Court found that: "The survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds … founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line…."[120]

The sea-ice is vital to Inuit culture and their way of life. As detailed in a petition concerning climate change filed by Inuit from Canada and Alaska with the Inter-American Commission on Human Rights:

Figure 3-4: Historic Inuit sea-ice use based on maps produced by the Inuit Land Use and Occupancy Project (Department of Indian and Northern Affairs Canada, 1976). *Jennifer Arthur-Lackenbauer*

> [A]lthough many Inuit are [now] engaged in wage employment, the Inuit continue to depend heavily on the subsistence harvest for food. Traditional 'country food' is far more nutritious than imported 'store bought' food. Subsistence harvesting also provides spiritual and cultural affirmation, and is crucial for passing skills, knowledge and values from one generation to the next, thus ensuring cultural continuity and vibrancy…
>
> [The Inuit] have developed an intimate relationship with their surroundings, using their understanding of the arctic environment to develop a complex culture that has enabled them to thrive on scarce resources. The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow.[121]

The economic and cultural dependence of the Inuit on the sea-ice from time immemorial is a critical aspect of Canada's claim over the waters of its Arctic archipelago.

An analysis of the criteria defined in the *Norwegian Fisheries* case and Article 7 of the LOSC for the drawing of straight baselines does not, however, entirely resolve the question of Canada's authority over its Arctic waters in light of the second major innovation introduced by the 1958 and 1982 Conventions. As an important concession to maritime States such as the United States, which have long advocated the right to freedom of navigation, both article 5(2) of the 1958 Geneva Convention and article 8(2) of the LOSC recognized the continuation of certain pre-existing navigation rights following the proclamation of baselines. Article 8(2) of the LOSC provides:

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

Focusing on the words "not previously considered as such," an essential argument has been put forward to defend Canada's claim to complete control over the Arctic waters: their prior legal status as Canadian internal waters. Thus, as Howson accurately points out, "the inquiry shifts from the validity of Canada's baseline system under international law to a determination of the status of the Arctic waters prior to their enclosure" in 1986.[122]

Some commentators have argued that Canada's own inconsistent actions and pronouncements regarding its Arctic waters may have damaged its claim to exclusive sovereignty. Although Prime Minister Trudeau declared in May 1969, in the wake of the *Manhattan* voyage, that the islands and the waters between the islands in the Canadian Arctic were considered "our [Canada's] own,"[123] some experts point out that the government stopped short of asserting Canadian sovereignty over the Arctic waters when it adopted the AWPPA. McDorman notes that the Canadian response was "not to assert *absolute jurisdiction* over Arctic waters, but to approach the problem functionally" with the primary goal of protecting the unique and fragile environment of the Arctic.[124]

This criticism arguably misinterprets the intention and reach of the AWPPA at the time it was adopted in 1970. The aim of the Canadian government was to create a 100-mile pollution prevention zone in the Arctic waters *around Canada's coast*, since Prime Minister Trudeau made clear to the House of Commons in May 1969 that "the waters between the islands of the archipelago are *internal* waters over which Canada has full sovereignty."[125] Indeed, section 3(1) of the Act ("Application of the Act") defined "Arctic waters" as:

> the waters … *adjacent to* the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of west longitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles; except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, there shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land such line of equidistance.[126]

This interpretation of the scope of Canada's "pollution prevention zone" also appears to be borne out by paragraph (2) of Section 3. It begins by reiterating that "[f]or greater certainty, the expression 'arctic waters' in this Act includes all waters described in subsection (1)…" It goes on, however, to provide that in respect of any person described in paragraph 6(1)(a), it also includes "all waters adjacent thereto lying

north of the sixtieth parallel of north latitude, the natural resources of whose subjacent marine areas Her Majesty in right of Canada has the right to dispose of or exploit … but does not include inland waters."[127] Finally, when Canada amended the AWPPA in June 2009 to extend the zone from 100 nm to 200 nm, the stated objective was to reconcile the definition of "arctic waters" within the Act with the Canadian exclusive economic zone, a maritime zone defined from the territorial baseline drawn *around the Arctic archipelago*.

Thus, as Canada's new Arctic pollution prevention zone stretched from the perimeter of its archipelago well beyond its territorial sea, in what at the time were considered to be high seas areas, it is entirely logical that Canada would seek to reassure the international community that it was not asserting its sovereignty over such a vast marine area but was rather claiming a limited basis of action for pollution prevention and control.[128]

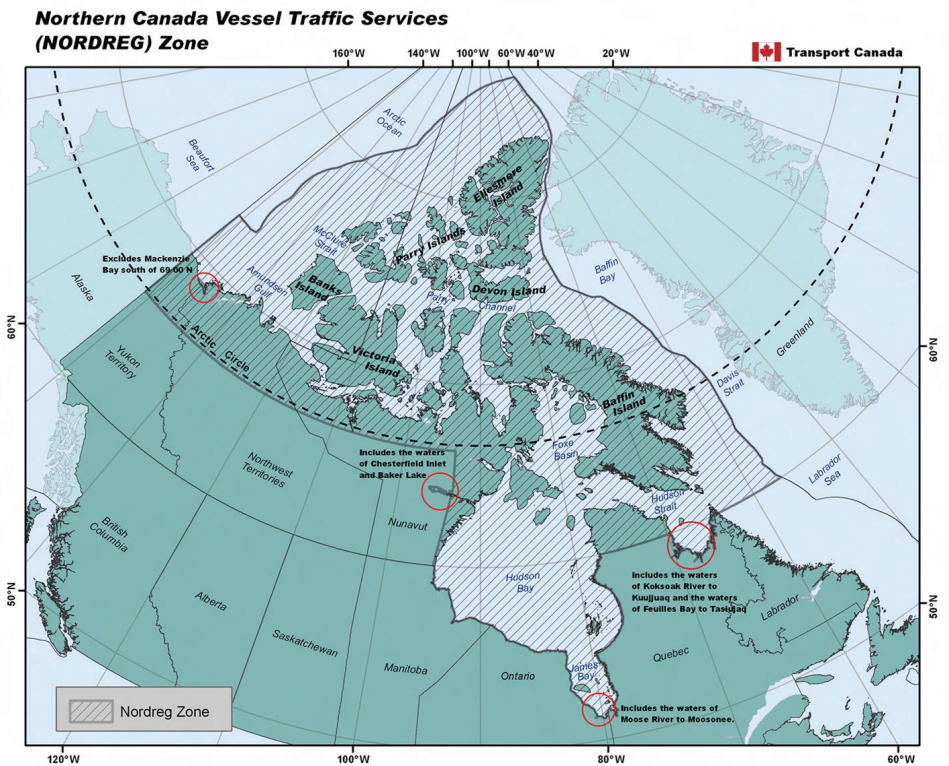

Figure 3-5: NORDREG Zone extended to 200 n.m. in 2009. *Transport Canada.*

The 'gate of territorial waters' theory, propounded following Canada's decision to extend its territorial sea from three miles to twelve miles is, according to Howson, another inconsistency that severely weakens the Canadian position:

> By implying that the territorial waters at either end of the Northwest Passage gave Canada the basis for 'undisputed control … over two of the gateways to the Northwest Passage', the Canadian government created the negative inference that whatever ocean space in the archipelago lay between the two limits of territorial waters should be considered 'high seas.'[129]

Finally, some commentators see the decision in 1985 to draw baselines around the Canadian Arctic archipelago as contradictory. In April 1970, during the House of Commons debate on the AWPPA and the extension of Canada's territorial sea from 3 to 12 miles, the following question was asked of the Government:

> Regarding the Arctic Islands, will Bill C-202 draw geographic lines of the 12 mile-limit around each island, or is it intended to draw a line enclosing all the Arctic islands? In other words, will the territorial sea as defined in Bill C-203, include areas between Arctic Islands of more than 24 miles?[130]

The response from the then Minister of Foreign Affairs, Mitchell Sharp, reflected the position that he had adopted earlier in the same debate when he declared that "Canada has always regarded the waters between the islands of the Arctic archipelago as being Canadian waters."[131] He replied: "Since obviously we claim these waters to be Canadian internal waters we would not draw such lines, Mr. Speaker."[132] "If they were previously 'internal waters'," Howson insists, "then there was no need to draw baselines in order to curtail the right of innocent passage…."[133]

This particular argument, however, fails to take into consideration the careful choice of words used by Secretary of State Clark in announcing the government's decision to draw straight baselines: "[T]hese baselines define the outer limit of Canada's *historic internal waters*."[134]

Pharand contends that Canada has given various indications, over a significant period of time, that it considers the waters of the Arctic archipelago to be Canadian internal waters.[135] In addition to Sharp's statement reproduced above,[136] Pharand points to a December 1973

letter in which the Bureau of Legal Affairs wrote that "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada…"[137] This view was subsequently confirmed in May 1975 by the Secretary of State for External Affairs, Allan MacEachen, when he stated that the Arctic waters were considered to be Canadian "internal waters."[138] Rothwell adds to this list of key pronouncements a 1980 legal memorandum in which the Department of External Affairs stated: "Canada continues to maintain the position that the Northwest Passage is not an international strait; that the waters making up the passage are internal…."[139]

It is critical to remember that Article 8(2) of the LOSC and its preservation of pre-existing rights of innocent passage are only relevant where it is "the establishment of straight baselines" that has the effect of "enclosing as internal waters" certain marine areas. As has been emphasized throughout this chapter, this is not the official Government of Canada position. Rather, Canada asserts that the waters within the Arctic archipelago are Canadian internal waters by virtue of an historic title. Article 8(2) is of no relevance in this context. The analysis of Article 8(2) has only been undertaken to engage with those experts who seek to analyze the Canadian baselines as strict LOSC Article 7 straight baselines – a purely academic exercise.

Does an international strait cut through Canada's internal waters?

The United States has persistently denied that the Northwest Passage is enclosed within Canadian internal waters. Rather, as McDorman reports, the American response to Canada's claims has consistently been that the waters of the Passage are part of an international strait through which a right of passage prevails:

> On issues involving navigational rights the United States has persistently taken a strong stand to protect the right of navigational passage…. While the trend in this century has been for coastal states to extend their jurisdiction ever seaward, the United States, along with other maritime powers, have sought to ensure a continued right of unimpeded navigation over as wide an area as possible. One must not underestimate the resolve of the United States regarding navigational issues and in particular regarding passage rights in international straits.[140]

This long-established American position was explicitly stated in President George W. Bush's January 2009 "National Security Presidential Directive and Homeland Security Presidential Directive," in which he emphasized that freedom of the seas was a top national priority for the United States. "The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits."[141] His successor, President Barack Obama, also expressly reaffirmed the official United States position in his 2013 "National Strategy for the Arctic Region": "Accession to the Convention [1982 United Nations Law of the Sea Convention] would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and overflight through the Northwest Passage and the Northern Sea Route."[142]

'Strait' is not a term of art and has never been defined in international treaty law. During the negotiations leading to the 1958 Law of the Sea conventions, States were unable to agree on a generally acceptable legal regime for international straits. The issue of straits was also quite divisive during the lead-up to the 1982 LOSC, pitting coastal States, particularly in the developing world, against the maritime powers. Although a compromise was eventually reached as to the nature and scope of the right of passage that would apply to "straits used for international navigation," the negotiators were unable to agree on a precise definition for such straits.[143]

Consequently, the only source of law for the meaning to be ascribed to an 'international strait' is the 1949 International Court of Justice decision in the *Corfu Channel* case.[144] The case concerned incidents which had taken place on 22 October 1946 in the Corfu Channel, which at the time Albania claimed as territorial waters. While navigating the strait, two British destroyers had struck mines and had suffered damage, including a serious loss of life. Alongside the question of Albania's responsibility for the explosions, the Court was asked to consider whether the United Kingdom had violated international law, through the acts of its Navy, by failing to obtain Albania's authorization before entering the North Corfu Channel. On this second issue, the Court concluded that the Channel "should be considered as belonging to the

class of international highways through which passage cannot be prohibited by a coastal State in time of peace."[145]

In answering the question "whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for the international navigation," the Court stated that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."[146] In this key passage, which remains the only international ruling on the issue, the ICJ set out the twin criteria that define an international strait: "one pertaining to geography and the other to the function or use of the strait," to borrow Pharand's words.[147] The deliberate use by the Court of the coordinative conjunction "and" would seem to give equal weight to both criteria.

The ICJ's geographic criterion was subsequently enlarged by the 1958 Territorial Sea Convention and the LOSC. As a result of the inclusion of article 16(4) in the 1958 Convention[148] and the concept of the exclusive economic zone in the LOSC,[149] it is now accepted that an 'international strait' may also join a part of the high seas with the territorial sea of a foreign State or two parts of the exclusive economic zone.[150] According to Pharand, the geographic criterion is easily met in the case of Canada's Northwest Passage in that it links two parts of the high seas:

> Indeed, the eastern end of the Passage leads to Baffin Bay, Davis Strait, the Labrador Sea and the Atlantic Ocean, whereas the western end leads to the Beaufort Sea, the Chukchi Sea, the Bering Strait and the Pacific Ocean.[151]

As to the second functional criterion—that the strait be used for international navigation—there has been some debate over its precise meaning. The critical question is whether an 'international strait' is one that *has been and is being used* by foreign vessels (actual use) or, on the other hand, one that merely *could be used* by foreign vessels (potential use). Once again, the only legal source of guidance on this issue appears to be the ICJ's decision in the *Corfu Channel* case:

> It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and *the fact of its being used* for international navigation. Nor can it be decisive that this Strait

> is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It *has nevertheless been a useful route* for international maritime traffic.[152]

The functional criterion was also codified in the 1958 Territorial Sea Convention and copied in the LOSC, without any of the Court's refinements. Both article 16(4) of the Geneva Convention and article 34(1) of the LOSC merely refer to "straits used for international navigation." According to Howson, the past tense "used," which appears in the *Corfu Channel* decision and in both statutory formulations, confirms that 'actual use' is the more tenable interpretation.[153]

S.N. Nandan and D.H. Anderson, both delegates at the Third U.N. Conference on the Law of the Sea, also take the view that potential use is insufficient, insisting that there must be actual use though such use need not be "regular or … reach any predetermined level."[154] Tommy Koh, President of the Conference from 1981 to 1982, agrees that potential use of a strait is not enough and that actual use is necessary. Koh argues that the LOSC requires evidence "that a strait is usually being used, the volume of such usage being irrelevant, for international navigation."[155]

Confirmation for this assessment can be found in the view expressed by the United Kingdom in its Pleadings in the 1951 *Norwegian Fisheries* case wherein it defined an international strait as "any legal strait to which a special regime as regards navigation applies under international law because the strait is *substantially used* by shipping proceeding from one part of the high seas to another."[156] The International Law Commission's draft convention for the 1958 Law of the Sea Conference similarly confined the right of non-suspendable innocent passage to straits "*normally* used for international navigation between two parts of the high seas."[157]

In 1964, Richard Baxter wrote that "international waterways must be considered to be those rivers, canals, and straits which are *used to a substantial extent* by the commercial shipping or warships belonging to states other than the riparian nation or nations."[158] As for the criteria applied by the ICJ in the *Corfu Channel* case, Baxter concluded that "the

test applied by the Court lays more emphasis on the practices of shipping than on geographic necessities."[159]

D.P. O'Connell also emphasized the importance of the "actual use" criterion:

> When it is said, then, that a strait in law is a passage of territorial sea linking two areas of high sea this is not to be taken literally, but rather construed as meaning a passage which *ordinarily carries the bulk of international traffic* not destined for ports on the relevant coastlines. The test of what is a strait, unlike the test of what is a bay, is not so much geographical, therefore, as functional.[160]

O'Connell later reaffirmed the importance of the functional element in what is widely regarded as his most authoritative study, *The International Law of the Sea*. In his opinion, the *Corfu Channel* case established "that not all straits linking two parts of the high seas are international straits, but *only those which are important as communication links*."[161]

In one of the most complete modern studies of the legal regime of straits, Hugo Caminos concludes:

> The amount of use required of a strait before it can be categorized as "belonging to a class of international highways through which passage cannot be prohibited" has never been adequately quantified by scholarly debate. One could conclude, however, that this amount lies somewhere between strict utility and potential utility.[162]

More recently, Robin Churchill and Alan Lowe have considered the Northwest Passage and the Northern Sea Route to be situations where there is "real doubt" as to whether an international strait exists.[163] They chose not to analyze the Northwest Passage—because the dispute between Canada and the United States "was circumvented" by the 1988 Arctic Cooperation Agreement—but their views on the Northern Sea Route would still seem to be of some relevance:

> [T]here are doubts as to whether the straits can be said to be "used for international navigation," and thus attract a right of transit passage, in the light of the handful of sailings through the (often ice-bound) straits that have actually taken place.[164]

Despite the fairly general view that a certain level of actual use is required, voices from within the U.S. military assert that potential use is sufficient. In 1987, Richard J. Grunawalt of the U.S. Naval War College

wrote: "Some nations take the view that an actual and substantial use over an appreciable period of time is the test. Others, including the United States, place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation. The latter view has the greater merit."[165] The last sentence is, of course, an opinion rather than an argument.

Twenty years later, James Kraska of the U.S. Navy asserted that "[t]he test is geographic, not functional—if the water connects one part of the high seas or EEZ to another part of the high seas or EEZ, it is a strait.... there is no authority for the idea that a strait is only a strait if it meets a certain minimum threshold of shipping traffic."[166] The Canadian media described Kraska's article as having "the full backing of the Bush administration in Washington,"[167] but there is no evidence of any other State which publicly supports the U.S. view. The 'potential use' interpretation is supported neither by customary international law nor the only ICJ decision on international straits—which are the only points of reference given that the treaties (1958 and 1982 Conventions) do not give a precise definition of what is an international strait.

That said, there is still some debate as to the necessary *volume* of traffic needed for a body of water to be characterized as an international strait. As Pharand reported, the evidence in the *Corfu Channel* case showed that it had been a useful route for ships flagged by seven different States: Greece, Italy, Romania, Yugoslavia, France, Albania, and the United Kingdom. Over a 21 month period, there had been some 2,884 crossings, and this figure covered only those ships which had put into port and been visited by customs. It did not include the large number of vessels which had gone through the strait without calling at the Port of Corfu. "In other words," Pharand concluded, "the actual use of the North Corfu Channel had been quite considerable."[168] In contrast, Robert Headland and his associates at the Scott Polar Institute document only 314 complete transits of the Northwest Passage over the course of more than a century (between 1903 and 2019) by 239 different vessels (several with changed names).[169]

Rothwell cautions, however, that a special polar standard could be applied in the case of the Northwest Passage:

> Certainly, the amount of traffic through the Northwest Passage is not comparable to that of the Corfu Channel, or other commonly

> accepted international straits. The need to apply different standards in the polar regions, however, has been recognized.[170]

The presence of ice in the Passage and the polar weather conditions should, according to Rothwell, allow for a test requiring a lower volume of international navigation of the Passage in order to classify it as an international strait.[171]

While acknowledging that the Court did not specify what level of activity was necessary,[172] Pharand maintains that, at the very least, the strait must have *a history as a useful route for international maritime traffic*."[173] In applying this test, Pharand suggests that the level of use be determined principally, but not exclusively, by reference to two factors: the number of ships navigating the strait and the number of flags flown.[174]

A further critical aspect must be emphasized: in the *Corfu Channel* case, the evidence showed that the thousands of foreign ships that had transited through the Channel had done so by right, without obtaining the prior approval of Albania or, indeed, involving Albanian officials in those transits. This state of affairs stands in marked contrast to the limited number of foreign transits through the Northwest Passage: Canadian authorities have been involved in all such transits and Canadian domestic regulations have been fully adhered to and respected. Even the American icebreaker *Polar Sea*, which sailed through the Passage in 1985 under an informal "agreement to disagree,"[175] complied with Canadian legal measures.[176] Far from treating the Northwest Passage as an 'international highway,' foreign ships have recognized Canada's authority and conformed to Canadian rules and regulations.

It is thus Canada's position that the Northwest Passage does not fulfill the functional criterion which, together with the geographic criterion, defines an international strait. Two recent, influential studies agree with this assessment. Michael Byers, in his 2013 study, concludes that in the absence of any *non-consensual* transits by foreign vessels through the two Arctic seaways (Northwest Passage and Northern Sea Route), they do not at present meet the definition of an international strait subjected to the right of transit passage.[177] Ana López Martin, author of the comprehensive volume *International Straits: Concept, Classification and Rules of Passage*, declares in turn: "Today the majority doctrine excludes the whole of the Northwest Passage for the

classification of an international strait because it cannot be used for international navigation."[178]

Writing in 1988, Howson warned that while the Northwest Passage did not at the time fulfil the twin criteria of an "international strait," the situation could quickly change:

> [T]hough at present both the rarity of surface voyages and the difficulty of navigation through the ice-bound waters keep international maritime navigation away from the Northwest Passage, technological advancement will soon complement geographic potential. Indeed, to a certain extent, this has already occurred with rapid advances in submarine technology. Under either 'actual' or 'potential' use standards, the Passage is likely to become a far more compelling case for the status of an 'international strait.'[179]

This warning, offered more than thirty years ago, did not take into account the current, sudden, and dramatic loss of Arctic sea-ice caused by accelerating climate change.

Recent Developments

While the arguments of the two main protagonists in the debate over the legal status of the Northwest Passage have not substantially changed over the course of the last half century, there have been some important developments in Canada. New policies and programmes have been established (1) aimed at recognizing the vital role that Canada's Indigenous peoples must play in Arctic ocean governance, and (2) dealing with the threats posed to the Arctic marine environment by climate change and the consequent increased level of marine activity.

Nation-to-nation reconciliation

Reconciliation with Canada's Indigenous peoples has been at the heart of Prime Minister Justin Trudeau's agenda and has strengthened the exercise of Canadian sovereignty in the Arctic.

Acknowledging the reality that "Canada's sovereignty over the waters of the Arctic archipelago is supported by Inuit use and occupancy" (article 15.1.1(c) of the NLCA), the Trudeau government announced in late December 2016 that it would co-develop a new "Arctic Policy Framework" for Canada in collaboration with Indigenous

and territorial partners. With the aim of creating a long-term vision of priorities and strategies for the Canadian Arctic, as well as promoting shared leadership and partnerships, the process adopted a whole-of-government approach involving many federal departments and agencies. National Indigenous organizations were heavily involved and several regional roundtables organized to seek the input of local Indigenous groups. Gatherings of academics and industry experts also ensured a broad spectrum of interests and ideas. This novel and widely inclusive process, challenging to manage in practice, led to the release in early September 2019 of "Canada's Arctic and Northern Policy Framework" [hereinafter Framework].[180]

The Framework is described on the Crown-Indigenous and Northern Affairs Canada website as "a profound change of direction for the Government of Canada."[181] The introduction to the Framework emphasizes that, unlike previous Canadian Arctic policies, it better aligns Canada's national and international policy objectives with the priorities of Indigenous peoples and of northerners:

> For too long, Canada's Arctic and northern residents, especially Indigenous people, have not had access to the same services, opportunities, and standards of living as those enjoyed by other Canadians. There are longstanding inequalities in transportation, energy, communications, employment, community infrastructure, health and education. While almost all past governments have put forward northern strategies, none closed these gaps for the people of the North, or created a lasting legacy of sustainable economic development.[182]

Recognizing that 'made in Ottawa' policies have not been successful in the past, the Framework "puts the future into the hands of the people who live there to realize the promise of the Arctic and the North."[183] Its vision is articulated as "[s]trong, self-reliant people and communities working together for a vibrant, prosperous and sustainable Arctic and northern region at home and abroad, while expressing Canada's enduring Arctic sovereignty."[184] A crucial element of this new, cooperative form of policy making is the inclusion in the Framework of chapters from Indigenous, territorial and provincial partners: "Through these chapters, our partners speak directly to Canadians and to the world, expressing their own visions, aspirations and priorities."[185]

In the months leading up to the release of the Framework, Inuit leaders from Nunavut seized a valuable opportunity to assert their resolve to be heard, for their "own visions, aspirations and priorities" for the region to be acknowledged and respected. When U.S. Secretary of State Mike Pompeo denounced Canada's claim over the NWP as "illegitimate" during a speech at the Arctic Council Ministerial meeting in Finland early in May 2019, Canada's Foreign Affairs minister Chrystia Freeland was quick to respond, declaring that "Canada is very clear about the NWP being Canadian" and insisting that "[t]here is both a very strong and geographic connection with Canada."[186] This diplomatic tit-for-tat exchange between high level American and Canadian government officials came as little surprise. The more forceful and compelling rebuttal came from Canadian Inuit, who served notice on Pompeo and the U.S. government that the NWP is part of Inuit Nunangat, their Arctic homeland, and who reminded all nations of their legally protected right to self-determination.[187]

Exercising Canadian sovereignty in a warming Arctic

In the past, Canada has been criticized for claiming the Northwest Passage as part of its national territory without implementing concrete measures and actions to fulfill its fundamental duty to act as responsible and responsive sovereign over its waters.

Since it was first elected in 2015, the Trudeau government has invested considerable sums and launched ambitious programmes to effectively exercise Canada's sovereign authority over its Arctic waters and discharge its duty to act as a responsible steward. On 7 November 2016, Prime Minister Trudeau launched the $1.5 billion *Oceans Protection Plan* (OPP) to improve marine safety, promote responsible shipping and protect Canada's marine environment. The first paragraph of the official government announcement declares that Canada's ambitious 'marine safety plan' is supported by "commitments to Indigenous co-management."[188] Indeed, one of the OPP's four main priority areas is defined as strengthening partnerships and launching co-management practices with Indigenous communities.[189]

Many of the initiatives launched under the OPP have Arctic components. Three programmes in particular have provided meaningful participation for local communities, land claims rights

holders, and territorial partners, and the opportunity to shape the emerging governance regime.

Under the impetus of the OPP, Transport Canada (TC) and the Canadian Coast Guard have revitalised their Low Impact Shipping Corridors Initiative. The goal is to identify specific shipping routes throughout the Arctic and prioritize spending for infrastructure and services for transportation and emergency response (e.g. hydrography, navigational aides, ice breaking, patrolling). Broad consultations with Inuit organizations and local communities have been conducted to ensure that ships do not senselessly disrupt wildlife and traditional, cultural, social and economic Indigenous activities.[190]

With OPP funding, Transport Canada has also established the "Proactive Vessel Management Initiative," a new approach to managing vessel traffic in Canadian waterways. Cambridge Bay, a community along the NWP in the Kitikmeot region of the central Canadian Arctic, has been selected as a host location for a pilot project to test various concepts and practices for the efficient resolution of vessel traffic management issues that are respectful of the needs and priorities of local residents.

Finally, as mandated by the NLCA, Indigenous Northerners have been heavily involved in the creation of Canada's largest marine conservation area, Tallurutiup Imanga (Lancaster Sound), at the eastern entrance of the NWP. After lengthy negotiations between the federal and Nunavut governments and the Qikiqtani Inuit Association (representing Inuit in the eastern Canadian Arctic), an agreement in principle was reached in December 2018 that includes a new collaborative federal-Inuit governance model and an Inuit advisory body. According to Oceans North, the agreement represents a new approach to protecting sensitive ocean environments: "a recognition that the people in the best position to manage this wonderful ecosystem are the people who have been managing it for centuries."[191] Discussions are also underway between the Qikiqtani Inuit Association, the Government of Nunavut, and the Government of Canada for the long-term protection of the multi-year ice pack in the Tuvaijuittuq marine protected area north of Ellesmere Island.

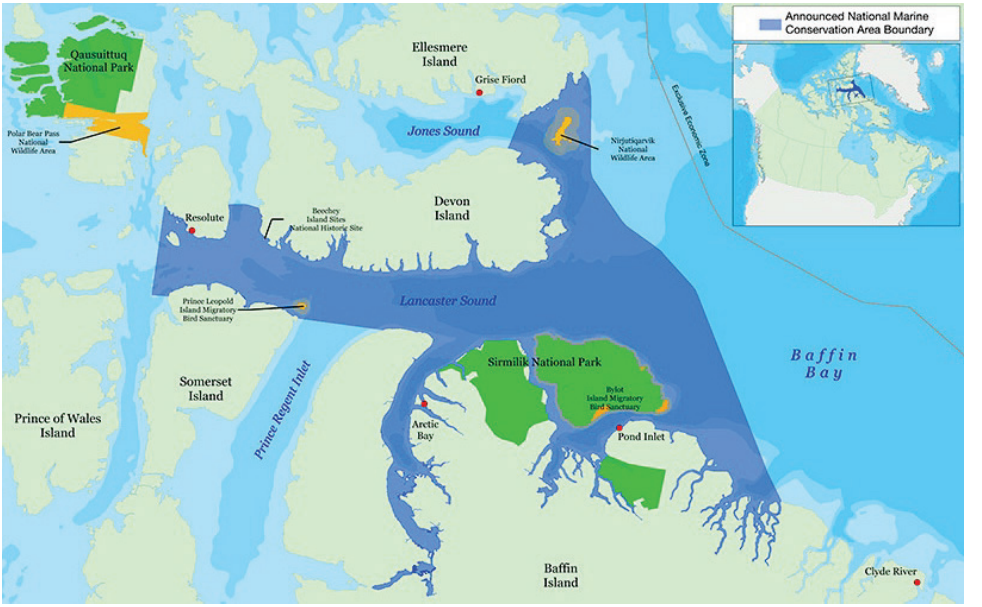

Figure 3-6: Boundary for Tallurutiup Imanga National Marine Conservation Area. *Parks Canada / Qikiqtani Inuit Association / Government of Nunavut*

Conclusion

Canada and the United States are *allies* in the quest for a practical and responsible navigational regime in the Arctic. Unfortunately, Washington is often cast as Canada's principal detractor and there are some elements, if not fully explained and properly understood in their context, which lend support to that characterization. However, the two continental partners have a long history of collaboration in the Arctic and have found ways to set aside their legal differences to make things happen and to move forward.[192]

The 1988 *Arctic Cooperation Agreement*, in which the two parties agreed to disagree and then proceeded to set out a regime governing transits of the NWP by American icebreakers engaged in research, represents a key aspect of this long-standing commitment to cooperation.[193] Deliberate legal ambiguity has served and continues to serve both countries well. Unfortunately, a new and powerful phenomenon over which neither Canada nor the United States has full control is 'rocking the boat.' Climate change and the melting of the sea ice – at a rate which is exceeding even the most pessimistic forecasts –

has changed the nature of the problem. This is no longer simply a bilateral issue, if it ever was.

Canada and the United States should continue to find ways to set their legal differences aside and work collaboratively. At the same time, Canada must continue to vigorously defend its claim to exclusive jurisdiction over the NWP at the international level. American officials should not interpret this policy as one of provocation. It is a necessary strategy aimed at a wider audience. In the face of a dramatically changing Arctic, it is only legally prudent and politically wise for Canada to defend a robust and enforceable navigational regime.

Since the early 1970s, Canada has acted with transparency in setting up its Arctic regime. The AWPPA has been updated in the intervening decades with input from the International Maritime Organization (IMO). Canada was an early proponent and spearheaded efforts within the IMO for the adoption of the *Polar Code*;[194] and many of its safety and environmental provisions mirror Canadian standards. Canadian regulations have now also been widely adopted by international classification societies.[195] Finally, Canada is on record since at least 1969 as being fully committed to facilitating navigation through the Northwest Passage so long as ships are respectful of the Arctic environment and its peoples. In that year, Prime Minister Pierre Elliott Trudeau declared that "to close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty … would be as senseless as placing barriers across the entrances of Halifax and Vancouver harbours."[196] The following year, in its response to a U.S. diplomatic note, the Canadian government reiterated "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."[197]

Canada has legal obligations which it must fulfill, principally to the Inuit and other Indigenous peoples who inhabit the Arctic and whose cultural identity is tied to the land, to the sea, and diminishing ice. Commitments to environmental stewardship and safe navigation in partnership with all Northern Canadians must continue to be concretized through inclusive and effective initiatives and programmes. For in the absence of decisive and sustained involvement, Canada cannot hope to convince an increasingly wide array of interested

stakeholders that it remains the best possible steward and manager of the Northwest Passage.

Notes

[1] For a historical perspective on territorial sovereignty in the Canadian Arctic, see I.L. Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions" (1963) 9 McGill L.J. 200 at 210-16 and R.S. Reid, "The Canadian Claim to Sovereignty over the Waters of the Arctic" (1974) 12 Can. Y.B. Int'l L. 111 at 112-114.

[2] R.R. Roth, "Sovereignty and Jurisdiction over Arctic Waters" (1990) 28 Alta L. Rev. 845 at 851. See also Reid, *ibid*. at 114. The only exception has been an inconsequential dispute with Denmark over tiny Hans Island, a barren uninhabited islet located halfway between Ellesmere Island and northwest Greenland. In a joint statement issued on 19 September 2005, the Canadian and Danish foreign ministers, while acknowledging that they held "very different views on the question of the sovereignty of Hans Island," pledged to continue their efforts to reach a long-term solution to the dispute. In the interim, they agreed to inform each other of any activities conducted on the Island and to show restraint. On 23 May 2018, Canada and Denmark announced the creation of a Joint Task Force to try and resolve their boundary issues in the Arctic, including the question of sovereignty over Hans Island.

[3] N.C. Howson, "Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage" (1988) 26 Colum. J. Transnat'l L. 337 at 346.

[4] See, for example, E. Elliot-Meisel, *Arctic Diplomacy* (New York: Peter Lang, 1998); P. W. Lackenbauer and P. Kikkert, "Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68" in G. Donaghy and M. Carroll (eds.), *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009* (Calgary: University of Calgary Press, 2011) 101; and A. Lajeunesse, *Lock, Stock, and Icebergs: A History of Canada's Arctic Maritime Sovereignty* (Vancouver: UBC Press, 2016).

[5] House of Commons *Debates* (6 April 1957) at 3186. Emphasis added.

[6] See discussion below.

[7] *Criminal Code of Canada*, S.C. 1953-54, c.51, s.420.

[8] *Coastal Fisheries Protection Act*, S.C. 1953, c.15, s.2(6). See J.B. McKinnon, "Arctic Baselines: A Litore Usque ad Litus" (1987) 66 Can. Bar Rev. 790 at 797.

[9] "The U.S. believed that no state could or should claim water or ice as territory." L. Kutner, "The Arctic Ocean: A Contest of Sovereignty" (1983) 8:5 The Common Law Lawyer 1 at 6.

[10] *Ibid*. Brownlie explains that the high seas are commonly described as *res communis omnium*: "The *res communis* may not be subjected to the sovereignty of any state, general acquiescence apart, and states are bound to refrain from any acts which might adversely affect the use of the high seas by other states or their nationals." I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 178.

[11] T.L. McDorman, "In the Wake of the 'Polar Sea': Canadian Jurisdiction and the Northwest Passage" (1986) 27 C. de D. 623 at 637.

[12] The *Manhattan* was specially modified into an ice-breaking vessel of 115,000 tons and 43,000 horsepower. Built in 1962, it was at the time the largest merchant ship ever to fly the American flag and the largest commercial ship ever constructed in the United States. "The *Manhattan* … was as long as the Empire State building laid on its side and displaced about twice the amount of water as the Queen Elizabeth." L. Gedney and M. Helfferich, "Voyage of the Manhattan" (19 December 1983), available at Alaska Science Forum, https://www.gi.alaska.edu/index.php/alaska-science-forum/voyage-manhattan. The ship sailed on 24 August 1969, and completed navigation of the Passage on 14 September 1969. Reid, *supra* note 1 at 111. For an account of the *Manhattan*'s voyage, see B. Keating, "North for Oil – Manhattan Makes the Historic Northwest Passage" (1970) 137 National Geographic 374.

[13] The accompanying Canadian Coast Guard vessel was the *John A. Macdonald*, a heavy icebreaker built in 1960 with a cruising range of 20,000 nautical miles and a displacement of 9,000 tons. According to the New York Times: "The 'Johnny Mac', as the vessel is called by the crew of the *Manhattan*, started out on the expedition as just another member of the supporting cast, but she earned co-star status by her performance on the voyage. The sturdy veteran of 10 seasons in the Arctic freed the Manhattan from ice on at least 12 occasions." W.D. Smith, "Tanker Manhattan is Escorted into Halifax Harbor," New York Times, 9 November 1969.

[14] Captain Pullen played a critical role throughout the voyage, advising Humble Oil "on matters of ice navigation, ice seamanship, route selection and tactics appropriate to ships working as a group in heavy pack ice." Opening remarks by H. Ian Macdonald, "S.S. Manhattan's Northwest Passage Voyage – Observations by Canada's Representative" in *The Empire Club of Canada Speeches 1969-1970* (Toronto: The Empire Club Foundation, 1970) 260 at 261. See also P.W. Lackenbauer and E. Elliot-Meisel (eds.), *One of the Great Polar Navigators": Captain T.C. Pullen's Personal Records of Arctic Voyages, Volume 1: Official Roles*, Documents on Canadian Arctic Sovereignty and Security (DCASS) No. 12 (Calgary: Arctic Institute of North America, 2018); and P.W. Lackenbauer and A. Lajeunesse (eds.), *Defining Ice: Lieutenant E.B. Stolee's Accounts of the Canadian*

Arctic Voyages of CCGS John A. Macdonald, 1969/70, Arctic Operational History Series Vol. 8 (Antigonish: Mulroney Institute on Government, 2019).
[15] J. Walz, "Oil Stirs Concern Over Northwest Passage Jurisdiction," New York Times, 15 March 1969, p. 12.
[16] Gedney & Helfferich, *supra* note 12.
[17] D. Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit" (2007) 38 Ocean Dev. & Int'l L. 3 at 38. This chapter relies heavily on the research and analysis undertaken by Professor Donat Pharand during his long and illustrious career. Over the course of forty years, Pharand published more than thirty articles in both French and English and three influential books: *The Law of the Sea of the Arctic with Special Reference to Canada*, *Northwest Passage: Arctic Straits*, and *Canada's Arctic Waters in International Law*. In the late 1980s, Pharand was already recognized as the leading authority on the issue of Canada's Arctic waters by such renowned international legal experts as Vaughan Lowe and Charles Rousseau. See S. Lalonde & R. St.J. Macdonald, "Donat Pharand: The Arctic Scholar" (2007) 44 Can. Y.B. Int'l L. 3 which chronicles Pharand's life and his profound contributions to the law of the sea of the Arctic.
[18] Howson, *supra* note 3 at 350.
[19] D.R. Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment" (1993) 26 Cornell Int'l L.J. 331 at 337-38. See also E.J. Dosman, *The National Interest: The Politics of Northern Development* (Toronto: McClelland and Steward, 1975) at 46-47.
[20] House of Common *Debates* (15 May 1969) at 8720. Emphasis added.
[21] *Arctic Waters Pollution Prevention Act,* R.S., c.2 (1st Supp.), s.1.
[22] Preamble, *ibid*. See also Howson, *supra* note 3 at 350. For an articulation of the two-pronged theoretical basis for the AWPPA, see A. Gotlieb & C. Dalfen, "National Jurisdiction and International Responsibility: New Canadian Approaches to International Law" (1973) 67 A.J.I.L. 229 at 240-47 and L. Legault, "The Freedom of the Seas: A License to Pollute?" (1971) 21 U.T.L.J. 211.
[23] Article 12 of the AWPPA. See Rothwell, *supra* note 19 at 339; D. Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: University of Ottawa Press, 1973) at 224-32; and Reid, *supra* note 1 at 117-29.
[24] Press Release (8 April 1970), reprinted in (1970) 9 I.L.M. 600 at 600-01.
[25] House of Commons *Debates* (16 April 1970) at 5951. See also House of Commons *Debates* (16 April 1970) at 5948 and 5949 and Reid, *supra* note 1 at 127.
[26] In 1978, a Canadian official acknowledged that a "drawer full of protests" had been received concerning the AWPPA. See: Erik Wang, Director of Legal Operations, Department of External Affairs, Canada, House of Commons,

Standing Committee on External Affairs and National Defence, *Proceedings*, No. 16, 27 April 1978, at p. 16, cited in T. McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the Continental Shelf" (1983) 14 J. Mar. Law & Com 195 at 215, fn 64. The U.S. government responded to the introduction of the AWPPA with a diplomatic note entitled "U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction". Press Release, No. 121 (15 April 1970), reprinted in 62 Dep't St. Bull. (11 May 1970) at 610-11. At the time, enforcement of pollution standards was only accepted within a State's internal waters and territorial sea.

[27] Reid, *supra* note 1 at 121.

[28] Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice (7 April 1970), reprinted in (1970) 9 I.L.M. 598.

[29] Canada's reservation now excluded from the Court's jurisdiction, "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." In explaining the need for the reservation on 8 April 1970, Prime Minister Trudeau acknowledged that there was a "very grave risk that the World Court would find itself obliged to find that coastal states cannot take steps to prevent pollution. Such a legalistic decision would set back immeasurably the development of law in this critical area." Reproduced in R. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea" (1970-1) 69 Mich. L. Rev. 1 at 29. The reservation effectively shielded Canada from any claims regarding the validity of the AWPPA. See generally R. St. J. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice" (1970) 8 Can. Y.B. Int'l L. 3.

[30] *Act to Amend the Territorial Sea and Fishing Zones Act*, S.C. 1969-70, c.68, s.1243. The Act also authorized the government to establish exclusive Canadian fishing zones in marine areas adjacent to the coasts of Canada but not beyond the new 12-mile territorial sea.

[31] The 15 April 1970 diplomatic note entitled "U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction," according to Howson, "attacked both extensions: the first, from three to twelve miles for the territorial sea, and the second, over all shipping in the Arctic waters for one hundred miles." Howson, *supra* note 3 at 352, fn 72. Howson's interpretation seems to be borne out by the use of the plural in the first sentence of the diplomatic note: "International law provides no basis for *these* proposed unilateral *extensions* of jurisdiction on the high seas…" Emphasis added.

[32] P.E. Trudeau, "Remarks to the Press Following the Introduction of Legislation on Arctic Pollution, Territorial Sea and Fishing Zones in the Canadian House of Commons on April 8, 1970" (1970) 9 I.L.M. 600.
[33] McDorman, *supra* note 11 at 627. Howson writes: "The 1970 Bill extending Canada's territorial sea from 3 to 12 miles … was designed in part to create an overlap of territorial waters in the Western portion of Barrow Strait, where the widest gap of sea between islands dotted across the strait (Lowther and Young Islands) is only 15.5 miles. A similar 'gate' of territorial waters already existed under the 3 mile rule in the Prince of Wales Strait, where the Princess Royal Islands, similarly dotted across the much narrower strait, reduce the widest gap to less than 6 miles." *Supra* note 3 at 355. Since Bellot Strait is less than 1 mile across, the addition of a gate in the Barrow Strait had the effect of forcing any vessel making the passage, including through M'Clure Strait, to enter Canada's territorial sea.
[34] In 1970, the legal adviser for the Canadian Department of External Affairs declared in testimony before the House of Commons Standing Committee on External Affairs and National Defence: "This [the enactment of a 12 mile limit] has implications for Barrow Strait, for example, where the 12-mile territorial sea has the effect of giving Canada sovereignty from shore to shore. To put it simply, we have undisputed control – undisputed in the legal sense – over two of the gateways to the Northwest Passage." Standing Committee on External Affairs and National Defence, *Minutes of Proceedings and Evidence*, No. 25, at 18, quoted in D. Pharand, *Canada's Arctic Waters in International Law* (Cambridge: University Press, 1988) at 124.
[35] McDorman, *supra* note 11 at 627 and D. Pharand, "Canada's Arctic Jurisdiction in International Law" (1983) 7 Dal. L.J. 315 at 325.
[36] Adopted on 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994). The United Nations treaty database indicates that as of 30 January 2020, there were 168 States Parties including four of the Arctic coastal States (Canada 7 November 2003; Denmark 16 November 2004; Norway 24 June 1996; and Russia 12 March 1997). The United States is neither a signatory nor a Party to the LOSC. However, as a law-making treaty, the LOSC impacts on non-parties as the majority of its articles are deemed to reflect customary law.
[37] Howson, *supra* note 3 at 354.
[38] Article 3 provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." See McDorman, *supra* note 11 at 627.
[39] R. Huebert, "Steel, Ice and Decision-Making: The Voyage of the Polar Sea and

its Aftermath. The Making of Canadian Northern Foreign Policy" (Ph.D. thesis, 1994) [unpublished] at 211-14 and 230.

[40] U.S. Dep't of State, Telegram No. 151842, 17 May 1985, reprinted in Office of Ocean Affairs, *Limits in the Seas No. 112: United States Responses to Excessive National Maritime Claims* (1992), at 73, available at https://www.state.gov/wp-content/uploads/ 2019/12/LIS-112.pdf.

[41] American Embassy Ottawa, Démarche from the United States to Canada, 21 May 1985, reprinted in J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims* (The Hague: Martinus Nijhoff Publishers, 1996) at 209.

[42] Canadian Embassy, Note No. 331, 11 June 1985, reprinted in *ibid*. at 209-210.

[43] United States, Diplomatic Note No. 222, 24 June 1985, reprinted in Office of Ocean Affairs, *supra* note 40 at 73-74.

[44] *Ibid*.

[45] Huebert, *supra* note 39 at 239.

[46] Canada, Note from Canada to the United States, 31 July 1985, reprinted in Office of Ocean Affairs, *supra* note 40 at 74. An exemption order under the Arctic Waters Pollution Prevention Act was issued for the *Polar Sea*: U.S.C.G.C. Polar Sea Exemption Order, P.C. Order 1985-2409, Aug. 1, 1985, SOR/85-722. It was reported that "[l]awyers went through appropriate laws with fine-tooth combs and the Canadians took meticulous care over detail, down to the state of every piece of environmental equipment on the vessel." See "Northwest Passage not for the Soviets, U.S. Envoy Feels," Globe and Mail, 2 August 1985, p. A1. As for Canada's unsolicited grant of consent, Huebert reports that the U.S. was "taken aback," for it was deemed inconsistent with the agreed upon non-prejudicial legal position. Huebert, *supra* note 39 at 240-42.

[47] J.C. Carman, "Chapter 9 – Economic and Strategic Implications of Ice-Free Arctic Seas" in S.J. Tangredi (ed.), *Globalization and Maritime Power* (Washington: National Defense University Press, 2002), http://www.ndu.edu/inss/Books/Books_2002/Globalization_and_Maritime_Power_Dec_02/10_ch09.htm.

[48] "Chapter 10 – A Northern Dimension for Canada's Foreign Policy" in *Independence and Internationalism: Report of the Special Committee of the Senate and of the House of Commons on Canada's International Relations* (Ottawa: Queen's Printer, 1986) at 127-35, http://www.carc.org/pubs/v14no4/6.htm.

[49] See, F. Griffiths, "Time to Ante Up in the Arctic Game," Globe and Mail, 22 August 1985, p. A7; B. Schiller, "Our Borderline Move on Arctic Sovereignty," Toronto Star, 12 September 1985, p. A13.

[50] Globe and Mail, *supra* note 46.

[51] House of Commons *Debates* (10 September 1985) at 6463. The statement was accompanied by the announcement of six major initiatives. "In summary, Mr.

Speaker, these are the measures we are announcing today : first, immediate adoption of an Order in Council establishing straight baselines around the Arctic archipelago, to be effective January 1, 1986; second, immediate adoption of a Canadian Laws Offshore Application Act; third, immediate talks with the United States on co-operation in Arctic waters on the basis of full respect for Canadian sovereignty; fourth, an immediate increase of surveillance overflights of our Arctic waters by aircraft of the Canadian Forces, and immediate planning for Canadian naval activity in the Eastern Arctic in 1986; fifth, the immediate withdrawal of the 1970 reservation to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice; and sixth, construction of a polar, class 8 ice-breaker and urgent consideration of other means of exercising more effective control over our Arctic waters."

[52] *Ibid*.

[53] The Territorial Sea Geographical Coordinates (Area 7) Order, S.O.R./85-872, enacted pursuant to the *Territorial Sea and Fishing Zones Act*, R.S.C. 1970, c.T-7, as amended.

[54] *Supra* note 51, reproduced in Statement Series, 85/49 & [1986] C.Y.I.L. 326 and reprinted in F. Griffiths (ed.), *Politics of the Northwest Passage* (Kingston & Montreal: McGill-Queen's University Press, 1987) 269. Emphasis added.

[55] U.S. Dep't of State, File No. P86 0019-8641, reproduced in Office of Ocean Affairs, *supra* note 40 at 29.

[56] For a discussion of United States' policy concerning the *Polar Sea* voyage, see McDorman, *supra* note 11 at 636-39.

[57] *Agreement on Arctic Cooperation*, 11 January 1988, U.S.-Can., reprinted in (1989) 28 I.L.M. 142. For a list of other bilateral and multilateral agreements and arrangements relating to the Arctic waters, see Roth, *supra* note 2 at 868.

[58] For an analysis of the specific wording and intent of the 1988 Agreement, see T.L. McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (New York: Oxford University Press, 2009) at 249. See also M. Byers and S. Lalonde, "Who Controls the Northwest Passage?" (2009) 42:4 Vanderbilt J. of Transnat'l L. 1133 at 1159-61.

[59] Clause 4 provides: "Nothing in this Agreement of cooperative endeavour between Arctic neighbors and friends nor any practice thereunder affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective position regarding third parties."

[60] Indeed, Rothwell comments: "Thus by entering into the Agreement, the United States is not viewed as making any concession towards Canada's claim over the Northwest Passage. The Canadian position that the Passage is not an international strait also remains intact." Rothwell, *supra* note 19 at 346.

Footnotes omitted.

[61] British High Commission Note No. 90/86 of July 1986, reproduced in Office of Ocean Affairs, *supra* note 40 at 29-30.

[62] House of Commons *Debates* (24 October 1969), Vol. I, at 39, reproduced in Pharand, *supra* note 34 at 111. Emphasis added by Pharand.

[63] *Ibid*. Emphasis added by Pharand.

[64] *Proceedings of Standing Committee on Indian Affairs and Northern Development* (16 December 1969), No. 1, at 6, reproduced in *ibid*. Emphasis added by Pharand.

[65] E.G. Lee, "Canadian Practice in International Law During 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1974) 12 Can Y.B. Int'l L. 272 at 279 (emphasis added).

[66] Pharand, *supra* note 34 at 112.

[67] U.N. Secretariat, "Juridical Regime of Historic Waters, Including Historic Bays" [1962] 2 Ybk ILC 1. See also D. Pharand, "Historic Waters in International Law with Special Reference to the Arctic" (1971) 21 U.T.L.J. 1. and C.R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden: Brill, 2007).

[68] According to Pharand, "British explorers, beginning with Martin Frobisher in 1576 and ending with those in search of the Franklin expedition in 1859, covered virtually all the waters of the Canadian Arctic Archipelago". Pharand, *supra* note 34 at 113.

[69] Pharand provides a useful summary of Canadian activity in his book *Canada's Arctic Waters in International Law* at Chapter 8 ("Historic waters applied to the Canadian Arctic Archipelago"):

> In 1906, Canada adopted legislation requiring whalers to obtain licences for Hudson Bay and the waters north of the 50th parallel. In 1922, the Eastern Arctic Patrol was created and annual patrols were made until at least 1958. These patrols, for the most part carried out by the RCMP, occasionally extended to the waters of the western Arctic. In 1926, the Arctic Islands Preserve was created within the sector formed by the 60th and 141st degrees of longitude with the aim of protecting Arctic wildlife and Inuit culture. After WWII, the Canadian Coast Guard was established and charged with the principal tasks of providing icebreaking services and re-supplying Arctic communities. Since 1970, Canadian survey ships have been active in surveying and charting the waters of the Archipelago and, in 1977, Canada instituted the NORDREG registration system for ships entering the Arctic.

Ibid. at 113-125, particularly 122.

[70] U.N. Secretariat, *supra* note 67.
[71] Pharand, *supra* note 34 at 121-5.
[72] As Pharand himself explains in *ibid*. at 121.
[73] The map is reproduced in Pharand, *ibid*. at 165.
[74] "Implications on Inuit Arctic Sovereignty," *Pan Inuit Trails*, http://www.paninuittrails.org/index.html?module=module.about.
[75] Inuit Place Names Program, http://ihti.ca/eng/place-names/pn-index.html.
[76] See J. Woehrling, "Les revendications du Canada sur les eaux de l'archipel de l'Arctique et l'utilisation immémoriale des glaces par les Inuit" (1987) 30 Germ. Y.B. Int'l L. 120 at 139.
[77] See S.B. Boyd, "The Legal Status of the Arctic Sea Ice: A Comparative Study and a Proposal" (1984) 22 Can. Y.B. Int'l L. 98 at 105 *et seq*.
[78] See the *Western Sahara Case* where the ICJ recognized that territories inhabited by Indigenous peoples having a measure of social and political organization were not *terra nullius* and thus conferred a limited but no less real international legal status on these human "collectivités." [1975] I.C.J. Rep. 12, 79 *et seq*.
[79] Preamble, *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, 25 May 1993, https://www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf.
[80] McDorman, *supra* note 58 at 238. Article 8(1) of the LOSC, the only article devoted to "Internal waters," provides that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State".
[81] See for instance, Roach and Smith, *supra* note 41 at 111.
[82] Howson, *supra* note 3 at 356.
[83] *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 115.
[84] *Ibid*. at 128.
[85] See for example the "general direction of the coast" and the "close link between the land and sea" criteria. The ICJ also decided that "economic interests particular to the region" should be taken into account when assessing a straight baseline system. See *ibid*. at 133.
[86] *Convention on the Territorial Sea and Contiguous Zone*, adopted 29 April 1958, 516 U.N.T.S. 205 (entered into force on 10 September 1964).
[87] M. Killas, "The Legality of Canada's Claims to the Waters of its Arctic Archipelago" (1987) 19 Ottawa L. Rev. 95 at 111.
[88] McKinnon, *supra* note 8 at 804.
[89] *Ibid*. at 804-05. See also J. Byrne, "Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago" (1970) U.T. Fac. L. Rev. 1 at 8.
[90] Roach and Smith, *supra* note 41 at 63-64.
[91] Douglas M. Johnston, *The Theory and History of Ocean Boundary-Making* (Montreal: McGill-Queen's University Press, 1988) 113.

[92] Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Baselines: An Examination of the Relevant Provisions of the UN Convention on the Law of the Sea* (New York: United Nations, 1989).
[93] *Ibid*. Emphasis added.
[94] Pharand, *supra* note 17, at 16.
[95] *Ibid*.
[96] *Fisheries Case*, *supra* note 83 at 127.
[97] Killas, *supra* note 87 at 113. He adds: "Indeed, the coastline in many places extends right into the mass of islands with peninsulas which appear more as islands connected by way of isthmus to the mainland."
[98] *Ibid*. For a detailed analysis of the "fringe" criterion, refer to *ibid*. at 111-16.
[99] *Ibid*. at 114.
[100] D. Pharand, "Canada's Sovereignty over the Newly-Enclosed Arctic Waters" (1987) 25 Can. Y.B. Int'l L. 325 at 331.
[101] See also D.L. VanderZwaag & D. Pharand, "Inuit and the Ice: Implications for Canada's Arctic Waters" (1983) 21 Can. Y.B. Int'l L. 53 at 79-83.
[102] *Fisheries Case*, *supra* note 83 at 133.
[103] *Ibid*.
[104] *Ibid*.
[105] *Ibid*. at 142.
[106] *Ibid*. at 129.
[107] Pharand, *supra* note 17 at 18 (citation to figure omitted). Emphasis added.
[108] V. Prescott, "Book Review of Donat Pharand's *Arctic Waters in International Law*" (1989) 5 National Geographic Research 271 at 272.
[109] Killas, *supra* note 87 at 118.
[110] *Ibid*.
[111] D. Pharand, "Sovereignty and the Canadian North" in *Report of the Royal Commission on the Economic Union and Development Prospects for Canada* (Ottawa: The Commission, 1985) 141 at 152.
[112] Pharand, *supra* note 17 at 18-19 (reference to figure omitted). The Robinson projection can be found under the "pseudocylindrical projections" section of the "Map projection overview" website developed by Peter H. Dana of the Department of Geography, University of Texas at Austin, http://www.colorado.edu/geography/gcraft/notes/mapproj/gif/robinson.gif.
[113] See, e.g., the International Bathymetric Chart of the Arctic Ocean, http://www.ngdc.noaa.gov/mgg/bathymetry/arctic/arctic.html.
[114] Pharand, *supra* note 17 at 19, referring to U.S. Department of State, *Limits of the Seas No. 106: Developing Standard Guidelines for Evaluating Straight Baselines* (1987).
[115] See Head, *supra* note 1 at 223 and Byrne, *supra* note 89 at 4-5. Canada's

Secretary of State for Foreign Affairs, Joe Clark, found this an appealing argument after the Polar Sea voyage stating that the Arctic waters were "joined and not divided by the waters between them. They are bridged for most of the year by ice." House of Commons *Debates* (10 September 1985) at 6463.

[116] Pharand, *supra* note 34 at 163.

[117] Killas, *supra* note 87 at 119.

[118] A few of Canada's baselines have been subjected to particular criticism: the Lancaster Sound line (51 miles); the Amundsen Gulf line (92 miles); the M'Clure Strait line (99 miles); and the Borden Island-Ellef Ringnes Island line (62 miles). It must be noted that neither the *Norwegian Fisheries* case, nor the 1958 and 1982 Law of the Sea Conventions, fix any maximum length for straight baselines.

[119] VanderZwaag & Pharand, *supra* note 101 at 64.

[120] *Fisheries Case*, *supra* note 83 at 142. According to Pharand, "[b]y its very flexible nature, the doctrine of consolidation of title easily encompasses the vital interests of the coastal State and its inhabitants… In the establishment of its straight baseline system by its 1935 decree, Norway invoked in the preamble the following vital and related interests: … the safeguard of the *vital interests* of the inhabitants of the northernmost parts of the country… The Court accepted Norway's arguments, by giving considerable weight to the 'vital needs of the population of the Lopphavet region'…" Pharand, *supra* note 34 at 144 (footnotes omitted); emphasis in original text.

[121] S. Watt-Cloutier, "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States" (2005) available at http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

[122] Howson, *supra* note 3 at 360.

[123] House of Commons *Debates* (15 May 1969) at 8720.

[124] McDorman, *supra* note 11 at 626. Emphasis in the original text.

[125] *Supra* note 20.

[126] *Supra* note 21.

[127] The author acknowledges, however, that the concept of "inland waters" is distinct from that of "internal waters" under international law.

[128] It must be emphasized that the definition of "Arctic waters" in the Act has since been modified (Section 2): "arctic waters means the internal waters of Canada and the waters of the territorial sea of Canada and the exclusive economic zone of Canada, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the

exclusive economic zone…" *Arctic Waters Pollution Prevention Act*, R.S.C., 1985, c.A-12 (bold text in the original).

[129] Howson, *supra* note 3 at 361 quoting Pharand, *supra* note 111 at 149.

[130] House of Commons *Debates* (16 April 1970) at 5953.

[131] *Ibid*. at 5948.

[132] *Ibid*. at 5953.

[133] Howson, *supra* note 3 at 360.

[134] *Supra* note 54. Emphasis added.

[135] Pharand, *supra* note 35 at 329-30. See the discussion above under the title "Internal waters on the basis of an historic title".

[136] "Since obviously *we claim these waters to be Canadian internal waters* we would not draw such lines, Mr Speaker." *Supra* note 132. Emphasis added.

[137] (1974) 12 Can Y.B. Int'l L. at 279. Reproduced in Pharand, *supra* note 35 at 329.

[138] Canada, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence*, No. 24 (22 May 1975) at 6. Reproduced in Pharand, *supra* note 35 at 329.

[139] "Canadian Practice in International Law during 1980 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1980) 19 Can. Y.B. Int'l L. 320 at 322. Reproduced in Rothwell, *supra* note 19 at 342. Though relying on the same statements as Pharand, Rothwell concludes, however, that they cannot overcome the combined effect of the Arctic Waters Pollution Prevention Act and Canada's claim to an extended territorial sea.

[140] McDorman, *supra* note 11 at 635.

[141] The White House, Section III "Policy," sub-section B "National Security and Homeland Security Interests in the Arctic," 9 January 2009, at paragraph 5, http://www.fas.org/irp/offdocs/nspd/nspd-66.htm.

[142] The White House, Section 3 "Strengthen International Cooperation: Accede to the Law of the Sea Convention," 10 May 2013, http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

[143] Part III of the LOSC (Articles 34 to 45) bears the title "Straits used for international navigation". However, no precise definition of the concept is offered in any of its three sections.

[144] [1949] I.C.J. Rep. 4.

[145] *Ibid*. at 29.

[146] *Ibid*. at 28.

[147] Pharand, *supra* note 17 at 30.

[148] Article 16(4) provides: There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas *or the*

territorial sea of a foreign State." Emphasis added.
[149] Article 37 of the LOSC states: "This section applies to straits which are used for international navigation between one part of the high seas *or an exclusive economic zone* and another part of the high seas *or an exclusive economic zone*. Emphasis added.
[150] Pharand, *supra* note 34 at 216.
[151] *Ibid*. at 223.
[152] *Corfu Channel*, *supra* note 144 at 28. Emphasis added.
[153] Howson, *supra* note 3 at 370.
[154] S.N. Nandan & D.H. Anderson, "Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea" (1989) 60 B.Y.I.L. 159 at 167-69.
[155] T.B. Koh, "The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea, (1987) 29 Malaya L. Rev. 163 at 178, quoted in Rothwell, *supra* note 19 at 355.
[156] [1951] I.C.J. Pleadings, vol. II, at 555 (emphasis added).
[157] Article 17(4) of the Draft, [1956] 2 Ybk ILC 264, http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf (emphasis added).
[158] R.R. Baxter, *The Law of International Waterways* (Cambridge, Mass.: Harvard University Press, 1964) 3 (emphasis added).
[159] *Ibid*. at 9.
[160] D.P. O'Connell, *International Law*, vol. I (London: Stevens, 1970) 497 (emphasis added).
[161] D.P. O'Connell, *International Law of the Sea*, vol. 1 (Oxford: Clarendon Press, 1982) 306 (emphasis added).
[162] H. Caminos, "The Legal Regime of Straits in the 1982 UN Convention on the Law of the Sea" (1987) 205 Rec. des Cours 13 at 128.
[163] R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) 106.
[164] *Ibid*.
[165] R.J. Grunawalt, "United States Policy on International Straits" (1987) 18 Ocean Dev. & Int'l L. 455 at 456.
[166] J.C. Kraska, "The Law of the Sea Convention and the Northwest Passage" in B. MacDonald (ed.), *Defence Requirements for Canada's Arctic – Vimy Paper 2007* (The Conference of Defence Associations Institute, 2007), http://www.cda-cdai.ca/Vimy_Papers/Defence%20Requirements%20for%20Canada's%20Arctic%20online%20ve.pdf.
[167] M. Blanchfield, "Pentagon adviser belittles Canadian claim to Northwest Passage," Ottawa Citizen, 15 February 2007.
[168] D. Pharand, *The Northwest Passage: Arctic Straits* (Dordrecht: Martinus Nijhoff

Publishers, 1984) 93.
[169] R.K. Headland et al., "Transits of the Northwest Passage to End of the 2019 Navigation Season," 12 December 2019, https://www.spri.cam.ac.uk/resources/infosheets/northwestpassage.pdf. As the authors explain, to qualify as a "complete" transit of the Northwest Passage, vessels must "proceed to or from the Atlantic Ocean (Labrador Sea) in or out of the eastern approaches to the Canadian Arctic archipelago (Lancaster Sound or Foxe Basin) then the western approaches (McClure Strait or Amundsen Gulf), across the Beaufort Sea and Chukchi Sea of the Arctic Ocean, through the Bering Strait, from or to the Bering Sea of the Pacific Ocean."
[170] Rothwell, *supra* note 19 at 357 citing the *Legal Status of Eastern Greenland Case (Norway v. Denmark)* (1933) P.C.I.J. (Ser. A/B) No. 53 at 22 in support.
[171] *Ibid*. Rothwell reports at page 356 that Butler takes a similar view in his study of the Northeast Arctic Passage, "favouring a broad interpretation of the functional requirement in the case of the polar regions." W.E. Butler, *Northeast Arctic Passage* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978) at 135. See also L.M. Alexander, "Exceptions to the Transit Passage Regime: Straits with Routes of 'Similar Convenience'" (1987) 18 Ocean Dev. & Int'l L. 479 at 480.
[172] D. Pharand, "The Northwest Passage in International Law" (1979) 17 Can. Y.B. Int'l L. 99 at 106-07.
[173] Pharand, *supra* note 34, at 35 (emphasis in original).
[174] Pharand, *supra* note 168 at 107.
[175] See discussion under Section III above.
[176] See discussion under Section III above.
[177] M. Byers, *International Law and the Arctic* (Cambridge: University Press, 2013) at 149. Emphasis added. He cites in support: R.D. Brubaker, *Russian Arctic Straits* (Dordrecht: Martinus Nijhoff, 2004) at 41 and 189; R. Rothwell, *The Polar Regions* (Cambridge: University Press, 1996) at 206; and Churchill & Lowe, *supra* note 163 at 138.
[178] A.G. López Martin, *International Straits: Concept, Classification and Rules of Passage* (Heidelberg: Springer, 2010) 59.
[179] Howson, *supra* note 3 at 370-71.
[180] Available on the Crown-Indigenous Relations and Northern Affairs Canada website at https://www.rcaanc-cirnac.gc.ca/eng/1560523306861/ 1560523330587.
[181] "Foreword from the minister," *ibid*.
[182] *Ibid*.
[183] "A shared vision," *ibid*.
[184] "Our vision," *ibid*.
[185] "A shared vision," *ibid*.
[186] H. Issawi, "Canada makes it 'very clear' the Northwest Passage is Canada's

after Pompeo questions legitimacy," The Star, 7 May 2019, https://www.thestar.com/edmonton/2019/05/07/freeland-makes-it-very-clear-the-northwest-passage-is-canadas-after-pompeo-questions-legitimacy.html.
[187] J. George, "Canadian Inuit challenge US stance on Northwest Passage," Arctic Today, 15 May 2019, https://www.arctictoday.com/ canadian-inuit-challenge-u-s-stance-on-northwest-passage/. The report was also published the same day by Nunatsiaq News, available at https://nunatsiaq.com/stories/article/ canadian-inuit-challenge-u-s-stance-on-northwest-passage/.
[188] "The Prime Minister of Canada announces the National Oceans Protection Plan," 7 November 2016, https://pm.gc.ca/en/news/news-releases/2016/11/07/ prime-minister-canada-announces-national-oceans-protection-plan.
[189] Transport Canada, "Oceans Protection Plan," https://www.tc.gc.ca/en/ initiatives/oceans-protection-plan.html.
[190] See "Arctic Corridors Research" at http://www.arcticcorridors.ca.
[191] Quoted in L. Sevunts, "Inuit and Ottawa reach agreement in principle on Arctic marine conservation area," Radio Canada International, 4 December 2018, https://www.rcinet.ca/en/2018/12/04/inuit-tallurutiup-imanga-lancaster-sound-agreement-arctic-marine-conservation-area/.
[192] There is quite a lot of sympathy for the Canadian position within American academic circles and even in Government. However, the United States has little official room to manoeuvre. It has been a cornerstone of American foreign policy to insist on the concept of freedom of the seas to guarantee mobility of U.S. naval assets around the world. Washington is concerned that 'giving in' to Canada over the NW Passage would set a bad precedent. It might encourage coastal States bordering other important international straits around the word (e.g. Torres Strait, the Straits of Malacca) to flex their muscle and adopt arbitrary rules which would severely harm American national interests.
[193] *Agreement on Arctic Cooperation*, *supra* note 57.
[194] *International Code for Ships operating in Polar Waters*, Amendments to the *International Convention for the Safety of Life at Sea*, 1974, Resolution MSC.386(94), 21 November 2014, in Report of the Maritime Safety Committee on its Ninety-Fourth Session, Annex 7, IMO Doc MSC 94/21/Add.1, and Amendments to the Annex of the Protocol of 1978 relating to the *International Convention for the Prevention of Pollution from Ships*, 1973, Resolution MEPC.265(68), 15 May 2015, in Report of the Marine Environment Protection Committee on its Sixty-eighth Session, Annex 11, IMO Doc MEPC 68/21/Add.1.
[195] "A non-governmental organisation in the shipping industry, a classification society establishes and maintains technical
standards for construction and operation of marine vessels and offshore structures. The primary role of the society is to classify ships and validate that

their design and calculations are in accordance with the published standards. It also carries out periodical survey of ships to ensure that they continue to meet the parameters of set standards." Definition of "Classification Society & IACS" on the Maritime Connector website, http://maritime-connector.com/wiki/classification-society/.

[196] House of Commons *Debates* (24 October 1969) at 39.

[197] House of Commons *Debates* (16 April 1970) at 6028.

Conclusions

P. Whitney Lackenbauer, Suzanne Lalonde, and Elizabeth Riddell-Dixon

With unrelenting media attention focused on the Arctic and the tenacity of "crisis" and "dispute" narratives suggesting an ominous future for the region, the aim of this volume was to revisit the three main maritime boundary, status of waters, and delimitation issues in the Canadian North. We hope that our comprehensive overviews of these cases provide a foundation for more sober assessments of the realities surrounding these issues, how they have been and continue to be managed, and how and why they might be resolved in the future.

Beaufort Sea (United States): The Beaufort Sea boundary remains the most significant unsettled maritime boundary dispute in the Canadian Arctic. The wording of the 1825 Anglo-Russian Boundary Treaty set the eastern border of Alaska at the "meridian line of the 141st degree, in its prolongation as far as the frozen ocean." As P. Whitney Lackenbauer outlined in his historical overview (chapter 1), Canada contends that this treaty language intended to extend the 141st meridian as an ocean boundary into the Arctic Ocean as far as the North Pole. In practice, Canada has unevenly applied a so-called "sector claim" to the water and ice in the Arctic Ocean since 1907. In contrast, the United States insist that the 1825 treaty delimitation applies only to the land border, and that applying an equidistance line in the Beaufort Sea is legally and geographically appropriate. Owing to the shape of the coastline, these different positions produce a pie-shaped disputed zone of approximately 6,250 square n.m.

This ongoing dispute belies easy resolution using strictly legal criteria. In 1965, Canada issued oil and gas exploration permits and leases in the Beaufort Sea up to the 141st meridian. The United States protested this action in 1976, prompting the two countries to meet to try

to resolve the dispute (along with their other maritime boundary disputes) over the next two years. Unable to reach an agreement at that time, and without strong incentives to make concessions to resolve the dispute, the two countries put the issue to the side. Although soaring hydrocarbon prices and heightened rhetoric about a so-called "race for Arctic resources" in the 2000s pushed the dispute back onto the political radar, sobering realities over the last decade have removed the perceived urgency to resolve it. Core questions remain. Do the 141st meridian or an equidistance line meet the criteria of equitable result? Do Inuvialuit rights influence potential options for a bilaterally-negotiated solution? How will recent Canada-U.S. collaboration on scientific research in the Beaufort to determine the geographic extent of sovereign rights to an extended continental shelf affect the calculus of the resources at stake in striking a negotiated solution?

Extended Continental Shelf: Canada filed a submission on the outer limits of its continental shelf in the Arctic Ocean with the UN Commission on the Limits of the Continental Shelf on 23 May 2019. Prepared in accordance with scientific and legal requirements prescribed in the UN Convention on the Law of the Sea (UNCLOS), Canada's submission includes 1.2 million square kilometres of seabed and subsoil in the Arctic Ocean (including the geographic North Pole). In the second chapter, political scientist Elizabeth Riddell-Dixon demonstrates how the work to define the outer limits of the Canadian continental shelf conforms with international law and practice, as do the activities and delineations of neighbouring states whose Arctic ECSs overlap with that of Canada.

Expanding upon her previous work, Riddell-Dixon discusses the submissions of Canada, Denmark/Greenland, and the Russian Federation to the Commission on the Limits of the Continental Shelf pertaining to their respective Arctic extended continental shelves. She challenges the validity of the commonly-held assumption that Canada and other Arctic countries are engaged in a highly competitive scramble to stake claims for extensions to their continental shelves beyond 200 nautical miles from shore. She concludes that the submissions are, for the most part, mutually reinforcing; that there are extensive overlaps in the areas of extended continental shelves delineated by the three Arctic States that will necessitate maritime boundary delimitation; that the

overlaps will be resolved peacefully and in accordance with international law; that the extended continental shelves, as currently delineated, leave very little of the Arctic seabed outside of national jurisdiction, which has consequences for the common heritage of humankind; and that negotiations are needed at the national and international levels to clarify Article 82 of UNCLOS. Although no resource development will take place on the Arctic extended continental shelves in the foreseeable future, exploitation will soon be a reality off Canada's east coast; hence, a consistent, workable regime is needed.

Northwest Passage: The third chapter highlighted the sensitive nature of the debate surrounding Canada's asserted right to exert exclusive and absolute authority over its Arctic historic internal waters, including the various routes of the Northwest Passage. While there is little merit to the idea that Canada's sovereignty is on "thinning ice," the lingering question of transit rights through the Northwest Passage remains the primary source of Canadian sovereignty concern – despite official insistence from Canada's foreign ministry that the country's ownership of the waters is not in doubt.[1] Canada's well-established legal position that it has the right to exercise full and exclusive sovereignty over the waters of the Northwest Passage remains contested, not in terms of foreign states claiming rival ownership but certainly in regards to Canada's right to control foreign navigation. While opposition to Canada's historic internal waters position has traditionally been centred in Washington, other nations are waking up to the possibility of a trans-polar route through the Canadian Arctic and the benefits that they might accrue from a regime of free transit through these waters.

International legal scholar Suzanne Lalonde explained how specific events and the development of the Law of the Sea have influenced the Northwest Passage "saga." While noting that Canada's official legal position – that the waters of the Arctic archipelago are Canadian internal waters by virtue of an historic title – is often overlooked, Lalonde acknowledges that the 1985 baselines might one day be relied upon (for instance in international judicial proceedings) as an alternative basis for Canada's sovereign authority. The chapter highlighted that valid arguments have been crafted both for and against the Canadian position—the inevitable result of a body of international

rules without any single authoritative interpretation and devoid of mathematical precision.

Lalonde's chapter, however, reveals Canada's longstanding commitment to the protection of its Arctic waters and the leadership role it has played in developing new norms of environmental protection within the Law of the Sea, particularly for polar waters. It also emphasizes that the Northwest Passage issue is not simply a matter of governance by the Government of Canada. Indigenous peoples, for whom the waters are a cultural heritage, are rightfully demanding that their identity be respected and their right to have a say in regulating marine activities recognized.

All three chapters confirm that the myth of Arctic resource wars erupting over uncertain boundaries, status of water disagreements, or overlapping continental shelves is pure fantasy, conjured by political and media commentators seeking simple, sensational frames to grab public attention. Denmark/Greenland and the United States are close allies, friends, and Arctic partners with which Canada shares deep mutual interests. There is no risk of a serious breach in bilateral relations over longstanding and well-managed disputes in the Beaufort Sea, over potential overlaps in extended continental shelves, or over Hans Island and the Lincoln Sea (see the appendix). Even potential friction between Canada and Russia over overlapping continental shelves around the North Pole is much more exciting in theory than in legal and political reality. The outer limits of the Canadian and Russian extended continental shelves in the Arctic Ocean are sure to overlap on the basis of scientific evidence, but there is no military component to this issue, and relative capabilities to assert control over resources has no bearing on the outcome. In fact, both Russia and Canada stand to gain the most if the delineation process unfolds in conformity with UNCLOS. There is every reason to anticipate that, in the end, diplomatic negotiations will yield mutually advantageous outcomes. Canada and Russia may find themselves on different sides in an era of renewed great power rivalry, but they also have much in common as Arctic states. Consequently, national self-interests mean that a general state of international competition does not portend Arctic conflict over overlapping rights to the resources on the outermost fringes of extended continental shelves.[2]

Marine transportation plays a critical role in Canada's plans to facilitate responsible and sustainable development of Northern resources. Canada welcomes navigation in its Arctic waters, provided ships respect Canadian conditions and controls related to safety, security, protection of the environment, and Inuit interests. The country has exercised leadership in terms of promoting legal rules for safe navigation in the Arctic, rules that are now largely reflected at the international level, notably in the International Maritime Organization's *Polar Code*.[3] Provided that Canada continues to act responsibly and transparently to guarantee the safety of shipping and the preservation of fragile Arctic waters, opposition to its legal position on the NWP will hopefully become more muted. Thus, the long-term goal of a stable and secure circumpolar world, where each Arctic littoral state enjoys sovereignty and sovereign rights, is compatible with Canada's ongoing management of maritime boundary disputes, its determination of the outer limits of its continental shelves, and enduring disagreements over the legal status of the Northwest Passage.

Notes

[1] See, for example, Alan Kessel, testimony to the Standing Senate Committee on National Security and Defence, Minutes of Proceedings, 15 March 2010, http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/defe-e/01mn-e.htm?Language=E&Parl= 40&Ses=3&comm_id=76.

[2] Parts of this paragraph and the following one are derived from P. Whitney Lackenbauer and Suzanne Lalonde, "Searching for Common Ground in Evolving Canadian and EU Arctic Strategies," in *The European Union and the Arctic*, ed. Nengye Liu, Elizabeth Kirk, and Tore Henriksen (Leiden: Brill, 2017), 119-71; and Lackenbauer and Lalonde, "Canada, Sovereignty, and 'Disputed' Arctic Boundaries: Myths, Misconceptions, and Legal Realities," in *The Networked North: Borders and Borderlands in the Canadian Arctic Region*, ed. Heather Nicol and P. Whitney Lackenbauer (Waterloo: Borders in Globalization/Centre on Foreign Policy and Federalism, 2017), 95-113.

[3] The IMO's International Code for Ships Operating in Polar Waters (Polar Code), which entered into force on 1 January 2017, covers a wide range of design, construction, equipment, operational, training, search and rescue, and environmental protection matters. See http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf.

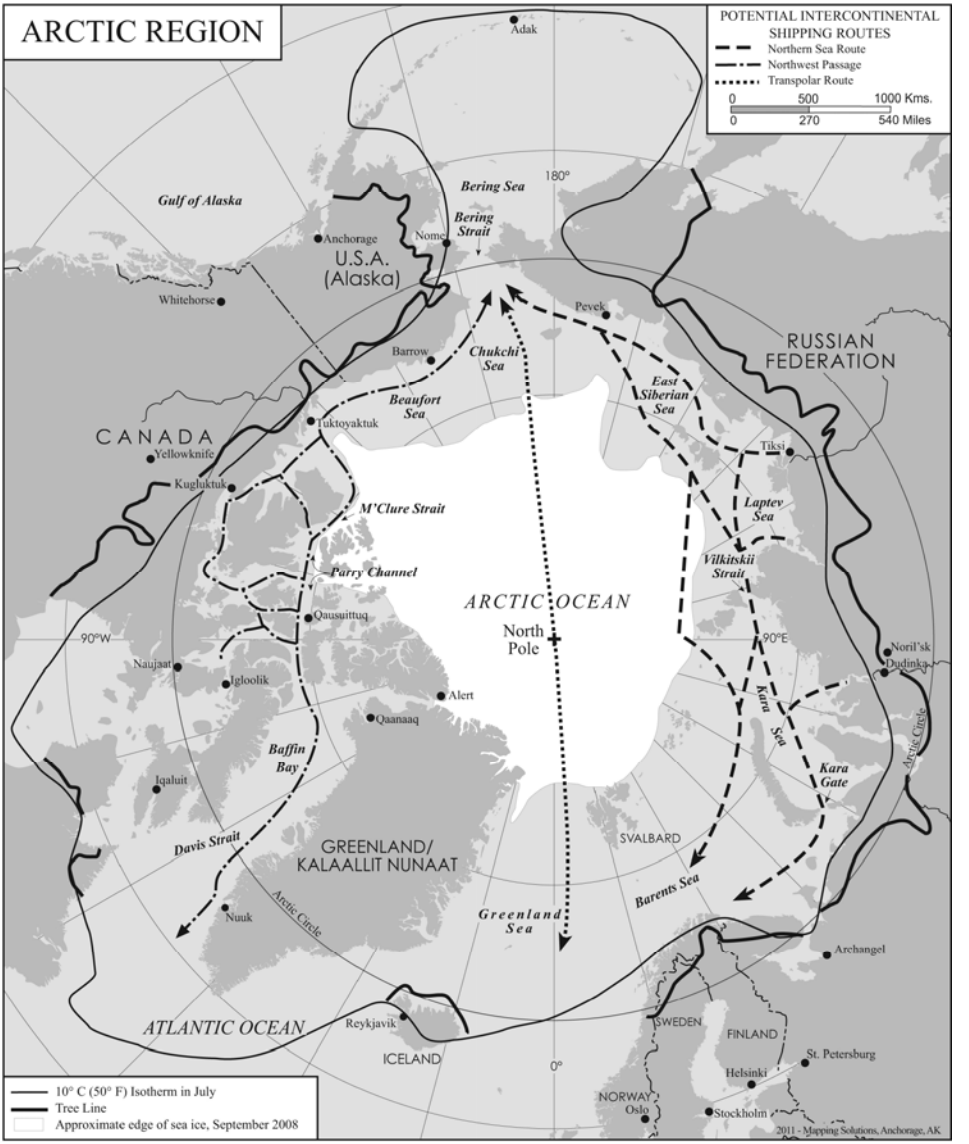

Figure 4-1: Potential Intercontinental Shipping Routes in the Arctic Region. *Mapping Solutions for Lawson Brigham.*

Appendix

Canada's Other Boundary Disputes in the Arctic

P. Whitney Lackenbauer

Hans Island: Canada's *Northern Strategy* (2009) observes that "Canada's sovereignty over its Arctic lands and islands is undisputed, with the exception of Hans Island, which is claimed by Denmark."[1] Because it is the only outstanding dispute involving land, this 1.3 km^2 barren and uninhabited sandstone island situated in the Kennedy Channel between Ellesmere Island and Greenland has attracted a disproportionate amount of attention.

The question of ownership of Hans Island arose in 1973 when the two countries delimited the continental shelf between Canada and Greenland. The two sides could not agree on the status of Hans Island, which fell right on the maritime boundary line, so they chose to set aside the question of the island itself. The shelf surrounding the island was delimited, with the maritime boundary stopping at the low-water mark on the island's south side and starting again from the low-water mark on the north side.[2] Accordingly, and despite popular misconceptions, the dispute has no significant impact on the status of the waters, seabed resources, or navigation rights around Hans Island itself.

The issue of ownership has been raised sporadically by both countries who, since the 1980s, have undertaken various public demonstrations to reinforce their claims. After discovering that Canada's Dome Petroleum was using Hans Island as a platform for research activities, the Danes sent an expedition to it in 1984 to plant their flag and proclaim sovereignty, leaving the message "Welcome to the Danish Island" and a bottle of brandy. Canada responded in kind with its own sign, a Canadian flag, and bottles of Canadian Club whiskey. This comical dance continued for the next two decades.[3]

The Danish position rests primarily on the principles of discovery, geology and usage. Hans Island was "discovered" in 1853 by an Ameri-

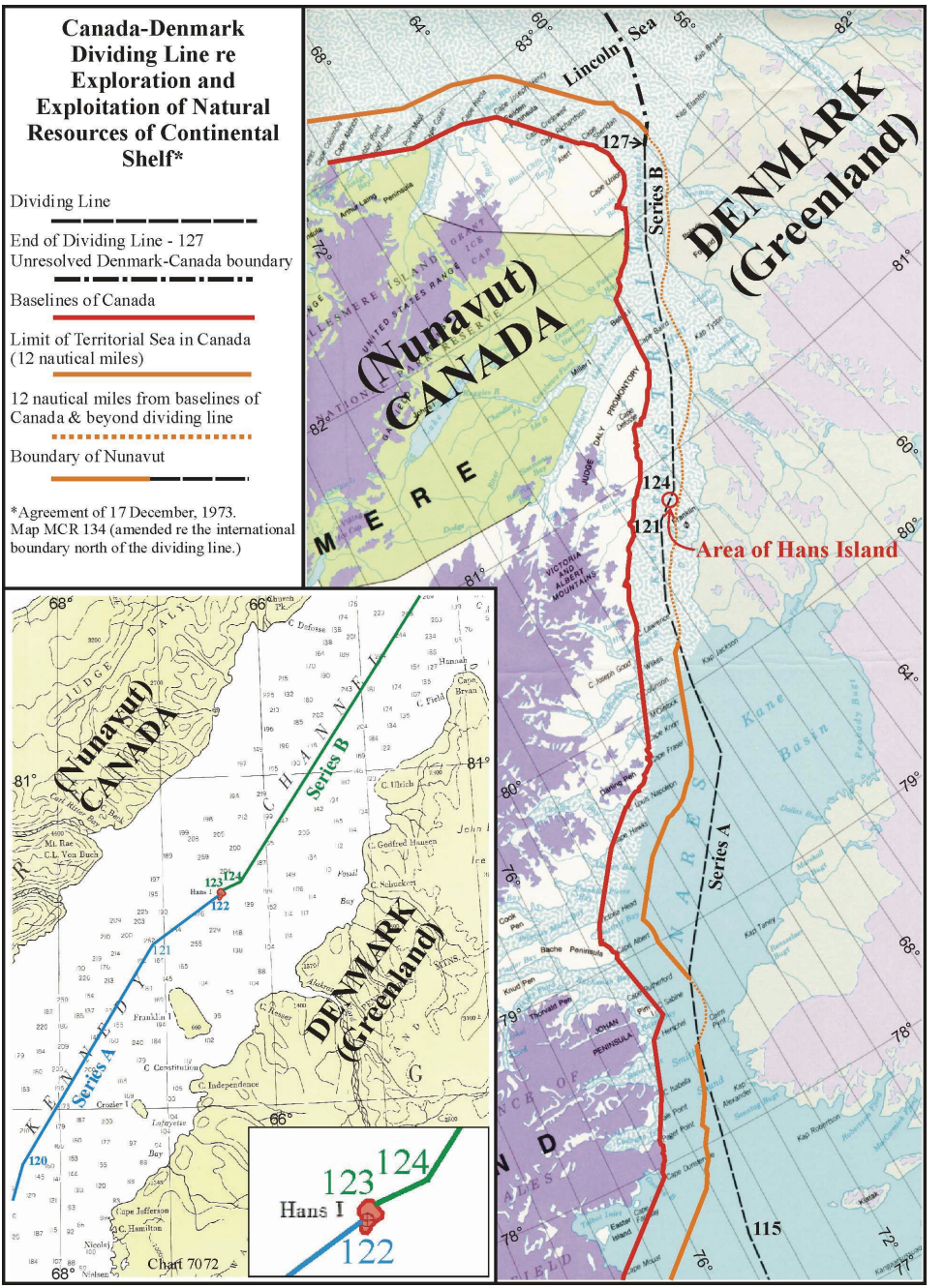

Figure 5-1: Hans Island. *Canadian Council of Land Surveyors*

can expedition undertaken in agreement with Danish authorities and with the participation of the famous Greenlander Hans Hendrik (1834-89) of Fiskenaesset.[4] Previously and subsequently, Greenland Inuit stopped on the island when crossing to Ellesmere Island to hunt. On the other hand, Canadian Inuit have never used Hans Island regularly.[5]

For its part, Canada claims that the entire region was transferred to its control by a British order-in-council in 1880 that incorporated "all British Territories and possessions in North America, not already included in the Dominion of Canada, and all islands adjacent to any such territories or possessions." Ottawa has always understood Hans Island to be on the Canadian side of the median line demarking the boundary with Greenland. In 1953, the Topographical Survey of Canada surveyed Hans Island and placed a cairn claiming it for Canada, and Canada issued a land use permit to Dome Petroleum in the 1980s to use the island as a scientific base to study ice movements. In 2000, a team of scientists from the Geological Survey of Canada mapped the island and took geographic samples. Canadian sources also suggest that the geological and geomorphological evidence cited by Denmark is relevant only when claiming continental shelf and not islands, where the test is effective occupation.

Given that the island is uninhabited, possesses no strategic value, and boasts no natural resources, this territorial dispute should raise little practical concern – but it has been imbued with symbolic and nationalist significance since the Danes sent naval vessels to the island in 2002 and 2003. Canada responded in 2005 with an inukshuk-raising and flag-planting visit by Canadian Rangers and soldiers, followed by a highly publicized visit by its Minister of National Defence Bill Graham. The media frenzy soon spiralled out of hand, alluding to Canada's 1995 "Turbot War" with the Spanish and even a possible "domino" effect, suggesting that if Canada lost Hans Island its other Arctic islands might succumb to a similar fate.[6]

In an effort to reduce tensions, the two countries issued a joint statement in September 2005 declaring that "we will continue our efforts to reach a long-term solution to the Hans Island dispute." The statement also provided that "in the tradition of cooperation in the region between our scientists we will explore the feasibility of joint scientific projects on or in the area of Hans Island." The two neighbours also agreed to keep each other informed of any activities related to the Island and pledged

that "all contact by either side with Hans Island will be carried out in a low key and restrained manner."[7] Since that time, the two countries have pursued regular bilateral discussions in a bid to arrive at a mutually acceptable solution. In 2008, they cooperated in setting up an automatic weather station on the island to measure atmospheric conditions in Nares Strait, which connects the Arctic Ocean with the North Atlantic Ocean and thus plays a key role in the global hydrologic cycle.[8]

Various diplomatic options exist to resolve this dispute. Canada and Denmark could negotiate an agreement which would see one country gain complete sovereignty over the island: the simplest solution, but one that is politically unattractive to both sides. Alternatively, the island could simply be split by connecting the lines currently demarcating Nares Strait, which would result in roughly half of the island going to each party, thus creating a new land border for both countries. In 2015, international legal scholar Michael Byers and Professor Michael Böss of the University of Aarhus proposed that Canada and Denmark should share sovereignty and jurisdictional responsibility over the island, appointing a joint commission to settle governance issues where required.[9] Others suggest simply ceding power to the Inuit of Nunavut and Greenland to co-manage as part of the Pikialasorsuaq (High North Polynya) area,[10] or (in what might be a tongue-in-cheek commentary) "gifting it" to the people of Greenland.[11] In any case, a negotiated solution requires political will, and the optics of surrendering sovereign territory – however small and insignificant in practical terms – are a strong disincentive. Given the excellent relations between the two countries, and their mutual satisfaction with the current arrangement over Hans Island, there is no acute pressure to settle this dispute.

Lincoln Sea (Denmark): The disagreement between Canada and the Kingdom of Denmark regarding two small maritime areas in the Lincoln Sea north of Ellesmere Island and Greenland, totalling approximately 65 square nautical miles, is highly technical in nature. The two countries signed a treaty in 1973 agreeing that the boundary in the Lincoln Sea should be an equidistance line, with Denmark subsequently using tiny Beaumont Island to establish its baseline and Canada arguing that this "rock" is too insignificant to influence the

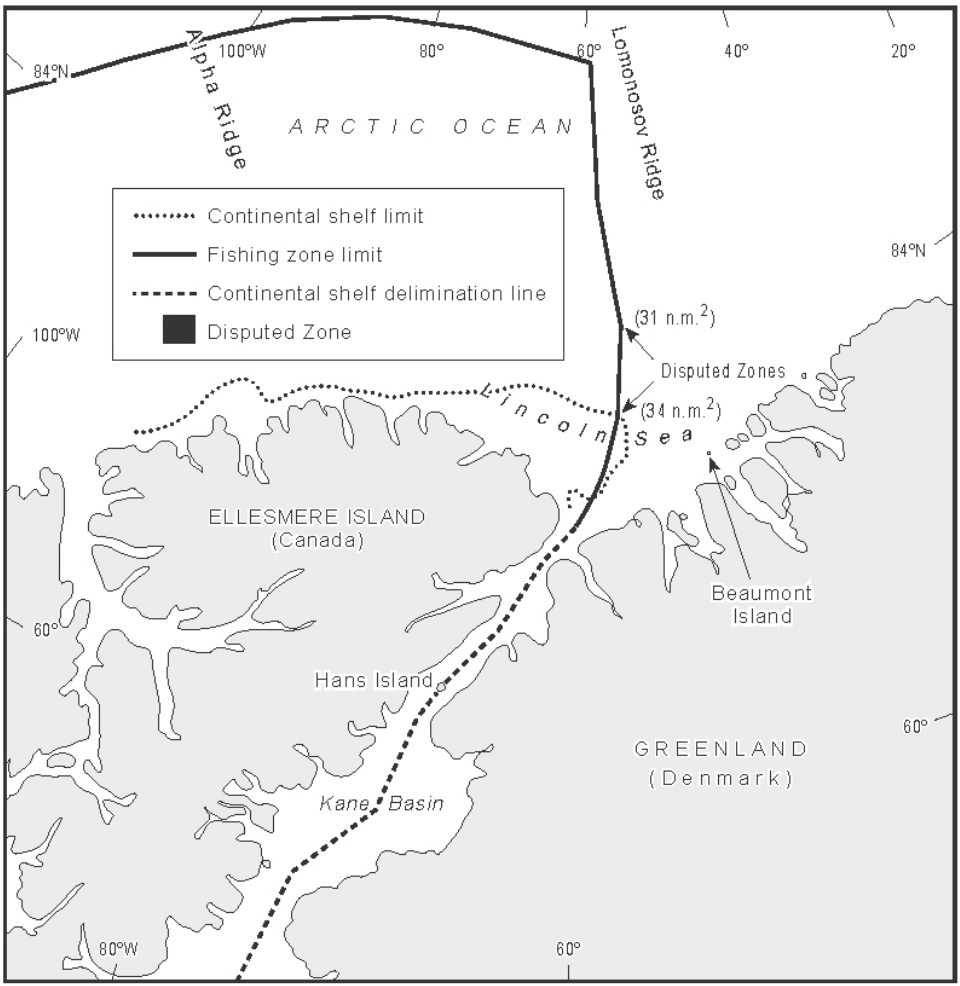

Figure 5-2: Lincoln Sea. *Gray, IBRU Boundary and Security Bulletin (Autumn 1997)*

boundary line.[12] On 28 November 2012, the foreign ministers of Canada and Denmark announced that they had reached a tentative agreement on where to establish the maritime boundary, stating that "with the passage of time" their "differences" on technical considerations had "faded."[13] Since that time, negotiators have been working to transform the tentative agreement into a treaty text for ratification by their respective governments which, in turn, will yield a continuous maritime boundary stretching more than 1,600 nautical miles.

During a May 2018 meeting in Ottawa, officials from Copenhagen and Nuuk announced that they were setting up a joint task force to

explore options and provide recommendations on how to officially resolve outstanding boundary issues in the Arctic with Canada, including the ownership of Hans Island, the maritime boundary in the Lincoln Sea, and the Labrador Sea continental shelf overlap beyond 200 nautical miles. Statements by the countries' foreign ministers emphasized collaboration and a commitment to "peaceful and constructive" deliberations. "Canada is looking forward to fruitful bilateral discussions with the Kingdom of Denmark under this newly established Task Force," Global Affairs Canada spokesperson Elizabeth Reid told reporters. "This work is a demonstration of our excellent cooperation with Denmark in the Arctic and our collective leadership in the region."[14] The task force has not publicly issued any findings or recommendations as of March 2020.

Notes

[1] Department of Indian Affairs and Northern Development, *Canada's Northern Strategy*, reproduced in P. Whitney Lackenbauer and Ryan Dean, eds., *Canada's Northern Strategy under the Harper Conservatives: Key Speeches and Documents on Sovereignty, Security, and Governance, 2006-15* [Documents on Canadian Arctic Sovereignty and Security (DCASS) No. 6] (Calgary and Waterloo: Centre for Military, Strategic and Security Studies/Centre on Foreign Policy and Federalism/Arctic Institute of North America, 2016), 104.

[2] *Agreement between the Government of Canada and the Government of the Kingdom of Denmark relating to the delimitation of the continental shelf between Greenland and Canada*, in force on 13 March 1974, Canada Treaty Series (CTS) 1974/9. See Article 2, para. 4, and Annex 4.

[3] Kenn Harper, "Hans Island Rightfully Belongs to Greenland, Denmark," *Nunatsiaq News*, 9 April 2004; Canadian Broadcasting Corporation (CBC), "Canada, Denmark agree to resolve dispute over Arctic island." 19 September 2005, http://www.cbc.ca/ news/world/canada-denmark-agree-to-resolve-dispute-over-arctic-island-1.551223; and Rob Huebert, "Return of the 'Vikings': The Canadian-Danish Dispute over Hans Island," in *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North*, ed. Fikret Birkes, Rob Huebert, Helen Fast, Micheline Manseau, and Alan Diduck (Calgary: University of Calgary Press, 2005), 343-63.

[4] Poul Kristensen, "Hans Island: Denmark Responds," letter to the editor, *Ottawa Citizen*, 28 July 2005.

[5] Milton Freeman, *Inuit Land Use and Occupancy Study* (Ottawa: Ministry of

Supply and Services, 1976).

[6] Rob Huebert, "Who Owns the Arctic?," The Agenda with Steve Paikin, TV Ontario, broadcast on 29 September 2008.

[7] Canada–Denmark Joint Statement on Hans Island, 19 September 2005.

[8] J.P. Wilkinson, P. Gudmandsen, S. Hanson, R. Saldo, and R.M. Samelson, "Hans Island: Meteorological Data from an International Borderline," *Eos* 90:22 (2 June 1990): 190-91. See also H. Melling, T.A.Agnew, K.K.Falkner, D.A. Greenberg, C.M.Lee, A.Münchow, B.Petrie, S.J.Prinsenberg, R.M.Samelson, and R.A.Woodgate, "Fresh-water fluxes via Pacific and Arctic outflows across the - Canadian polar shelf," in *Arctic-Subarctic Ocean Fluxes: Defining the Role of the Northern Seas in Climate*,ed. R.R. Dickson et al. (Dordrecht: Springer, 2006), 193–247.

[9] Bob Weber, "Experts say Canada, Denmark should share control of Arctic island," *Globe and Mail*, 11 November 2015.

[10] See, for example, Canada, Special Senate Committee on the Arctic, *Northern Lights: A Wake-Up Call for the Future of Canada* (June 2019), 112.

[11] Adam Lajeunesse and Heather Exner-Pirot, "Hans Island: A Housewarming Gift?" (June 2018), http://northernmaritime.ca/wp-content/uploads/2018/06/Hans-Island-3.pdf.

[12] Randy Boswell, "Canada, Denmark Start Talks to Resolve Border Dispute," *Edmonton Journal*, 27 March 2010.

[13] Department of Foreign Affairs and International Trade, "Canada and Kingdom of Denmark Reach Tentative Agreement on Lincoln Sea Boundary," *News Release*, 28 November 2012.

[14] Levon Sevunts, "Canada and Denmark set up joint task force to resolve Arctic boundary issues," *Eye on the Arctic*, 23 May 2018, https://www.rcinet.ca/eye-on-the-arctic/2018/05/23/greenland-canada-hans-island-sea-boundary/; and Sevunts, "Hans Island: a housewarming gift for Greenland?," *Eye on the Arctic*, 18 June 2018, https://www.rcinet.ca/eye-on-the-arctic/2018/06/18/hans-island-housewarming-gift-greenland/.

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Canada and the Maritime Arctic

Boundaries, Shelves, and Waters

P. Whitney Lackenbauer, Suzanne Lalonde, and Elizabeth Riddell-Dixon

This book offers comprehensive overviews of Canada's Arctic maritime boundary dispute in the Beaufort Sea, its extended continental shelf in the Arctic, and the debate surrounding the status of the waters of the Northwest Passage. The authors – an historian, a political scientist, and a legal scholar – bring distinct approaches to the topics, confirming that Canada's disagreements and potential continental shelf overlaps with its Arctic neighbours are well-managed and do not threaten the territorial integrity of Canada, its identity, or its future prosperity.

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