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Richard B. Bilder
University of Wisconsin

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THE CANADIAN ARCTIC WATERS POLLUTION PREVENTION ACT: NEW STRESSES ON THE LAW OF THE SEA

Richard B. Bilder*

ON June 17, 1970, the Canadian Parliament approved the Arctic Waters Pollution Prevention Act, which asserts Canada's jurisdiction to regulate all shipping in zones up to 100 nautical miles off its Arctic coasts in order to guard against pollution of the region's coastal and marine resources.¹ Related legislation extends Canada's territorial sea from three miles to twelve miles and authorizes the Government to establish exclusive Canadian fishing zones in marine areas adjacent to the coasts of Canada but beyond the new twelve-mile territorial sea.² At the same time that this legislation was intro-

* Professor of Law, University of Wisconsin. B.A. 1949, Williams College; LL.B. 1956, Harvard University.—Ed.

This Article is based upon a paper delivered at the Fifth Annual Law of the Sea Institute, University of Rhode Island, on June 17, 1970. I would like to express my appreciation to the University of Wisconsin Sea Grant Program, which has facilitated my study of international environmental problems.

1. Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. 1970) [hereinafter Pollution Prevention Act]. The Act is reproduced in the Appendix following this Article. The bill (C-202, 28th Parl., 2d Sess., reprinted in 9 INTL. LEGAL MATERIALS 543 (1970)) was introduced on April 8, 1970, and approved unanimously by the House of Commons on June 9, 1970, and by the Senate on June 17, 1970. Royal Assent was given on June 26. As of mid-September 1970 the Act had not yet been proclaimed; it is, however, considered "law" in that it is on the statute books, but it is not yet in force. The bill was considered by the House of Commons on April 8, 15, 16, 17, and 22, and June 3, 4, and 9; the relevant debates for those dates are found in 114 H.C. DEB. 5626, 5890-93, 5936-55 & 5960-77, 5993-6012, 6170-72, 7696-709, 7722-24, 7895-907 (1970). It was considered by the Senate on June 9, 10, 11, 16, and 17; the relevant debates, which were perfunctory, are printed in 118 SEN. DEB. 1175, 1201-04, 1215, 1241-43, 1249 (1970). The hearings of the House Standing Committee on Indian Affairs and Northern Development, to which the bill was referred after the second reading, furnish an additional valuable source of legislative history. See *Minutes of Proceedings and Evidence Before the House Standing Comm. on Indian Affairs and Northern Development Respecting Bill C-202*, Nos. 15 (April 30, 1970), 16 (May 5, 1970), 17 (May 7, 1970), and 19 (May 14, 1970). The Act is not applicable to Canada's east and west coasts. See note 87 *infra*.

2. An Act to Amend the Territorial Sea and Fishing Zones Act, 18-19 Eliz. 2, c. 68 (Can. 1970). The bill (C-203, 28th Parl., 2d Sess., reprinted in 9 INTL. LEGAL MATERIALS 553 (1970)) was also introduced on April 8, 1970, and was approved by the House of Commons on June 4, 1970, and by the Senate on June 18, 1970. Royal Assent to this Act was also given on June 26, and Canada has had a twelve-mile territorial sea since that date. However, parts of this Act require proclamation, and, as of mid-September 1970, no such proclamation had yet been made. Section 4 of the Act, adding § 5A to the Territorial Sea and Fishing Zones Act of 1964, 13 Eliz. 2, c. 22 (Can.), authorizes the Governor in Council to establish a system of straight baselines, or "fisheries closing lines," as they were termed in the parliamentary debates, across the entrances of bodies of waters in special need of fishery conservation protection and where Canada has special historic fishing claims, thereby establishing exclusive Canadian fisheries zones in such areas. The Gulf of St. Lawrence, Bay of

duced into the Canadian Parliament, the Government took steps to remove the possibility of a challenge in the International Court of Justice to its establishment of such contiguous pollution and fishery zones by adding a reservation to that effect to its long-standing acceptance of the Court's compulsory jurisdiction.³

The Canadian Pollution Prevention Act is of interest in several respects. It opens a new round in the historic and multifaceted struggle over freedom of the seas. It raises complex questions of international law and policy regarding the legal regime of Arctic waters, the concept of contiguous zones, the status of waters within archipelagoes, and the doctrines of innocent passage and international straits. It illustrates both the perception of an increasing

Fundy, Dixon Entrance, Hecate Strait, and Queen Charlotte Sound were given as examples of such areas. *See* remarks of Hon. Mitchell Sharp, Secretary of State for External Affairs, 114 H.C. DEB. 6015-16 (April 17, 1970). *See also* An Act To Amend the Fisheries Act, 18-19 Eliz. 2, c. — (Can. 1970), providing certain conforming amendments in existing legislation. I have not attempted in this Article to explore the many interesting legal and other questions raised by the new fisheries legislation. They are, however, related to those raised by the Pollution Prevention Act.

3. On April 7, 1970, the Canadian representative to the United Nations presented to Secretary-General U Thant a declaration amending Canada's acceptance of the compulsory jurisdiction of the International Court of Justice by adding a reservation that Canada retains jurisdiction over

disputes arising out of or concerning jurisdiction of 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.

See N.Y. Times, April 9, 1970, at 13, col. 5. The full text of the present Canadian Declaration is appended to the Canadian Government's Background Notes on the Arctic Waters Pollution Prevention Bill and the Territorial Sea and Fishing Zones Bill (April 8, 1970) [hereinafter Background Notes], and is reprinted in 9 INTL. LEGAL MATERIALS 598 (1970).

The jurisdiction of the International Court generally depends upon specific consent of the parties to the dispute, expressed either in a special agreement or in a dispute settlement provision of a more general international agreement. However, under article 36(2) (the so-called "optional clause") of the Statute of the Court (59 Stat. 1055 (1945), T.S. No. 993), the states parties to the Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in certain broad classes of legal disputes. Canada made such a declaration, with certain conditions, with respect to the Permanent Court of International Justice, on September 20, 1929, and this declaration was made applicable to the International Court of Justice, as the Permanent Court's successor, by I.C.J. STAT. art. 36(5). The 1929 Canadian Declaration is printed in J. CASTEL, INTERNATIONAL LAW 844-45 (1965).

The Government has made it clear that it does not regard this new reservation as being applicable to disputes regarding the extension of the breadth of the Canadian territorial sea to twelve miles, and is prepared to submit any such disputes to the International Court. *See, e.g.*, Notes for an Address by the Prime Minister to the Annual Meeting of the Canadian Press, Toronto, Ontario, April 15, 1970, at 9 (O.P.M. Press Rel., April 15, 1970) [hereinafter Prime Minister's Press Speech], reprinted in 9 INTL. LEGAL MATERIALS 600 (1970).

number of coastal states that existing international law and international arrangements are inadequate to protect their legitimate interests, and the strong pressures within such states for unilateral action to remedy these perceived deficiencies. It suggests, in particular, the type of stress that the growing concern on the part of coastal states regarding ocean pollution is likely to exert on traditional law-of-the-sea doctrines, and it also suggests the complex issues which may be involved in attempting to achieve international agreement on a regulatory regime adequate to prevent such pollution. Finally, the Act offers an instructive study of the international legal process in action.

The immediate stimulus for the Canadian legislation was the historic voyage in the summer of 1969 of the United States tanker *S.S. Manhattan* through the waters and ice of the Northwest Passage, north of the Canadian mainland.⁴ The voyage was designed to demonstrate the feasibility of utilizing ice-breaking supertankers on this route for the large-scale transportation of oil from the developing oil fields of Alaska's North Slope to the markets of the Eastern Seaboard of the United States. Previously, the 1967 *Torrey Canyon* incident,⁵ the 1968 Santa Barbara oil spill,⁶ and a succession of similar incidents had dramatically highlighted the environmental hazards posed by the possibility of maritime-tanker and oil-drilling

4. The *Manhattan*, a 115,000-ton oil tanker owned by the Humble Oil & Refining Co., a subsidiary of Standard Oil Co. (New Jersey), was specially modified for the voyage. The ship sailed on August 24, 1969 (N.Y. Times, Aug. 25, 1969, at 1, col. 3), and completed navigation of the passage on September 14, 1969 (*id.*, Sept. 15, 1969, at 1, col. 3). Canadian sensitivity was manifest during the voyage (*see, e.g.*, N.Y. Times, Sept. 21, 1969, § 4, at 8, cols. 1-5), and the voyage was frequently referred to during the parliamentary debates on the Pollution Prevention Act.

On the long and romantic history of the search for a Northwest Passage between Europe and the Orient—a goal of navigators since Martin Frobisher's first unsuccessful attempt in 1576—see Pharand, *Innocent Passage in the Arctic*, 6 CAN. YB. INTL. L. 3, 42-47 (1968). The passage was first completed by Roald Amundsen in 1906. In 1960, the American nuclear submarine *Seadragon* accomplished the first underwater passage.

5. In late March 1967 the *S.S. Torrey Canyon*, a 119,000-ton oil tanker, ran aground on rocks sixteen miles off the coast of Cornwall and split open, spilling more than 35 million gallons of oil into the ocean and onto British and French beaches, killing large numbers of birds and fish, and giving rise to a series of complex and protracted legal claims by both private individuals and the British and French governments. *See, e.g.*, E. COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); C. GILL, F. BOOKER & T. SOPER, THE WRECK OF THE TORREY CANYON (1967); Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DENVER L.J. 400 (1967).

6. The blowout of the Union Oil Co. well in the Santa Barbara Channel off the coast of California occurred in late January and early February 1968, and coated 400 square miles of ocean and forty miles of shoreline with oil. TIME, Feb. 14, 1968, at 23-25. *See* Baldwin, *The Santa Barbara Oil Spill*, 42 COLO. L. REV. 33 (1970). *See generally* Note, *Continental Shelf Oil Disasters: Challenge to International Pollution Control*, 55 CORNELL L. REV. 113 (1969).

accidents.⁷ The *Manhattan's* feat gave warning that Canada's Arctic environment might soon be subjected to similar threats.⁸ The immediacy of the potential problem was further underlined in Canadian public consciousness by the grounding of the Liberian tanker *Arrow* in February 1970 in Chadabucto Bay off Nova Scotia, which caused oil pollution of the waters and adjacent coast.⁹

Canada's fear of oil pollution of its Arctic waters and coasts based on these recent maritime disasters is heightened by a number of factors. The Canadian North as well as the Arctic region above the Canadian mainland have long held a special place in nationalistic sentiments; Canadians regard the area as a treasured part of their national heritage, and it has been referred to as Canada's "last frontier" and a touchstone of the Canadian identity.¹⁰ More materialistically, Canada holds great hopes for the exploration and ex-

7. See generally, on ocean oil pollution problems, Note, *Oil Pollution and the Sea*, 10 HARV. INTL. L.J. 316 (1969); Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155 (1968); INTERNATIONAL CONFERENCE ON OIL POLLUTION OF THE SEA, REPORT OF PROCEEDINGS HELD IN ROME, OCTOBER 1968 (1969) [hereinafter ROME PROCEEDINGS]. Statistics cited in the *Harvard International Law Journal* Note, *supra*, at 317-19, give some sense of the dimensions of the problem. It is estimated that oil influxes into the sea from shipping activities currently amount to at least 1 million metric tons per year, but the actual amount may be much greater. Most of these losses result from "deballasting," cleaning activities, and minor accidents, rather than from major accidents. In 1968 the world's tanker fleet numbered 4,300 ships and transported more than 700 million tons of oil; one ship out of every five in the world's merchant fleet was engaged in transporting oil and almost all of these ships were powered by oil. In contrast to existing "supertankers" (the *Torrey Canyon* was 119,000 tons and the *Manhattan* is 115,000 tons), some sixty tankers of 150,000 tons or more are now on order throughout the world; a Japanese company has launched a 276,000-ton tanker and other Japanese yards have orders for tankers as large as 312,000 tons.

8. During the parliamentary debates, one member reported that when the *Manhattan* was placed in drydock after its voyage, two large holes were discovered in the cargo tanks below the waterline; if oil, not water, had been carried on the test run, there presumably would have been substantial spillage. See remarks of Mr. Perrault, 114 H.C. DEB. 5973 (April 16, 1970). With respect to the *Manhattan's* second voyage, commencing in the spring of 1970, the Canadian Government imposed a number of conditions on the owners, including a requirement of icebreaker escort, a series of safety modifications and requirements, and a minimum of \$6.5 million in accident insurance. N.Y. Times, April 5, 1970, at 27, col. 1.

One industry projection is that thirty giant 250,000-ton ice-breaking tankers will ultimately be needed to move Alaskan North Slope oil to the east coast of the United States through the Northwest Passage if this method of transportation is selected to supply the Eastern Seaboard. Wall St. J., Dec. 17, 1969, at 8, cols. 2-3. In the late fall of 1969, General Dynamics Corp. formally proposed to five major oil companies operating on the North Slope the building of six 170,000-ton nuclear submarines, each carrying up to 300,000 tons of oil, to transport oil to the east coast under the water and ice of the Northwest Passage. *Id.*

9. See N.Y. Times, Feb. 9, 1970, at 78, col. 1. The *Arrow* incident is frequently referred to in the parliamentary debates.

10. See, e.g., Prime Minister's Press Speech, *supra* note 3, at 1-5; Lloyd, *Canada's Arctic in the Age of Ecology*, 48 FOREIGN AFFAIRS 726 (1970).

plotation of the potential mineral resources of this vast region, a process which has barely begun.¹¹ The dangers which utilization of the Northwest Passage pose to this unique environment are generally considered by Canadians to be particularly acute. For one thing, the hazards of Arctic navigation substantially increase the risk of maritime accidents. Moreover, the peculiar ecology of the Arctic region—an environment in which life exists only precariously—coupled with the slow rate of hydrocarbon decomposition in a frigid climate and the difficulty of dispelling oil in Arctic areas, might cause any major oil spill to have disastrous and irreversible ecological consequences. Indeed, under these conditions, even small amounts of oil pollution could be extremely damaging.¹² Thus it is not surprising that Canada takes the view that it has both a special interest in its Arctic environment and a particular responsibility to protect it from the threat of oil pollution.

However, while Canada's motivation is apparent, its right to establish regulations aimed at preventing pollution throughout this broad Arctic area is less than clear.¹³ The Northwest Passage comprises not one route, but rather several possible routes through the archipelago north of the Canadian mainland. The most feasible route for international navigation is likely to be that commencing in the east in Lancaster Sound, running west through Barrow Strait and Viscount Melville Sound, then southwest through Prince of Wales Strait between Banks and Victoria Islands, and finally west again along the north coast of the mainland into Prudhoe Bay in the Beaufort Sea.¹⁴ Canada has long asserted territorial claims to the

11. See, e.g., Lloyd, *supra* note 10, at 731-32, 734-35.

12. See Prime Minister's Press Speech, *supra* note 3, at 6-7. The ecological dangers posed by oil pollution are stressed in parliamentary debates and are specifically referred to in the preamble to the Pollution Prevention Act. For general discussions of the ecological effects of oil pollution, see "TORREY CANYON" POLLUTION AND MARINE LIFE (J. Smith ed. 1968), various papers collected in ROME PROCEEDINGS, *supra* note 7, and Note, *supra* note 7, at 321-22, citing references.

13. For comprehensive discussions of the history and recent status of various Canadian Arctic claims, including the "sector theory," Canadian claims to waters of the Canadian Archipelago, and the status of the Northwest Passage, see Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L.J. 200 (1963); Pharand, *Innocent Passage in the Arctic*, 6 CAN. YB. INTL. L. 3 (1968); Smith, *Sovereignty in the North: The Canadian Aspect of an International Problem*, in THE ARCTIC FRONTIER 194 (R. MacDonald ed. 1966). Professor Head's article is of particular interest since he is currently serving as Legislative Assistant to Prime Minister Trudeau and was presumably involved in the preparation of the Pollution Prevention Bill.

14. Pharand, *supra* note 13, at 48. An alternate route is through the more northerly but much wider McClure Strait rather than Prince of Wales Strait, but ice is more likely to be encountered on this route.

islands of the archipelago along this route and those claims do not appear to be challenged.¹⁵ Canada has also made clear its claim to exclusive exploitation of the continental shelf north of the mainland, and this claim also seems uncontested.¹⁶ On the other hand, while there seems to be broad international consensus that the waters of the Arctic Ocean are "high seas,"¹⁷ the status of the waters within the Canadian Archipelago is more controversial.

The Canadian position regarding these archipelagic waters was itself for a long time ambiguous.¹⁸ Before the recent legislation was passed, Canada claimed only a three-mile territorial sea, which would, except for Prince of Wales Strait, leave a narrow strip of "high seas" throughout most of the Northwest Passage. With its present claim of a twelve-mile territorial sea, more of the channels—Barrow Strait in particular—become wholly territorial waters, but substantial portions of the rest of the Northwest Passage would presumably still remain high seas. However, the Canadian claim of jurisdiction in the archipelago appears now to rest on an archipelagic theory rather than on a twelve-mile territorial-sea theory. Recent statements indicate that Canada considers all of the waters within the Arctic Archipelago "Canadian waters" without regard to the

15. See generally references cited in note 13 *supra*; remarks of Prime Minister Trudeau, 114 H.C. DEB. 40 (Oct. 24, 1969); J. CASTEL, *INTERNATIONAL LAW* 257 (1965).

16. See remarks of Prime Minister Trudeau, 114 H.C. DEB. 40 (Oct. 24, 1969), and of External Affairs Minister, Mitchell Sharp, 114 H.C. DEB. 6014 (April 17, 1970). The right of a coastal state to exercise sovereign rights over its continental shelf for the purpose of exploring the seabed and exploiting its natural resources is recognized by article 2(1) of the Geneva Convention on the Continental Shelf, *opened for signature* April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter *Continental Shelf Convention*], to which forty-one countries, including the United States and Canada (as of Feb. 6, 1970), are presently parties. (Canada is not a party to any of the other three Geneva Law of the Sea Conventions). The International Court, in the recent North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands, Federal Republic of Germany v. Denmark), [1969] I.C.J. 3, has held that this right now has become a principle of customary international law. The Court's decision in the *North Seas Continental Shelf Cases* is digested and excerpted at 63 AM. J. INTL. L. 591 (1969), and reprinted in 8 INTL. LEGAL MATERIALS 340 (1969).

17. See Pharand, *Freedom of the Seas in the Arctic Ocean*, 19 U. TORONTO L.J. 210 (1969). A recent incident involving the alleged murder of one United States national by another on Fletcher's Ice Island, which floats about 325 miles from the North Pole, has brought related issues to public attention. See N.Y. Times, July 31, 1970, at 1, col. 3. For a discussion of the complex jurisdictional problems raised by incidents of misconduct in polar regions, particularly Antarctica, see Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231 (1966).

18. See, e.g., Pharand, *supra* note 13, at 56, where he concludes, after surveying the literature, that "it is difficult to ascertain Canada's official policy with respect to the waters within the Arctic archipelago . . ." But see Head, *supra* note 13, at 218, where he states that "Canada regards the waters between the islands as territorial waters . . ." As of the time of the *Manhattan's* first voyage, Prime Minister Trudeau himself expressed doubt concerning the status of the waters. See N.Y. Times, Aug. 31, 1969, at 23, col. 1. See generally *id.*, Sept. 8, 1969, at 23, col. 1.

breadth of the territorial sea.¹⁹ Apparently such territorial waters are considered at most to be subject to such rights of "innocent passage" as are determined by Canada to exist.²⁰

Uncontested Canadian sovereignty over key straits, coupled perhaps with Canada's claim over all archipelagic waters, might have provided a feasible basis for an assertion of Canadian jurisdiction over the Northwest Passage. However, the Arctic Waters Pollution Prevention Act appears to be based on a separate and more far-reaching contiguous-zone theory.²¹ A brief summary of the Act should make this theory clear.

19. See Summary of Canadian Note Handed to the United States Government on April 16, 1970, 114 H.C. DEB. 6027, 6028-29 (April 17, 1970) [hereinafter Canadian Note], reprinted in 9 INTL. LEGAL MATERIALS 607 (1970). On the Canadian claim to the archipelagic waters, see also Minister Sharp's remarks that "we claim these to be Canadian territorial waters," 114 H.C. DEB. 5953 (April 16, 1970), and that "we regard the waters between the islands as our waters, and we always have." 114 H.C. DEB. 6015 (April 17, 1970). Indeed, the Prime Minister has suggested that the Government may regard Beaufort Sea as something less than "high seas." See Prime Minister's Press Speech, *supra* note 3, at 10.

20. Concerning the question of innocent passage, see notes 79-84 *infra* and accompanying text.

21. The Government repeatedly emphasized that the Act was based upon a functional exercise of coastal-state jurisdiction to protect against threats of coastal and coastal-water pollution rather than a claim of sovereignty. See, e.g., the Prime Minister's press interview of April 16, 1970, where he said of the new bill: "It is not an assertion of sovereignty: it is an exercise of our desire to keep the Arctic free of pollution" Quoted at 114 H.C. DEB. 5955 (April 16, 1970); see also Prime Minister's Press Speech, *supra* note 3, at 9.

It is interesting to note that the principal parliamentary controversy concerning the Act involved the question whether the Government's decision to base controls on a contiguous-zone theory, rather than on a specific claim of sovereignty over the archipelagic waters, coupled with its extension of the territorial sea to a specific limit of twelve miles, amounted to a weakening or abandonment of the Canadian archipelagic claim. See, e.g., remarks of Mr. Stanfield, 114 H.C. DEB. 5941-43 (April 16, 1970). The issue was sharpened by the fact that the Standing Committee on Indian Affairs and Northern Development of the House of Commons had specifically recommended that Canada assert sovereignty over the waters of the archipelago. See text of the Committee's first report in VOTES AND PROCEEDINGS OF THE HOUSE OF COMMONS OF CANADA, No. 38, at 207-10 (Dec. 16, 1969), and references to the report at 114 H.C. DEB. 5943, 5969 (April 16, 1970). However, the Secretary of State for External Affairs, the Hon. Mitchell Sharp, took the position that none of these actions weakened Canadian claims to sovereignty, citing the decision in North Atlantic Fisheries Case (United States v. Canada), 11 U.N.R.I.A.A. 167 (Perm. Ct. Arb. 1910), to hold that a state may, without prejudice to its claim to sovereignty over the whole of a particular area of the sea, exercise only so much of its sovereign powers over such part of that area as may be necessary for its immediate purposes. The Government's reluctance to be forced into unambiguous statements on the sovereignty issue is apparent throughout the debates. See, e.g., Minister Sharp's statement that, while Canada would "not back down one inch from [its] basic position on sovereignty . . . there is no interest on the part of the Canadian government in the exercise of chauvinism." 114 H.C. DEB. 6015 (April 17, 1970). See also 114 H.C. DEB. 5949 (April 17, 1970). While the opposition ultimately managed to elicit such relatively clear statements, see note 19 *supra*, the Government continued to play this aspect of the matter in low key. A move to amend the bill to provide that "[n]othing in this Act shall in any way be construed as inconsistent with Canada's rightful claim of sovereignty in and over the water, ice and

The Arctic Waters Pollution Prevention Act deals with pollution arising from shipping, from land-based installations, and from commercial activities, such as oil drilling, carried out on the Canadian Continental Shelf. The Act's provisions apply to "arctic waters" which are defined as waters in both a liquid and a frozen state "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 longitude *and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles . . .*"²² In addition, "arctic waters" include waters adjacent to those in the area described above to the extent that such adjacent waters overlies "submarine areas [that] Her Majesty in right of Canada has the right to dispose of or exploit"²³ insofar as the Act applies to persons exploring for, developing, or exploiting natural resources in such submarine areas.²⁴

The Act prohibits, and prescribes penalties for, the deposit of "waste" in Arctic waters or on the islands or mainland under conditions which may cause such waste to enter the Arctic waters,²⁵ and further requires that any deposit of waste or danger thereof be reported.²⁶ Exceptions to these requirements may be authorized by the Governor in Council.²⁷ The Governor in Council may also order the destruction or removal of ships in distress which are depositing waste or which are likely to deposit waste in Arctic waters.²⁸ The definition of "waste" is comprehensive and covers, among other things, "any substance that, if added to any waters, would degrade or alter . . . those waters to any extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man . . ."²⁹

land areas of the Arctic regions between the degrees of longitude 60 and longitude 141" met with procedural difficulties and was withdrawn. 114 H.C. DEB. 7704-09 (June 3, 1970); *id.* 7722-23 (June 4, 1970).

22. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 3(1) (Can. 1970) (emphasis added). An exception is that the line of equidistance between the Canadian Arctic islands and Greenland is substituted for the 100-mile line where the equidistance-line is less than 100 miles from the Canadian coast. The 141st meridian of longitude is the line defining the northern portion of the Canadian-Alaskan boundary.

23. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 3(2) (Can. 1970). This definition encompasses the water overlying the continental shelf.

24. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, §§ 3(2), 6(1)(a) (Can. 1970).

25. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 4 (Can. 1970).

26. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 5 (Can. 1970).

27. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 4 (Can. 1970). In Canadian practice, a delegation to the Governor in Council is, in effect, to the Prime Minister and his Cabinet. *See* R. CHEFFINS, *THE CONSTITUTIONAL PROCESS IN CANADA* 72-73 (1969), and R. DAWSON, *THE GOVERNMENT OF CANADA* 230 (4th ed. 1963).

28. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 13 (Can. 1970).

29. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 2(h) (Can. 1970). Attempts to

The Governor in Council may, by order, prescribe as a "shipping safety control zone" any area of the Arctic waters.³⁰ He may then make regulations relating to navigation in such zones and prohibit any ship from entering any zone unless it meets the prescribed regulations. Such regulations may relate to hull and fuel tank construction, navigational aids, safety equipment, qualification of personnel, time and route of passage, pilotage, icebreaker escort, and so forth.³¹ At certain times of the year, or when certain ice conditions prevail, ships may be completely banned from entering any given zone.³² Finally, the Governor in Council may exempt from the application of such regulations any ship or class of ships that is owned or operated by a sovereign power other than Canada when he is satisfied that such ships comply with standards substantially equivalent to those prescribed by Canadian regulations and that all reasonable precautions will be taken by those ships to reduce the danger of any deposit of waste.³³

The Act further provides for the appointment of "pollution prevention officers"³⁴ having broad powers, including authority both to board ships within a shipping safety control zone for inspection purposes, and to order ships in or near a safety control zone to remain outside it if the officers suspect that the ships do not comply with the standards applicable within the zone.³⁵

The remedial provisions of the Act are far-reaching. Any person who deposits waste in Arctic waters in violation of the Act is liable

arrive at an operationally useful definition of marine pollution raise complex and fundamental questions. Compare the Canadian definition, with the definition suggested by the International Oceanographic Commission and accepted by the Joint IMCO/FAO/UNESCO/WMO Group of Experts on the Scientific Aspects of Marine Pollution, which defines marine pollution as:

Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairment of quality for use as sea water and reduction of amenities. Comprehensive Outline of the Scope of the Long-Term and Expanded Programme of Oceanic Research, U.N. Doc. A/7750, pt. 1, at 3 (Nov. 10, 1969).

30. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 11 (Can. 1970).

31. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 12 (Can. 1970).

32. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 12(1)(c) (Can. 1970).

33. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 12(2) (Can. 1970).

34. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 14 (Can. 1970).

35. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 15 (Can. 1970). Pollution prevention officers may also be empowered to enter any land-based operation undergoing construction, alteration, or extension, that may result in the deposit of waste in Arctic waters, to determine whether adequate standards are being complied with (§ 15), and the Governor in Council may issue instructions requiring any modifications to the work, or prohibit it entirely (§ 10). Pollution prevention officers may perform similar functions with respect to commercial operations carried out on the continental shelf (§ 15).

to a fine not exceeding 5,000 dollars, and any ship that deposits such waste is liable to a fine not exceeding 100,000 dollars, with each day on which the offense is committed being considered a separate offense.³⁶ In addition, any person failing to make required reports to pollution control officers or otherwise failing to comply with various orders or regulations, and any ship navigating within a shipping safety control zone while not complying with standards or regulations or otherwise failing to comply with various provisions of the Act is liable to fines not exceeding 25,000 dollars.³⁷ Furthermore, a pollution prevention officer may, with the consent of the Governor in Council, seize a ship and its cargo anywhere in the Arctic waters or elsewhere in the territorial sea or the internal or inland waters of Canada when he suspects on reasonable grounds that the ship, or the ship or cargo owners have contravened the provisions of the Act.³⁸ When a ship is convicted of an offense under the Act, a Canadian court may order the forfeiture of both the ship and its cargo in addition to any other penalty imposed.³⁹

The Act also provides for civil liability both for all costs and expenses incurred by the Canadian Government with regard to the violation and for actual loss or damage incurred by other persons resulting from the deposit of waste by persons engaged in exploring for, developing, or exploiting the natural resources on the land adjacent to the Arctic waters or in the submarine areas below the Arctic waters, or by persons carrying on any undertaking on the mainland or the islands of the Canadian Arctic or on Arctic waters, or by the owners of ships navigating within the Arctic waters and owners of the cargo of any such ship.⁴⁰ Such civil liability is absolute and does not depend upon proof of fault or negligence;⁴¹ however, the Act does provide that the Governor in Council may make regulations establishing limits of liability for various classes of persons. For example, with respect to ship and cargo owners, the limitation of liability shall take into account the size of the ship and the nature and quality of the cargo carried.⁴² The Governor in Council may also require evidence of financial responsibility adequate to cover the costs of cleanup and damage resulting from any pollution to be provided by persons exploiting the natural resources in the land adja-

36. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 18 (Can. 1970).

37. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 19 (Can. 1970).

38. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 23(1) (Can. 1970).

39. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 24(1) (Can. 1970).

40. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 6 (Can. 1970).

41. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 7(1) (Can. 1970).

42. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 9 (Can. 1970).

cent to the Arctic waters, and by owners of ships and cargo, when such ships are navigating within any shipping safety control zone specified by the Governor in Council where deposit of its cargo (oil, for instance) would constitute "waste."⁴³ Finally, the Act sets out procedures for resolving damage claims in the Canadian courts.⁴⁴

The Canadian Government was well aware that the Pollution Prevention Act might raise foreign-relations problems, particularly with the United States,⁴⁵ and its expectations were realized. The American response was prompt and legalistic. On April 9, 1970, a State Department spokesman stated that:

We regret the introduction of this legislation by the Canadian Government which, in our view, constitutes a unilateral approach to a problem which we believe should be resolved by cooperative international action.

The United States does not recognize any exercise of coastal state jurisdiction over our vessels in the high seas and thus does not recognize the right of any state unilaterally to establish a territorial sea of more than three miles or exercise more limited jurisdiction in any area beyond 12 miles.⁴⁶

He added, however, that the United States "is prepared promptly to seek either bilateral or multilateral solutions to these problems in the framework of international law."⁴⁷

In a further statement on April 15, reflecting an official note to the Canadian Government, the Department of State developed its position more fully:

International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction.

43. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 8 (Can. 1970).

44. Pollution Prevention Act, 18-19 Eliz. 2, c. 47, § 6(3) (Can. 1970).

45. Canadian officials had emphasized the Government's view of its special responsibilities with respect to the Northwest Passage since at least the fall of 1969, *see, e.g.*, the statements by External Affairs Minister, Mitchell Sharp, reported in *N.Y. Times*, Sept. 19, 1969, at 3, col. 1, and by Transport Minister, Donald Jamieson, reported in *id.*, Nov. 26, 1969, at 14, cols. 1-6, and the probability of legislation was indicated in the Speech from the Throne and the Prime Minister's remarks in the ensuing debate. 114 H.C. DEB. 1-3 (Oct. 24, 1969); *id.* 34-43; *N.Y. Times*, Oct. 24, 1969, at 4, col. 3. On November 11, 1969, Prime Minister Trudeau discussed Canadian concern regarding Arctic pollution with United Nations Secretary-General U Thant, stating in a news conference afterwards that "[w]e owe it to the world to do something [on pollution]." *N.Y. Times*, Nov. 12, 1969, at 7, col. 1. The issue was a subject of discussion at a Canadian-United States Ministerial Meeting in June 1969, *N.Y. Times*, Sept. 19, 1969, at 3, col. 1, and was a principal topic at further United States-Canadian high-level discussions on March 11, 1970, in Washington and March 20, in Ottawa. 114 H.C. DEB. 5952-53 (April 16, 1970).

46. Statement of Robert J. McCloskey, *N.Y. Times*, April 10, 1970, at 13, col. 3.

47. *Id.*

We are concerned that this action by Canada if not opposed by us, would be taken as a precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resource jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law.⁴⁸

The State Department asked the Canadian Government to defer making its proposed legislation effective until an international agreement was reached. However, in the event that the Canadian Government was unwilling to make this concession, the State Department urged that the issue be voluntarily submitted to the International Court of Justice.

The Canadian Government, in turn, promptly rejected the American position and suggestions. In a note delivered to the United States Government on April 16, 1970,⁴⁹ the Ministry of External Affairs stated that the Pollution Prevention Bill was justified since it was "based on the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment";⁵⁰ that such extensions of jurisdiction for limited protective purposes outside the territorial seas had ample precedent, particularly in American practice; and that, while the Canadian Government was prepared to participate in international efforts to deal with the problem, it was not prepared to await the development of international rules as the solution. Indeed, the Canadian Government viewed its own unilateral action as a positive contribution to the development of such rules since it is a well-established principle that customary international law is developed by state practice. Moreover, the Canadian Government refused to accept the American suggestion that the Northwest Passage constituted high seas, that it was an international strait, or that the waters of the Arctic Archipelago were other than Canadian. Finally, Canada would not agree to submit the dispute to the International Court. Canada then proceeded to enact the new legislation and the United States in turn proceeded with plans to convene an international conference on Arctic pollution problems, to be held in the fall of 1970.

48. Dept. of State Press Rel. No. 121 (April 15, 1970), reprinted in 9 INTL. LEGAL MATERIALS 605 (1970); N.Y. Times, April 16, 1970, at 6, cols. 1-2. Subsequently, the Canadian newspapers prominently reported a statement by State Department Assistant Legal Advisor Robert H. Neuman, made in testimony in mid-July before Senator Muskie's Air and Water Quality Subcommittee, that Canada had "absolutely no right to enact" legislation asserting such a 100-mile-wide pollution prevention zone. See Montreal Star, July 22, 1970, at 12, col. 1; Toronto Daily Star, July 23, 1970, at 4.

49. Canadian Note, *supra* note 19.

50. *Id.* at 6028.

There are many aspects of the Arctic Waters Pollution Prevention Act which are of interest from the standpoint of international law and the functioning of the international legal order. Of chief interest, of course, is the question whether the Pollution Prevention Act violates existing international law, particularly in its assertion of jurisdiction to regulate shipping in a contiguous zone up to 100 miles off Canada's northern coasts. As previously indicated, the Act seems to be based on the theory of Canada's right to exercise jurisdiction for pollution control purposes on the high seas contiguous to but *outside* of Canadian territorial waters, rather than on the theory that the waters embraced in the legislation are territorial or internal waters subject to Canadian sovereignty.⁵¹ In general, international law prohibits any state from purporting to subject any part of the high seas to its sovereignty, or from interfering with the exercise of freedom of navigation by ships sailing under other states' flags on the high seas.⁵² However, international law does recognize a limited exception to these principles in the concept of the "contiguous zone," which permits a coastal state to exercise jurisdiction for certain purposes in areas of the high seas lying somewhat outside its territorial sea.⁵³ In essence, Canada justifies the Pollution Prevention Act as being within the scope of this contiguous-zone exception.

The most authoritative evidence of the present state of international law on the subject of contiguous zones is found in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.⁵⁴ While Canada is not party to the convention, thirty-seven other nations are, including the United States, the United Kingdom,

51. See note 21 *supra*.

52. International law in this respect is codified in the Geneva Convention on the High Seas, *opened for signature* April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter High Seas Convention], which entered into force for the United States on September 30, 1962. As of July 1, 1970, forty-four states were parties. Article 1 of the convention defines the "high seas" as "all parts of the sea that are not included in the territorial waters or in the internal waters of a state." Article 2 of the convention provides:

The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises, *inter alia* . . . (1) freedom of navigation.

Article 6 provides that, save in exceptional cases expressly provided for in international treaties or the convention, a ship shall be subject to the exclusive jurisdiction of its flag state on the high seas. Article 22 of the convention prohibits warships from boarding foreign merchant ships on the high seas except under special circumstances not here relevant (suspicion of piracy, slave trade, or flying a false flag).

53. See generally M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* ch. 6 (1962).

54. *Opened for signature* April 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention], which entered into force for the United States September 10, 1964.

France, and the Soviet Union, and widely accepted "law-making" conventions of this nature are considered relevant evidence of customary international law.⁵⁵ Article 24(1) of the Territorial Sea Convention provides that, in a zone of the high seas contiguous to the territorial sea, a coastal state may exercise the control necessary to "[p]revent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea" and to "[p]unish infringement of the above regulations committed within its territory or territorial sea."⁵⁶ Paragraph 2 of article 24, however, specifically provides that: "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."⁵⁷ While the inclusion of "sanitary regulations" as a recognized basis of jurisdiction within the permitted twelve-mile contiguous zone could reasonably be read to include pollution prevention regulations, the assertion of pollution control jurisdiction beyond twelve miles—the present breadth of Canada's territorial sea—appears to be inconsistent with the convention.⁵⁸

Any argument that pollution problems were not contemplated by the Law of the Sea Conventions, and that article 24(2) of the Territorial Sea Convention is thus not pertinent to the issue of contiguous zones established for the specific purpose of pollution prevention, seems refuted by the express reference to oil pollution

55. See generally the decision of the International Court in the North Seas Continental Shelf Cases, [1969] I.C.J. 3. See note 16 *supra*. It should be noted, however, that while the Court in that case recognized that the general principle of coastal-states' rights in the continental shelf had become customary law, the Court went on to reject the contention that article 6(1) of the convention, setting out particular methods of delimiting competence between contiguous states, had given rise to such a rule of customary law. See also Letter from Secretary of State Rusk to Attorney General Kennedy, Jan. 15, 1963, in 2 INTL. LEGAL MATERIALS 527 (1963), taking the position that the Territorial Sea Convention, *supra* note 54, although not yet entered into force, "must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time." Pharand, *supra* note 13, at 59, indicates that Canada, while not a party to the Geneva Law of the Sea Conventions, apparently recognizes many of their provisions as codifying customary international law.

56. Territorial Sea Convention, *supra* note 54, art. 24(1).

57. Territorial Sea Convention, *supra* note 54, art. 24(2).

58. Even if the term "sanitary regulations" is read to include antipollution measures, such measures could, under the convention, only be applied with respect to damage likely to be caused within the territory or the territorial sea of the state concerned.

The United States itself has recently adopted more stringent legislation to deal with offshore pollution. See the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91. However, while the Act generally prohibits discharges of oil "into or upon the waters of the contiguous zone" (§ 11(a)(9)), the term "contiguous zone" is carefully defined to mean the "zone established under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone" (§ 11(b)(2)). See also President Nixon's Message to Congress on Offshore Oil Pollution, May 20, 1970, reprinted in 62 DEPT. STATE BULL. 754 (1970).

in article 24 of the 1958 Geneva Convention on the High Seas,⁵⁹ drafted at the same conference as the Territorial Sea Convention, which provides that:

Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.⁶⁰

The reference in article 24 to "existing treaty provisions" is primarily directed to the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil,⁶¹ which has since been amended in 1962⁶² and 1969.⁶³ This latter convention, however, which is presently the only international agreement dealing broadly with the preventive aspects of ship-borne marine pollution, does not confer any authority on coastal states to assert jurisdiction for pollution control purposes beyond the twelve-mile contiguous zone; indeed, enforcement of the convention's prohibitions is left expressly to the flag state of the offending vessel rather than the interested coastal state.⁶⁴

59. High Seas Convention, *supra* note 52, art. 24. Since the conventions were drafted simultaneously at a single conference, they are presumably to be construed *in pari materia*.

60. See also article 25 of the High Seas Convention, *supra* note 52, which requires states parties to take measures to prevent pollution of the sea by radioactive materials and other harmful agents, and article 5(7) of the Continental Shelf Convention, *supra* note 16, which provides that a coastal state engaging in the exploration of the continental shelf and exploitation of its natural resources is obliged to take "all appropriate measures for the protection of the living resources of the sea from harmful agents."

61. *Opened for signature* May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 [hereinafter Oil Pollution Convention]. The convention entered into force in 1958. Canada became a party to the convention in 1956. The United States became a party on December 8, 1961, subject to an understanding, reservations, and a recommendation. 75 Stat. 402 (1961), T.I.A.S. No. 4900, at 36-39. As of July 1, 1970, forty-two states were parties.

62. April 11, 1962, [1966] 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332. The 1962 amendments entered into force in 1967. As of July 1, 1970, forty-one states had accepted these amendments.

63. The 1969 amendments are annexed to IMCO Ass. Res. A.175 (VI) (Oct. 21, 1969). On May 20, 1970, President Nixon requested Senate consent to ratification of these amendments. N.Y. Times, May 21, 1970, at 1, col. 3; 62 DEPT. STATE BULL. 756-57 (1970).

64. The Oil Pollution Convention generally prohibits, with certain exceptions, the discharge of oil or oily wastes within certain defined zones. The prohibited zones are established for the most part as "all sea areas within 50 miles from land," (annex A(1)) but certain zones have a greater or less breadth. The convention applies to all sea-going ships, again with certain exceptions such as vessels under 500 tons gross tonnage, but different standards are applicable for tankers than for other ships.

Each signatory is required to ensure that facilities for dealing with oily wastes are available at its main ports, and that each of its vessels carries an oil record book specifying the ship's operations involving the recovery or discharge of oil or oily wastes. The oil record book is to be open to inspection by port authorities in any port of the states parties. Any infraction of the convention "shall be an offence punishable under the

The Canadian legal position seems further weakened by the fact that neither of the two conventions adopted by the recent International Conference on Marine Pollution Damage, which was held in Brussels in the fall of 1969 to deal specifically with such problems,⁶⁵ purports to extend beyond the twelve-mile contiguous zone the jurisdiction of coastal states to regulate shipping for pollution control purposes. One of these conventions, the International Convention on Civil Liability for Oil Pollution Damage (the so-called "private law" convention), is concerned solely with the limits of liability for pollution damage rather than with its prevention or general regulation.⁶⁶ The other, the International Convention Re-

laws of the territory in which the ship is registered" (art. III(3)), leaving enforcement solely to the flag state of the offending ship. Other states may notify the flag state through diplomatic channels of evidence that an infraction has occurred, but, if the flag state fails to prosecute the violator, the only resort of the complaining state is to diplomatic protest or litigation in an international forum.

The 1962 amendments in general permit states parties to extend the prohibited zones to a minimum of 100 miles from their coasts; extend the convention's coverage to all tankers over 150 tons gross tonnage, and, so far as practicable, all other vessels of whatever size; and provide that new vessels over 20,000 tons built under contract after the convention comes into force shall be prohibited from discharging oil anywhere in the world. In addition, the 1962 conference adopted a resolution favoring the complete avoidance, as soon as practicable, of all discharges of persistent oils into the sea.

The 1969 amendments will abolish the system of prohibited zones and, in principle, prohibit all oil discharges, except under conditions more stringent than those previously applicable.

The convention has not proved very effective. See note 120 *infra*. For analysis and criticisms of the convention, see generally the articles cited in note 7 *supra*, and 3 UNITED STATES COMM. ON MARINE SCIENCE, ENGINEERING AND RESOURCES, PANEL REPORT: MARINE RESOURCES AND LEGAL-PRACTICAL ARRANGEMENTS FOR THEIR DEVELOPMENT pt. VIII, at 81-90 (1969).

65. See Final Act of the International Legal Conference on Marine Pollution Damage, 1969, (Nov. 28, 1969), and attached conventions. The conference was sponsored by IMCO and over forty nations participated. The two conventions are reprinted in 64 AM. J. INTL. L. 471-90 (1970) and 1 J. MARITIME L. & COMMERCE 367-87 (1970). In addition to the two conventions, the conference adopted two resolutions, on International Co-Operation Concerning Pollutants Other than Oil, and Establishment of an International Compensation Fund for Oil Pollution Damage, reprinted in 64 AM. J. INTL. L. 398-400 (1970). On May 20, 1970, President Nixon asked Senate consent to ratification of both of the 1969 Brussels Conventions. N.Y. Times, May 21, 1970, at 1, col. 3; 62 DEPT. STATE BULL. 756-57 (1970).

66. International Convention on Civil Liability for Oil Pollution Damage, *opened for signature* Nov. 29, 1969, reprinted in 64 AM. J. INTL. L. 481 (1970). The convention aims at ensuring that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships. The convention places the liability for any such damage caused within the territorial boundaries of a contracting state, including liability for the costs of any preventive measures taken and further loss or damage caused by such preventive measures, on the owner of the ship from which the polluting oil escaped or was discharged. Subject to a number of specific exceptions, this liability of the owner is strict: it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except in cases in which the owner has been guilty of actual fault in respect of the incident, he may limit his liability in respect of any one incident to an aggregate sum of 2,000 francs (approximately \$134) for each ton of the ship's gross tonnage; but the

lating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the so-called "public law" convention), is more relevant to the contiguous-zone question in that it would permit parties to employ limited antipollution measures, such as bombing or towing, against vessels which were involved in maritime casualties on the high seas having the effect of creating "grave and imminent danger to their coastline or related interests" from oil pollution.⁶⁷ However, this convention, like the private-law convention, is directed essentially at remedial rather than preventive action. Moreover, it may be inferred that the states participating in the Brussels Conference regarded the establishment of even this limited authority to act against pollution threats on the high seas as a highly exceptional measure. Not only did they consider the drafting of a special international agreement necessary for establishing the authority to take such ac-

owner's liability, where he is entitled to limit it, must not in any event exceed 210 million francs (approximately \$14 million) for each incident.

The convention requires ships registered in states parties to it to maintain insurance or other financial security in sums equivalent to the owner's total liability for one incident. These ships are required to carry certificates (issued by their flag state) evidencing such insurance or other guarantee. Contracting states are required not to permit ships under their flags to trade without insurance, and to ensure that vessels entering or leaving their harbors and other installations do carry insurance.

Provisions determining the courts that are competent to exercise jurisdiction in respect of claims under the convention, the period within which claims must be brought, and the distribution of compensation money to victims are also included.

The convention applies to all tankers and other oil-carrying vessels, except that only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage. The convention does not apply to warships or other ships owned or operated by a state and used temporarily for government noncommercial service; but it does apply, in respect of the liability and jurisdiction provisions (but not the insurance requirements) to ships owned by a state and used for commercial purposes.

The convention will enter into force when eight states have become parties, including five states each with not less than 1 million gross tons of tanker tonnage.

67. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *opened for signature* Nov. 29, 1969, reprinted in 64 AM. J. INTL. L. 471 (1970). Article 1(1) of the convention provides that states parties

may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

The convention stipulates the conditions under which, and the procedures through which such measures are to be taken, and imposes upon a state, which takes measures that go beyond what is reasonably necessary to achieve the ends stated in the convention, the obligation to pay compensation for any damage resulting from such unjustified action. There is provision for the settlement of disputes arising out of any measures purported to be taken under the convention. The parties involved in the dispute may either agree to settle it by negotiation or conciliation or, failing such agreement, by means of an arbitration procedure contained in an annex to the convention. The convention applies to all sea-going vessels except warships or other ships owned or operated by a state and used temporarily on government noncommercial service. The convention will enter force when fifteen states have become parties.

tion, but they also carefully limited such authority to the most urgent cases, and circumscribed its exercise with detailed procedural requirements and provisions regarding liability.

Nor can the Canadian position derive any clear support from international practice. There are, as the Canadian Government points out, a number of analogous cases in which states have asserted jurisdiction for various purposes, such as conservation of coastal fisheries or national security,⁶⁸ in a contiguous zone broader than twelve miles, and indeed there does seem to be a general trend toward increasing coastal-state assertions of jurisdiction in such zones. However, there appear to be no precedents—in terms of practice by other states—directly supporting the Canadian assertion of so broad a contiguous zone for the specific purpose of pollution control.⁶⁹

In short, however persuasive the Canadian case may be in terms of what international law ought to be—and the Canadian arguments have considerable appeal in that regard—it is simply not persuasive in terms of what international law seems now to permit. The Canadian Government's awareness of the weakness of its legal position with respect to the assertion of jurisdiction on a contiguous-zone theory is evident in its withdrawal of jurisdiction from the International Court of Justice to deal with the issue. Indeed, on several occasions Prime Minister Trudeau conceded that the Court might well rule against Canada if the matter were submitted to it. For example, in explaining the Canadian reservation, the Prime Minister indicated 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."⁷⁰ The Canadian Government's essentially de-

68. See generally M. McDUGAL & W. BURKE, *supra* note 53; Comment, *Fisheries Jurisdiction Beyond the Territorial Sea*, 44 WASH. L. REV. 307 (1969); and notes 104-10 *infra*. Canadian commentators have drawn particular analogy to the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the Sea, April 29, 1958, [1966] 17 U.S.T. 138, T.I.A.S. No. 5980, 559 U.N.T.S. 286, to which twenty-eight states, including the United States but not Canada, are presently parties. The convention provides, *inter alia*, that "[a] coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea" (art. 6(1)) and may thus take the initiative in prescribing measures of conservation. Such measures, however, must be nondiscriminatory, based on appropriate scientific findings, and urgently needed. If negotiations with other states having an interest in the exploitation of the areas involved do not result in an agreement, any of these states may invoke the compulsory arbitration machinery set up by the convention. See generally Bishop, *The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 COLUM. L. REV. 1206 (1962).

69. See, e.g., M. McDUGAL & W. BURKE, *supra* note 53, at 848-49: "Very few states have sought protection from this type of [oil] pollution by extending authority to ocean areas beyond the territorial sea. There has rather been clear recognition of a need for inclusive prescription."

70. Prime Minister's Press Speech, *supra* note 3, at 9. However, the Government has

fensive posture with respect to its legal position is further apparent in its admission that by its unilateral action it is, in its view, breaking new ground and creating new law in this area.⁷¹

The Canadian claim to sovereignty over at least substantial portions of the waters of the Northwest Passage raises additional complex questions of international law. Since some fifty-seven countries presently claim territorial seas of twelve miles or more,⁷² it seems extremely unlikely that any international tribunal would hold Canada's assertion of a twelve-mile limit to be contrary to international law.⁷³ As mentioned previously, this twelve-mile territorial sea in itself encloses several important straits in the Passage.⁷⁴ With regard to the broader Canadian claim to the waters of the entire archipelago, international law provides few guidelines.⁷⁵ Similar archipelagic claims by Indonesia and the Philippines have thus far won little international support.⁷⁶ But Canada may make a respectable argument that the Arctic Archipelago is distinguishable from these other situations—in its geographic contours, its geologic continuity with the mainland, its unique often-frozen condition, and perhaps in its freedom from historic patterns of conflicting interests or use by other states.⁷⁷ It is not clear how and where the baselines

never conceded that the Act is in violation of international law; its position has rather been that there is an absence of international law clearly applicable to issues of ocean pollution in general and navigation in Arctic areas in particular. *See, e.g., id.* at 10; statement of Mr. Beesley, Head of Legal Division, Department of External Affairs, in *Minutes of Proceedings and Evidence Before the House Standing Comm. on Indian Affairs and Northern Development Respecting Bill C-202*, No. 15, at 15:7-13 (April 30, 1970); and note 111 *infra*.

71. *See, e.g.,* Prime Minister's Press Speech, *supra* note 3, at 8, where he notes that "[o]ur pollution legislation is without question at the outer limits of international law: We are pressing against the frontier . . ." *See generally* text accompanying notes 93-97 *infra*.

72. The figure is from the Prime Minister's Press Speech, *supra* note 3, at 9. For a convenient recent compilation of national claims to territorial seas, see 8 INTL. LEGAL MATERIALS 516 (1969).

73. Canada has stated its willingness to submit this issue to the International Court. Prime Minister's Press Speech, *supra* note 3, at 9. The United States Government has recently indicated that it would support a new law-of-the-sea treaty setting the breadth of the territorial sea at twelve miles, so long as there were guaranteed rights of free transit through and over international straits. *See* President Nixon's Statement on United States Policy for the Seabed, May 23, 1970, reprinted in 62 DEPT. STATE BULL. 737-38 (1970); Secretary of State Rogers, *The Rule of Law and the Settlement of International Disputes*, in 62 DEPT. STATE BULL. 623, 624 (1970).

74. *See* text accompanying note 18 *supra*.

75. *See, e.g.,* M. McDUGAL & W. BURKE, *supra* note 53, at 418-19, where they comment: "It is clear that no consensus has evolved for any particular system of delimiting the bounds of authority over the waters of archipelagic islands." *See also* Sorenson, *The Territorial Sea of Archipelagoes*, 6 NED. TIJDSCHRIFT VOOR INTERNATIONAAL RECHT (special issue) 315 (1959).

76. *See, e.g.,* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 282-85 (1965).

77. *See* Canadian Note, *supra* note 19, at 6028. The argument is developed by Head,

of such an archipelagic claim would be drawn,⁷⁸ what the precise status of the waters enclosed would be, or how such an archipelagic claim may affect the drawing of shipping safety control zones under the new Pollution Prevention Act. The status of the archipelagic waters as either internal or territorial is important primarily in its relation to the right of innocent passage, which is generally applicable to territorial but not internal waters.⁷⁹ However, there are

supra note 13, at 218-20. Several Canadian commentators have suggested that a Canadian archipelagic claim may be analogous to and supported by the International Court of Justice's treatment of the "skjaergaard" in the Norwegian Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116. In that case the Court decided, *inter alia*, that the baseline for determining Norway's territorial sea should be established from certain base-points on the outer-most of the countless rocks and islands off the Norwegian coast (the "skjaergaard"), rather than, under the usual rule, from the low-water mark on its mainland. In reaching this decision, the Court took into account the geographic and geologic relation of the "skjaergaard" to the mainland. Article 4(1) of the Territorial Sea Convention, *supra* note 54, reflects this decision by providing that the method of straight baselines may be employed in delimiting the territorial sea, *inter alia*, "if there is a fringe of islands along the coast in its immediate vicinity" However, it seems questionable that the language itself could be read so broadly as to include so extensive a geographic entity as the Canadian Archipelago. See also Pharand, *supra* note 13, at 58, concluding that "any delimitation that closed off the Northwest Passage would be contrary to international law."

78. The Government was not prepared to table maps of the zones and indicated that they would be defined only at a later date. Remarks of Mr. Chrétien, 114 H.C. DEB. 5940-41 (April 16, 1970).

79. Article 14(1) of the Territorial Sea Convention, *supra* note 54, provides that "all States . . . shall enjoy the right of innocent passage through the territorial sea" and article 15(1) provides that coastal states must not hamper such passage. The convention distinguishes "territorial waters" from "internal waters"; under article 5(1), "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state." However, the right is subject to a number of limitations and ambiguities. Thus, article 14(4) defines passage as "innocent so long as it is not prejudicial to the peace, good order and security of the coastal State," and article 16(1) provides that "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." Under article 16(3), a state may suspend the right of innocent passage of merchant vessels in its territorial waters when necessary for its security. Moreover, article 17 provides that "foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law, and, in particular, with such laws and regulations relating to transport and navigation." It is relevant that the International Law Commission, in its commentary on the draft article on which article 17 was based, noted as examples of such laws and regulations, *inter alia*, those dealing with protection of the waters of the coastal state against pollution of any kind caused by ships, and the conservation of the living resources of the sea. International Law Commn., Report, 11 U.N. GAOR, Supp. 9, at 20, U.N. Doc. A/3159 (1956). See 4 M. WHITEMAN, *supra* note 76, at 387.

The exercise of the right within an archipelago is particularly unclear. Article 5(2) of the Territorial Sea Convention, *supra* note 54, provides that when the establishment of a straight baseline in accordance with article 4 (*e.g.*, to enclose a fringe of islands) has the effect of enclosing as internal waters areas which previously had been considered part of the territorial sea or high sea, a right of innocent passage, as provided in articles 14-23, shall exist in these waters. Pointing out that the difference between internal and territorial waters is not so clear-cut as sometimes alleged, Secretary of State for External Affairs, the Hon. Mitchell Sharp, commented:

There is a school of thought, for example, that the status of the waters of the Arctic archipelago fall somewhere between the regime of internal waters and the

strong indications that the Canadian Government takes the position that oil-tanker passage, by virtue of its potential for pollution, is per se "noninnocent."⁸⁰ If this characterization prevails, issues related to rights of innocent passage clearly become of little relevance.

The question whether the Northwest Passage constitutes an "international strait" for purposes of applying the right of innocent passage again has no clear answer. Article 16(4) of the Territorial Sea Convention provides that "[t]here 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"⁸¹ thus in effect confirming a similar right under customary international law recognized by the International Court in the *Corfu Channel Case*.⁸² In view of the extremely limited use of the Northwest Passage to date,⁸³ the contention that the Passage is one "used for international navigation" or that it constitutes

regime of the territorial sea. Certainly, Canada cannot accept any right of innocent passage if that right is defined as precluding the right of a coastal state to control pollution in such waters. The law may be undeveloped on this question, but if that is the case, we propose to develop it.

114 H.C. Deb. 6015 (April 17, 1970). See also Background Notes, *supra* note 3, at 3, which states:

The Government intends to open up the Northwest Passage as a water-way for innocent passage by ships of all states, by laying down conditions for the exercise of such passage; by establishing that the passage of ships threatening pollution will not be considered innocent; by ensuring against the Northwest Passage becoming, through the process of customary usage, an uncontrolled international strait; and by adopting a functional and constructive approach which does not interfere with the activities of others and reflects the Government's responsibility to its own people and [to] the international community to preserve the ecological balance of Canada and its marine environment.

80. See statement of Mr. Beesley, Head of Legal Division, Department of External Affairs, on April 29, 1970, in *Minutes of Proceedings and Evidence Before the House Standing Comm. on External Affairs and National Defence*, No. 25, at 25:11 (April 29, 1970):

It is the Canadian position that any passage threatening the environment of a coastal state cannot be considered innocent since it represents a threat to the coastal state security.

See also statements by Secretary of State for External Affairs, the Hon. Mitchell Sharp, quoted in note 79 *supra*; and Background Notes, *supra* note 3, quoted in note 79 *supra*.

81. Territorial Sea Convention, *supra* note 54, art. 16(4). Article 16(4) in effect limits the right of a coastal state to suspend innocent passage through such a strait for reasons of security, as might otherwise be the case under article 16(1). The issue is significant since Canada in part bases its claim to control of the Northwest Passage on grounds of "national security."

82. (United Kingdom v. Albania) [1949] I.C.J. 4. The case arose out of damage done to several British warships in the Corfu Straits by mines which had been laid in the channel with the knowledge of the Albanian authorities. The case firmly established the principle that vessels of war, like merchant ships, were entitled to exercise the right of innocent passage through an international strait, at least in times of peace. The Court placed the Corfu Strait in the category of an "international highway" in view of its convenience for international navigation and the substantial use made of it for that purpose.

83. There have been less than a dozen transits to date, none of which have been commercial. See Pharand, *supra* note 13, at 42-45.

an "international highway" so as to bring it within the scope of the doctrine of "international straits" is at least open to argument.⁸⁴ Again, the practical significance of this issue seems to be diminished by the apparent Canadian position that it alone has the right to determine whether passage is in fact "innocent," and that tankers—at least those not complying with Canadian regulations—may properly be denied the right of innocent passage.

Viewing the Pollution Prevention Act as a whole, it is interesting to speculate why the Canadian Government chose to assert jurisdiction over the Northwest Passage on a highly controversial contiguous-pollution-zone theory when it might well have satisfied many of its stated objectives in a less vulnerable way. The American objection to Canada's extension of its territorial sea to twelve miles was pro forma, and, as indicated,⁸⁵ with this extension several of the principal straits making up the Passage are clearly subject to Canadian sovereignty. Thus, even without utilizing a contiguous-zone theory, Canada would seem to have broad authority to establish reasonable pollution control regulations and requirements for all ships transiting such territorial straits, and thus, in effect, for all vessels utilizing the Passage. Indeed, even jurisdiction based on Canada's archipelagic claim outlined above⁸⁶ seems less controversial than the contiguous-zone concept on which the Pollution Prevention Act is based. Of course, jurisdiction based on a territorial or archipelagic theory would be geographically more limited than that based on a contiguous-zone approach and vessels might conceivably discharge oil or otherwise act contrary to Canadian desires outside of

84. The criterion for application of the "international straits" rule seems to be the channel's usefulness for international maritime traffic rather than the actual volume of use. In the *Corfu Channel Case*, [1949] I.C.J. 428, the Court said:

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 navigation. But in the opinion of the court the decisive criteria is rather its geographical situation as connecting the two parts of the high seas and the fact of its being used for international navigation.

In its draft article relating to this question, the International Law Commission proposed that the "international straits" rule apply only if the strait was "normally" used for international navigation. See International Law Commn., Report, 11 U.N. GAOR, Supp. 9, at 19-20, U.N. Doc. A/3159 (1956). However, the Conference omitted the word "normally" (see text accompanying note 81 *supra*), indicating its unwillingness to adopt "extent of use" as a criterion for applicability of the rule. See 4 M. WHITEMAN, *supra* note 76, at 463-65.

In the summer of 1967, the United States was unsuccessful in persuading the Soviet Union that Vilkitski Strait, connecting the Kara and Laptev Seas and part of the "Northeast Passage," was an international strait, requiring the grant of innocent passage to the United States Coast Guard icebreakers *Edisto* and *Eastwind*, which were then attempting a circumnavigation of the Arctic Ocean. See Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 AM. J. INTL. L. 927 (1968); Bilder, *Emerging Legal Problems of the Deep Seas and Polar Regions*, 20 NAVAL WAR COLL. REV. 34, 38-39 (1967).

85. See text accompanying note 18 *supra*.

86. See text accompanying note 19 *supra*.

territorial straits or the archipelago. Moreover, a more traditional approach would do little to solve the problem of ship-caused pollution of Canada's east and west coasts, where straits and islands are lacking; if Canada wished to control high-seas pollution off those coasts, it could do so only on some broader pollution zone theory. The Canadian Government may have seen the unique and particularly appealing Arctic situation as providing a relatively favorable context for the introduction of the new pollution zone theory. The Arctic experience could then later be used as a precedent for application of the theory on the east and west coasts.⁸⁷

It is also interesting to conjecture why the Canadian Government chose to act unilaterally rather than to await international action as the United States requested. The introduction of the Canadian legislation clearly had already served a purpose in spurring the United States to a commitment to seek rapid international agreement on problems of Arctic pollution, and the practical problem created by tanker transit through the Passage is, at the very least, several years in the future.⁸⁸ Canada could presumably have deferred approval of the Act pending the results of the international conference called by the United States.

Government statements and parliamentary debates suggest that the answer lies in good part in an increasing and profound Canadian disillusionment and frustration with international processes concerning the law of the sea, based, *inter alia*, on Canada's experience with the defeat of many of its principal proposals at the Geneva Law of the Sea Conferences of 1958 and 1960 and the Brussels Marine

87. While the present Pollution Prevention Act applies only to Canada's Arctic coasts, the Government has indicated that it will introduce legislation to protect against pollution of Canada's east and west coasts as well. See reply by Minister of Transport, the Hon. Donald Jamieson, to question by Mr. Barnett, 114 D.C. DEB. 5893 (April 15, 1970). See also remarks of Mr. Chrétien, *id.* 5938 (April 16, 1970), and Background Notes, *supra* note 3, at 3-4. One of the stated purposes of the territorial-sea bill in providing a twelve-mile territorial sea (see note 2 *supra* and accompanying text) was to "provide the comprehensive jurisdictional basis which Canada requires to enforce anti-pollution controls outside Arctic waters off Canada's east and west coasts" 114 H.C. DEB. 6012 (April 17, 1970) (remarks of External Affairs Minister, Mitchell Sharp).

88. Wall St. J., Dec. 17, 1969, at 8, cols. 2-3. The method of transporting Alaskan North Slope oil to the east coast is still unsettled. Various schemes other than use of the Northwest Passage have been proposed, including construction of a pipeline directly from the North Slope to the American Midwest or from the Puget Sound area of Washington to the Midwest. A consortium of oil companies is already committed to constructing a pipeline across Alaska from Prudhoe Bay to the ice-free port of Valdez, on the Gulf of Alaska, from which oil may be shipped by conventional tankers to the west coast of the United States. Estimates of comparative costs and benefits of the different schemes apparently still are inconclusive. *Id.* A recent report indicates that the Humble Oil & Refining Co., chief financial backer of the S.S. *Manhattan* ice-breaking-tanker studies, has at least temporarily suspended those studies and shelved its plans for transporting oil in tankers through the Northwest Passage, in order to concentrate on pipeline alternatives. *Id.*, Oct. 22, 1970, at 14, cols. 3-4.

Pollution Conference of 1969.⁸⁹ Official statements reflect the Canadian Government's view that international discussion would, at a minimum, produce considerable delay and might ultimately result in what seemed to be simply another sacrifice of coastal-state interests to those of ship-owning states.⁹⁰ Internal politics and nationalistic pressures—perhaps a desire by the Liberal government to establish its independence from American policy—may also have played a role in the Canadian decision to forego reliance on traditional international law processes.⁹¹ Finally, the Government may well have seen as its best strategy to confront the United States and other nations with a *fait accompli*⁹² as quickly as possible, before

89. See, e.g., Canadian Note, *supra* note 19, at 6027-28.

On the Geneva Law of the Sea Conferences, see generally 4 M. WHITEMAN, *supra* note 76, at 79-137; Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INTL. L. 607 (1958); Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INTL. L. 751 (1960). For some of the Canadian proposals at the two conferences, see 4 M. WHITEMAN, *supra* note 76, at 95-97, 124, 133.

At the 1969 Brussels Conference, Canada objected to the conventions on the grounds, *inter alia*, that they failed to permit sufficient prior control to prevent accidents from occurring; that liability in the private-law convention was placed at too low a figure and should be placed on the cargo-owner as well as the ship-owner; and that financial reparation under the private-law convention extended only to pollution damage inflicted within territorial limits and did not include damage caused to fishing interests in contiguous areas. See references cited in Hardy, *International Control of Marine Pollution*, at 33 n.63a (to be published in the spring of 1971 in the *National Resources Journal*). See generally statement by Minister of Transport, the Hon. Donald Jamieson, 114 H.C. DEB. 2698-700 (Jan. 22, 1970); remarks by Mr. Rowland, *id.* 7903 (June 9, 1970). Canada cast the only vote against the private-law convention and abstained on the public-law convention.

90. Among the many expressions of this attitude, see, e.g., Prime Minister Trudeau's comment that "We have no reason to believe that such a[n effective international] regime can be expected within the next few months, or even years," Prime Minister's Press Speech, *supra* note 3, at 8; External Affairs Minister, Mitchell Sharp's comment that "Canada has tested the climate for international action against pollution, and . . . the climate has been found seriously wanting," 114 H.C. DEB. 5951 (April 16, 1970); and the remarks of Mr. St. Pierre:

We tried in 1958. We tried in 1960. We tried last fall at the IMCO meeting in Brussels. Time and time again we have been faced with the fact that international sea law is primarily made by shipping nations for shippers and that the rights of the third parties, the coastal states, are not sufficiently recognized.

114 H.C. DEB. 5964 (April 16, 1970). See also Minister Sharp's remarks at 114 H.C. DEB. 5949-50 (April 16, 1970), and, questioning the sincerity of United States' appeals for multilateral action, at 114 H.C. DEB. 6013 (April 17, 1970). In the Statement by Professors of International Law at the Faculty of Law, University of Toronto, on the Canadian Initiative To Establish a Maritime Zone for Environmental Protection: Its Significance for the Multilateral Development of International Law, Presented at the Annual Conference of the American Society of International Law, New York City, April 24, 1970, at 8-9 [hereinafter University of Toronto Statement], the authors (Professors R. St. J. MacDonald, Gerald L. Morris, and Douglas M. Johnston) indicate a lack of faith in the ability of IMCO, as an agency reflecting primarily the interests of the major flag states, to deal adequately with ocean pollution problems.

91. However, Prime Minister Trudeau expressly denied that the measure was "jingoistic" or anti-American. Prime Minister's Press Speech, *supra* note 3, at 9.

92. The Canadian action was in this sense similar to its successful unilateral action in 1964 establishing a twelve-mile fishing zone (Territorial Sea and Fishing Zones Act of 1964, 13 Eliz. 2, c. 22, § 4(1) (Can.)), which was at first protested but subsequently

strong international counter-pressures could be mobilized. This course of action would at least have the effect of forcing more prompt international action and might strengthen Canada's hand at any international negotiations which might ensue. Moreover, if Canada agreed to the American request, if the results of such negotiations eventually proved unsatisfactory to Canada, and if it only then took unilateral action by adopting legislation such as the Pollution Prevention Act—possibly by that time in the face of strongly contrary international opinion expressed at the negotiations—the Canadian position might be considerably weakened. On the other hand, in view of Canada's refusal to delay passage of the Act, its many allegations of commitment to the concept of internationally agreed measures ring somewhat hollow. Unless Canada is prepared to rescind or limit the Arctic Waters Pollution Prevention Act, there seems to be relatively little left for an international conference to negotiate concerning Arctic pollution.

Certain aspects of the Canadian position are illustrative of the workings of the international legal process. Particularly interesting in this regard is the Canadian attempt to characterize its unilateral action as a positive and praiseworthy contribution to international law—in the words of some of its proponents, “a current initiative of striking importance and relevance in the context of the dynamic, creative development of international law.”⁹³ Pointing out the accepted role of state practice in the development of customary international law, and noting the many examples of unilateral action leading to the development of law—such as the 1945 Truman proclamation of jurisdiction over the continental shelf,⁹⁴ Canada's 1964 legislation unilaterally establishing exclusive fishing zones,⁹⁵ and the gradual extension by unilateral state action of the territorial sea beyond three miles⁹⁶—Canadian spokesmen have sought to portray

imitated by the United States. This unilateral action was likewise defended by the Canadians as a response to the failure to achieve international agreements, necessary to protect Canadian resources, and justified by the impetus such action might give to effective negotiations; and it likewise threatened serious conflicts with the United States. See the extracts from parliamentary debates on that occasion quoted in J. CASTEL, *INTERNATIONAL LAW* 790-94 (1965). See generally Gotlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law*, 2 CAN. YB. INTL. L. 55 (1964).

93. University of Toronto Statement, *supra* note 90, at 1.

94. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945). The American action was widely copied by other states and led eventually to the 1958 Continental Shelf Convention, *supra* note 16, and the 1969 decision of the International Court in the North Seas Continental Shelf Cases, [1969] I.C.J. 3, recognizing the doctrine as a principle of customary international law.

95. Territorial Sea and Fishing Zones Act of 1964, 13 Eliz. 2, c. 22 (Can.). Again, the contiguous-fishing-zone concept has been widely copied.

96. Compare, for example, the 1960 table of state claims respecting marginal seas prepared by the United Nations Secretariat and reprinted in 4 M. WHITEMAN, *supra*

the new legislation as a demonstration of Canada's commitment to, rather than departure from, the principle of respect for international law.⁹⁷

It is indeed well accepted that state practice is an important component in the development of international law. However, the argument that unilateral action, especially action contrary to accepted norms, is therefore somehow justified and appropriate—perhaps even as a matter of international duty—is not convincing and raises troublesome questions. Clearly, every state acting contrary to accepted law could so justify its position. An argument along these lines might have been more persuasive in the context, for example, of the Truman proclamation on the continental shelf,⁹⁸ when relevant international law was undeveloped and international arrangements for dealing with such questions were less common or less readily available. But, despite Canada's suggestions to the contrary,⁹⁹ the Canadian action is not written on a clean slate. Instead, it appears to be contrary to relatively clear and well-established international rules, and occurs in a context in which international institutions and procedures are readily available to discuss possible changes in such rules. There is considerable weight in Canada's arguments that the existing rules are inadequate and obsolete; but the alleged obsolescence of international rules has never, in itself, been regarded as a valid legal excuse for their violation.

In this respect, the Canadian position illustrates a recurrent dilemma inherent in the comparative inflexibility of the modern international legal process—the problem of establishing viable and orderly processes of legal change through which smaller states can effectively, within the legal system, work to develop law that is responsive to their needs despite the intransigence of larger powers. When states such as Canada perceive collective international pro-

note 76, at 19-35, with compilations for subsequent years such as those reprinted in 2 INTL. LEGAL MATERIALS 1122 (1963), and 8 *id.* 516, 519-39 (1969).

97. See, e.g., Canadian Note, *supra* note 19, at 6027; the Prime Minister's Press Speech, *supra* note 3, at 9, where he states that "we have acted as we have because of necessity, but also because of our awareness of the impetus given to the development of international law by individual state practice"; the remarks of Secretary of State for External Affairs, the Hon. Mitchell Sharp, that "[t]he bill we have introduced should be regarded as a stepping stone toward the elaboration of an international legal order which will protect and preserve this planet . . .", 114 H.C. DEB. 5949 (April 16, 1970), and that "[w]e are . . . determined to act as pioneers in pushing back the frontiers of international law . . .", *id.* 5951; and the remark of Mr. Allmand that "what we had done actually was a spur to the development of international law in connection with pollution control. I firmly believe that by introducing and passing these bills we shall be developing international law relating to pollution." 114 H.C. DEB. 5997 (April 17, 1970).

98. See note 94 *supra* and accompanying text.

99. See, e.g., notes 111 & 115 *infra*.

cesses as unlikely in practice to protect what they regard as vital interests, they may see no viable alternative to unilateral action, whatever the consequences such action may produce for the existing legal system.¹⁰⁰ And indeed, as Canada points out, such unilateral actions, if imitated by many other states as well, may ultimately lead to the gradual jelling of consensus on new rules. But the clumsiness of such a process of legal change and the strains it produces on the legal order are evident.

Canada's extensive reliance on American practice in defense of its action is also significant.¹⁰¹ The Canadian Government and parliamentarians cited as precedents for the Act such unilateral American assertions of jurisdiction beyond its territorial waters as the Truman continental-shelf¹⁰² and fisheries¹⁰³ proclamations, customs-enforcement practices,¹⁰⁴ Air Defense Identification Zones,¹⁰⁵ the establishment by the United States of an exclusive twelve-mile fisheries zone¹⁰⁶ (after strong objection to Canada's prior establishment of such a zone), high-seas atomic tests,¹⁰⁷ and the Cuban missile quarantine.¹⁰⁸ Moreover, the Canadian Government pointed out

100. See, e.g., the comment in University of Toronto Statement, *supra* note 90, at 1-2, that the Canadian legislation "exemplifies the unavoidable resort to unilateral action by a national government faced by the inability of the international community to remedy a critical situation affecting its essential interests."

101. See, e.g., Canadian Note, *supra* note 19, at 6027.

102. See note 94 *supra*.

103. Proclamation No. 2668, 10 Fed. Reg. 12,304 (1945); 4 M. WHITEMAN, *supra* note 76, at 945-62. The proclamation stated that the United States would regard it proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been, or in the future may be, developed on an international scale. The United States would unilaterally regulate such activities in zones where only its nationals were involved and would do so by agreement where nationals of other states were involved.

104. See, e.g., the Anti-Smuggling Act of 1935, ch. 438, 49 Stat. 517, as amended, 19 U.S.C. §§ 1701-11 (1964), discussed in Jessup, *The Anti-Smuggling Act of 1935*, 31 AM. J. INTL. L. 101 (1937).

105. The United States (since 1940) and also Canada (since 1951) have promulgated regulations establishing Air Defense Identification Zones (ADIZ), extending at some points several hundred miles over the high seas. Foreign aircraft entering such zones are required to file flight plans and to make periodic position reports. The American regulation appears to be applicable to foreign aircraft only if they are bound for the United States. See 14 C.F.R. §§ 99.1-49 (1970); 4 M. WHITEMAN, *supra* note 76, at 496-97. The American zones were specifically referred to in remarks by Mr. Douglas, 114 H.C. DEB. 5944-45 (April 16, 1970), and Mr. St. Pierre, *id.* 5965.

106. 16 U.S.C. §§ 1091-94 (Supp. III, 1965-1967).

107. Compare McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955), with Margolis, *The Hydrogen Bomb Experiments and International Law*, *id.* at 629. Such tests by the United States on or under the high seas are now prohibited by the 1963 Nuclear Test Ban Treaty, Aug. 5, 1963, [1963] 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

108. See, e.g., Christol and Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962*, 57 AM. J. INTL. L. 525 (1963). The quarantine was specifically referred to in remarks by Mr. Nielsen, 114 H.C. DEB. 6003 (April 17, 1970), and Mr. Baldwin, *id.* 7897 (June 9, 1970).

that any American criticism of the Canadian withdrawal of jurisdiction over the pollution control and fisheries issues from the International Court could only be regarded as highly hypocritical in view of the United States' own much broader "Connally reservation"¹⁰⁹ to the jurisdiction of that Court. The vulnerability of the United States to these arguments serves to illustrate the potential mirror effect of national decisions in the international legal arena; a state is in no position to complain if other states imitate its actions. National policy should consequently take account of these precedential effects of unilateral actions, recognizing that each state by its own decisions—and more particularly, a great power such as the United States—helps define the type of world order in which it must itself henceforth live. Indeed, international law most appropriately enters into the national decision-making processes as a reminder of the long-run national interest in the existence of a credible system of international rules—an important policy objective which might otherwise be ignored under domestic pressures to achieve a short-run and ephemeral national advantage.

Finally, Canada's refusal to permit the International Court to rule upon its dispute with the United States regarding the pollution control and fisheries questions serves to demonstrate the limitations of international adjudicative processes and suggests some of the reasons for those limitations.¹¹⁰ The Canadians were not prepared to risk losing a case in which they felt their vital interests were involved. Under existing international law their case was at best questionable. Moreover, they apparently viewed the Court as having an inherently conservative and legalistic bias; that is, as unlikely to approach the matter creatively or with sufficient flexibility to take

109. Canadian Note, *supra* note 19, at 6029. For other more pointed comments to this effect, see remarks of Secretary of State for External Affairs, the Hon. Mitchell Sharp, 114 H.C. DEB. 5949 (April 16, 1970), and of Mr. Douglas, *id.* 5945.

The Connally Amendment consists of certain language in the United States' acceptance of the compulsory jurisdiction of the International Court under the "optional clause" of the Statute of the Court (art. 36(2)) by which the United States reserved such acceptance concerning "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America" (emphasis added). 61 Stat. 1218 (1946), T.I.A.S. No. 1598, reprinted in 15 DEPT. STATE BULL. 452 (1946). This "self-judging" reservation has been much criticized. Since the Canadian acceptance of the "optional clause" is on terms of reciprocity, it could presumably, in any event—even in the absence of its newly filed reservation—have invoked the American reservation as a bar to any attempt by the United States to bring it before the Court under the "optional clause." See *Case of Certain Norwegian Loans*, [1957] I.C.J. 9.

110. See generally C. JENKS, *THE PROSPECTS FOR INTERNATIONAL ADJUDICATION* (1964); L. BLOOMFIELD, *LAW, POLITICS AND INTERNATIONAL DISPUTES* (International Conciliation Pamphlet No. 516, 1958); and J. STONE, *THE INTERNATIONAL COURT AND WORLD CRISIS* (*id.* No. 536, 1962).

into account relatively new and emerging national interests such as concern with pollution. Drawing a distinction between Canada's willingness to submit its extension of the territorial sea to international adjudication, and its unwillingness to so submit its pollution control legislation, Prime Minister Trudeau commented:

There is . . . no novelty in 12 miles; there is no new legal concept involved. There are differences of opinion but Canada is nevertheless prepared to have the territorial sea legislation adjudicated upon by international tribunals. We are content to do so in this instance because there is a body of law and practice upon which a court can base its decision. Such is not the case, however, with the concept of pollution control. There is as yet little law and virtually no practice in this area.

It is for that reason that we are not prepared in this matter of vital importance to risk a setback. Make no mistake. Involved here is not simply a matter of Canada losing a case in the World Court—that is one of the prices that we have long willingly paid as part of our adherence to an international rule of law. What is involved, rather, is the 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.

In short, where we have extended our sovereignty, we are prepared to go to court. On the other hand, where we are only attempting to control pollution, we will not go to court until such time as the law catches up with technology.¹¹¹

111. Prime Minister's Press Speech, *supra* note 3, at 9. See also the Prime Minister's explanation to Parliament of Canada's filing of the new reservation:

Canada is not prepared however to engage in litigation with other states concerning vital issues where the law is either inadequate or non-existent and thus does not provide a firm basis for judicial decision. . . .

It is well known that there is little or no environmental law on the international plane and that the law now in existence favours the interests of the shipping states and the shipping owners engaged in the large scale carriage of oil and other potential pollutants.

114 H.C. DEB. 5624 (April 8, 1970). See also the comment of External Affairs Minister, Mitchell Sharp:

Where the law is deficient any action undertaken to remedy its deficiencies cannot properly be judged by the existing standards of that law. Such a proceeding would effectively block any possibility of reform. Canada remains firmly attached to the rule of law in international affairs and has the highest respect for the International Court of Justice and the part it plays in the maintenance of the rule of law. At the same time, however, we are not prepared to litigate with other states on vital issues concerning which the law is either inadequate, non-existent, or irrelevant to the kind of situation Canada faces, as in the case of the Arctic. It is no service to the court or to the development of international law to attempt to resolve by adjudication questions on which the law does not provide a firm basis for decision.

114 H.C. DEB. 5952 (April 16, 1970).

The Prime Minister's explanation elicited some criticism. *E.g.*, the remark of Mr. Lewis: "What nonsense it is to say, 'Canada strongly supports the rule of law in international affairs' when in the next breath he says he does not intend to be bound by it. We should stop this hypocrisy in international affairs." 114 H.C. DEB. 5625 (April 8, 1970).

It may be too early to attempt to pass ultimate judgment on the Canadian action, but some tentative conclusions might be ventured. Undoubtedly, the Pollution Prevention Act will encounter wide criticism. First, the Act appears to be, on its face, inconsistent with the existing international law of the sea. Also, Canada's decision to act unilaterally does not buoy hopes for the orderly development of international law through collective international processes. Finally, the precedents established by the Act are clearly capable of widespread abuse by other, perhaps less responsible states, with potentially harmful consequences for traditional principles of freedom of the seas. If a nation of the international stature of Canada may establish a 100-mile contiguous zone to control pollution, other coastal states may also seek to do so; and the range of regulation justified under the rubric of pollution control may in practice differ little from that asserted under claims of sovereignty over such zones. Moreover, if 100-mile contiguous zones can be established for pollution control purposes, why not for other purposes as well. Canada's legal characterization of its action as being justified under principles of "self-defense" is particularly troublesome and capable of introducing new uncertainties into this already murky area of international law. Similarly, Canada's suggestion that tankers may enjoy only some attenuated right of innocent passage adds to already existing confusion concerning the meaning of that concept, and could lead to further constrictions on innocent passage as an important principle of the law of the sea. Indeed, there is much to suggest that the American concern over Canada's action, and its strong diplomatic response, arose more from fears of these potentially harmful precedential effects on the international legal order than from specific objection to Canadian control of the Northwest Passage.¹¹² Viewed in this light, the Pollution Prevention Act weakens international law and is another significant step in the process of erosion of the principle of freedom of the seas—a process that has been continuing since 1945.

On the other hand, the Canadian action cannot simply be dismissed as irresponsible, nor can the real pressures it reveals be ignored. Canada's sincere commitment and many contributions to international law and processes have been widely recognized and are in many respects outstanding. Its concern with the problem of Arctic pollution seems justified and its frustration with the slow pace and

112. See Dept. of State Press Rel. No. 121 (April 15, 1970), quoted in text accompanying note 48 *supra*.

uncertain results of international action is understandable. As the Canadians point out, after almost fifty years of international discussion of maritime oil pollution problems, including the recent 1969 Brussels Conference, very little has been accomplished actually to prevent such pollution.¹¹³ Canada's view that the development of the law of the sea has been dominated by ship-owning nations, and has tended to reflect primarily their interests rather than coastal-state interests, also seems historically correct; efforts to deal with ship-caused ocean pollution are certain to continue to encounter powerful resistance. Finally, the contiguous-zone concept implies international acceptance of the legitimacy of coastal-state action on the high seas when such action is necessary to protect certain generally recognized special coastal-state interests. This functional principle of coastal-state jurisdiction having once been accepted, its limitation to particular historically established interests or to a uniform zonal breadth becomes difficult to maintain; the principle should presumably be capable of embracing newly developing coastal-state interests and the zone encompassed should be defined by what is necessary in a practical sense to protect each such special interest, taking account also of the reasonable interests of other states.¹¹⁴ Thus, while the twelve-mile limitation may have been ample to deal with more traditional coastal-state problems, it has become increasingly obvious that it may not be possible to meet legitimate pollution prevention interests within so narrow a zone—at least in the absence of more effective international antipollution measures. So viewed, Canada's Pollution Prevention Act demonstrates not its lack of commitment to international

113. See Prime Minister's Press Speech, *supra* note 3, at 6-7, quoting from Kennan, *To Prevent a World Wasteland: A Proposal*, 48 FOREIGN AFFAIRS 401 (1970), to the effect that oil spillage into the oceans is estimated at a million tons per year, is steadily increasing, and effective measures to deal with this problem have not been forthcoming. The failure of the international community to deal with oil pollution problems was emphasized in remarks by Secretary of State for External Affairs, the Hon. Mitchell Sharp, 114 H.C. DEB. 5949 (April 16, 1970), Mr. Douglas, *id.* 5945, and Mr. Murphy, *id.* 6006-07 (April 17, 1970).

114. M. McDUGAL & W. BURKE, *supra* note 53, at 849, seem to suggest that general community policies would support such an extension of jurisdiction:

Since the impact of pollution is usually upon coastal residents, the coastal state has an understandable interest in preventing the discharge of oil and other substances in such a way that harmful pollution results. If it were practicable for the coastal state to enact and enforce prohibitory regulations applicable in adjacent seas, there would seem to be sufficient justification for considering this permissible under general community policy. To the extent, therefore, that a coastal state could exercise sufficient effective control, it would be appropriate to permit it to prohibit the discharge of oil that would, or could reasonably be thought to, damage marine life and property in the vicinity.

See also the interesting discussion in L. HYDEMAN & W. BERMAN, *INTERNATIONAL CONTROL OF NUCLEAR MARITIME ACTIVITIES* ch. 7, at 236-40 (1960).

law, but rather the continued failure of that law, and of international institutions and processes generally, to meet real and pressing coastal-state needs.¹¹⁵

In the final analysis, an assessment of Canada's actions may depend, in large part, upon the optimism or pessimism with which one views the international legal system and its capacity to respond promptly and effectively to new challenges. There are hopeful signs of increased responsiveness. Canada's dissatisfaction with the existing state of law of the sea reflects a broader international recognition of its deficiencies, and there is a prospect that the law of the sea may soon undergo substantial revision.¹¹⁶ Similarly, Canada's concern

115. This attitude was summarized by Secretary of State for External Affairs, the Hon. Mitchell Sharp, as follows:

The pioneering venture upon which we are embarked is a measure of our serious concern at the failure of international law to keep pace with technology, to adapt itself to special situations, and in particular to recognize the right of a coastal state to protect itself against the dangers of marine pollution.

Existing international law is either inadequate or non-existent in this respect. Such law as does exist . . . is largely based on the principle of freedom of navigation, and is designed to protect the interests of states directly or indirectly involved with the maritime carriage of oil and other hazardous cargoes.

A new "victim-oriented" law must be created to protect the marine environment and those rights and interests of the coastal state which are endangered by the threat to that environment. The Arctic waters bill is intended to advance the development of such new law. It is based on the fundamental principle of self-defence

114 H.C. DEB. 5951 (April 16, 1970). See also remarks of Minister Sharp, 114 H.C. DEB. 5951 (April 16, 1970); Mr. St. Pierre, *id.* 5963-64; Mr. Douglas, *id.* 5945; and Mr. Allmand, *id.* 5997-98 (April 17, 1970).

116. See, e.g., G.A. Res. 2574 (XXIV) (Dec. 15, 1969), requesting the Secretary-General to ascertain the views of member states on the desirability of convening at an early date a conference on the law of the sea to review the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas—particularly in order to arrive at a clear, precise, and internationally accepted definition of the area of the seabed and ocean floor which lies beyond national jurisdiction, in the light of the international regime to be established for that area—and to report on the results of his consultations to the General Assembly at its twenty-fifth session. In a note of June 12, 1970, from the Secretary of State to the United Nations Secretary-General, the United States endorsed the idea of such a conference or conferences, noting, *inter alia*, the United States Government's conviction "that the protection of the environment, and particularly the prevention of pollution, must occupy a major role in the further development of the international law of the sea." 63 DEPT. STATE BULL. 38, 39 (1970).

See also President Nixon's Statement on United States Policy for the Seabed, May 23, 1970, reprinted in 62 DEPT. STATE BULL. 737-38 (1970). The statement proposed that all nations adopt as soon as possible a treaty under which they would renounce all national claims to the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind, whose exploitation was subject to an international regime. It also indicated that the United States was currently engaged with other states in an effort to obtain a new law-of-the-sea treaty which would establish a twelve-mile limit for territorial seas and provide for free transit through international straits, and would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the sea. The President's comments at the beginning of his statement have broad relevance to the problems discussed in this Article:

The nations of the world are now facing decisions of momentous importance

with pollution problems is but one manifestation of increasing world-wide concern with environmental issues.¹¹⁷ Ocean pollution problems have received particular attention by international bodies and various proposals for international action have been advanced.¹¹⁸

to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be losers.

The issue arises now—and with urgency—because nations have grown increasingly conscious of the wealth to be exploited from the seabeds and throughout the waters above, and because they are also becoming apprehensive about ecological hazards of unregulated use of the oceans and seabeds. The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable.

This is the time, then, for all nations to set about resolving the basic issues of the future regime for the oceans

117. See, e.g., among the many current discussions, U.N. Secretary-General, *Report on Problems of the Human Environment*, U.N. Doc. E/4667 (1969); Kennan, *To Prevent a World Wasteland: A Proposal*, 48 FOREIGN AFFAIRS 401 (1970); Ritchie-Calder, *Mortgaging the Old Homestead*, *id.* at 207; and Wolman, *Pollution as an International Issue*, 47 *id.* 164 (1968).

Implementing this general concern, the United Nations General Assembly decided in December 1968 to hold a United Nations Conference on the Human Environment, which will convene in 1972 in Stockholm. See G.A. Res. 2398, 23 U.N. GAOR Supp. 18, at 2-3, U.N. Doc. A/7218 (1968). See also G.A. Res. 2581 (XXIV) (Jan. 8, 1970).

118. See generally references cited in notes 6 & 7 *supra*; Hardy, *supra* note 89. For a popular discussion of general ocean environmental problems, see W. MARX, *THE FRAIL OCEAN* (1967).

The United Nations General Assembly has adopted several resolutions dealing with marine pollution. The most recent is G.A. Res. 2566 (XXIV) (Jan. 12, 1970), on Promoting Effective Measures for the Prevention and Control of Marine Pollution, which requests the Secretary-General, in cooperation with the specialized agencies and intergovernmental organizations concerned, to complement reports and studies under preparation, with special reference to the forthcoming United Nations Conference on the Human Environment, by (1) a review of harmful chemical substances, radioactive materials, and other noxious agents and wastes which may dangerously affect man's health and his economic and cultural activities in the marine environment and coastal area; (2) a review of national activities and activities of specialized agencies and intergovernmental organizations dealing with the prevention and control of marine pollution including suggestions for more comprehensive action and improved coordination in this field; and (3) seeking the views of member states on the desirability and feasibility of an international treaty or treaties on the subject. See also G.A. Res. 2467B, 23 U.N. GAOR Supp. 18, at 15-16, U.N. Doc. A/7218 (1968), on prevention of marine pollution which might result from exploration and exploitation of the resources of the seabed and ocean floor; and G.A. Res. 2414, 23 U.N. GAOR Supp. 18, at 30-31, U.N. Doc. A/7218 (1968), requesting the Secretary-General to report on progress achieved in promoting effective international agreements on the prevention and control of marine pollution.

The Intergovernmental Maritime Consultative Organization (IMCO) Assembly has recently called for a variety of measures to combat ocean pollution and has decided to convene an International Conference on Marine Pollution in 1973 "for the purpose of preparing a suitable international agreement for placing restraints on the contamination of the sea, land and air by ships, vessels and other equipment operating in the marine environment . . ." IMCO Ass. Res. A.176 (VI) (Oct. 21, 1969). IMCO is also working on pollution problems through its Maritime Safety Committee and Subcommittee on Pollution.

A number of governmental and nongovernmental international organizations are also undertaking major monitoring and surveillance efforts to learn more concerning the precise causes, scope, and effects of ocean pollution and the impact of specific

Yet, while the need for effective regulation of ocean pollution is broadly conceded, each of the possible choices for a comprehensive regulatory regime poses difficulties. Regulation by the flag state of the ship concerned—the method sanctioned by traditional laissez faire concepts of freedom of the seas and adopted in the Oil Pollution Convention¹¹⁹—has thus far proved ineffective, and suggestions for simply strengthening existing proscriptions may prove of limited usefulness; enforcement procedures are clumsy and flag states have had little incentive to enforce antipollution rules outside their own territorial seas.¹²⁰ On the other hand, regulation of ocean pollution by coastal states in broad contiguous zones outside their territorial seas, along the lines of the Canadian Act, raises problems already discussed; such extensions further undermine traditional concepts of freedom of navigation, are capable of abuse, and, in any event, cannot control pollution which enters the ocean far from a nation's coasts but which may nevertheless ultimately affect it. Proposals for regulation by either new or existing international agencies, which would be vested with some type of enforcement powers, raise complex practical questions, as well as broader political issues, and it is doubtful that the major ship-owning powers will presently support such far-reaching proposals.¹²¹ Thus, agreement on some widely ac-

pollutants. Particularly noteworthy are the work of the Intergovernmental Oceanographic Commission (IOC), which has recently proposed and is helping to implement the Long-term and Expanded Program of Oceanographic Research (LEPOR); the work of the Joint IMCO/FAO/UNESCO/WMO Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP); and the work of the Food and Agriculture Organization (FAO), which in December 1970 will hold a Technical Conference on Marine Pollution and Its Effects on Living Resources and Fishing.

119. See note 61 and text accompanying note 64 *supra*.

120. For criticisms of the Oil Pollution Convention, see generally the references cited in note 7 *supra*, and Böös, *Revision of the International Convention on Oil Pollution*, in *ROME PROCEEDINGS*, *supra* note 7, at 281. Among these criticisms are the limited number of states presently bound by the convention; the practical difficulty of policing, detecting, and proving violations by ships in the vast seas areas covered; and the uncertainties of effective enforcement by the flag state, particularly when the ships involved are sailing under "flags of convenience." See also the assessment of the present situation by Max Edwards, Assistant Secretary for Water Pollution Control, U.S. Dept. of Int., in *Oil Pollution and the Law*, in *ROME PROCEEDINGS*, *supra* note 7, at 295:

In international waters we have no effective oil pollution deterrent . . . Enforcement of the requirements set forth by the International Convention on Oil Pollution is not credible. There are no teeth in the prohibition against dumping in certain zones because the reporting of violations is on the honour system. Unfortunately, the pangs of a sea captain's conscience are not an adequate deterrent to oil pollution. IMCO has no enforcement authority and the high seas are unpatrolled.

See also Hardy, *supra* note 89, at 27, which points out, *inter alia*, that the convention is of little or no help in dealing with the problem of an accidental massive oil spill.

121. There have been many suggestions for the creation of new international agencies to deal comprehensively with international environmental problems or with the oceans specifically. See, e.g., Kennan, *To Prevent a World Wasteland: A Proposal*,

ceptable ocean pollution control regime—perhaps one involving a combination of these various types of proposals rather than any one alone¹²²—may, as Canada foresees, be slow in coming and difficult to attain.

48 FOREIGN AFFAIRS 401 (1970); the proposal by Professor Richard Baxter at the March 1970 Columbia University Conference on the International and Interstate Regulation of Water Pollution, N.Y. Times, March 14, 1970, at 31, col. 2; and the reported consensus in favor of a unified ocean regime under international control at the recent Pacem in Maribus Conference on ocean problems held at Malta during July 1970, N.Y. Times, July 5, 1970, at 8, col. 1; TIME, July 20, 1970, at 34.

The international organization presently most concerned with maritime problems is the Intergovernmental Maritime Consultative Organization (IMCO), a specialized agency of the United Nations. However, IMCO has only limited powers (primarily related to maritime safety), has dealt principally with shipping rather than general ocean problems, and is considered by many states to be dominated by the large ship-owning states. There probably would be considerable resistance to expanding its functions to general oceanic regulation.

Such proposals obviously raise many issues. For example, is it preferable to deal separately with particular ocean pollution problems or to deal instead with ocean pollution on a comprehensive basis? Is ocean pollution really a separate problem or only a part of either the problem of general oceanic management, or alternatively, of general environmental management, best handled through a comprehensive agency operating in one of these broad areas? Can such matters be dealt with by international agreements establishing particular rights and obligations or are new international institutions with regulatory powers required? Should any such broad agency operate within the United Nations framework or outside of it, what should its powers be, and how should it reach decisions?

While I have suggested in this Article that many nations might be reluctant to support an international oceanic organization with broad-ranging and significant powers, it is worth noting that President Nixon's recent Statement on United States Policy for the Seabed, *supra* note 116, specifically contemplates the establishment of international machinery to authorize and regulate the exploration and use of seabed resources beyond the continental margins. Such machinery might well set a pattern for broader institutional development. See generally U.N. Secretary-General, *Study of International Machinery*, U.N. Doc. A/AC.138/23 (1970), prepared for the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. Similarly, states might be prepared to consider some type of international authority designed to administer, and perhaps even police, internationally agreed anti-pollution rules in the limited area of Arctic waters. The 1959 Antarctic Treaty, Dec. 1, 1959, [1961] 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71, highly innovative in many other respects, stops short of establishment of such an international authority. See, e.g., Hanessian, *The Antarctic Treaty 1959*, 9 INTL. & COMP. L.Q. 436 (1960); Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INTL. L. 349 (1960); H. TAUBENFELD, A TREATY FOR ANTARCTICA, (International Conciliation Pamphlet No. 531, 1961).

122. For example, environmental surveillance and monitoring might best be handled on a broadly coordinated regional or global basis, under comprehensive international auspices. See, e.g., the International Oceanographic Commission's LEPOR program, *supra* note 118, and the joint-research program aimed at curbing water pollution in the Gulf of Mexico recently agreed upon by the United States, Mexico, Cuba, and Jamaica, as members of the Caribbean Sea and Adjacent Regions Cooperative, N.Y. Times, March 1, 1970, at 12, col. 8; and, for a discussion of the American-Canadian International Joint Commission as a pollution control agency, see Jordan, *Recent Developments in International Environmental Pollution Control*, 15 MCGILL L.J. 279 (1969). Imminent pollution threats or disasters might often be dealt with through regional cooperative arrangements. See, e.g., the Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, between the various states bordering on the North Sea, reprinted in 9 INTL. LEGAL MATERIALS 359 (1969). En-

The final outcome of the United States-Canadian Northwest Passage dispute remains to be seen. In response to the Canadian action, the United States has attempted to organize an international conference on Arctic pollution problems, to involve both Arctic and non-Arctic states and to convene perhaps in the fall of 1970. This attempt has encountered difficulties, however, and it is apparent that any such conference will face serious obstacles. As of the late summer of 1970, it was still uncertain whether a conference would in fact be held; negotiations were under way in an attempt to find a formula that would secure general acceptance with respect to the nature of the conference, the states to be invited,¹²³ and the site and date.

Canadian participation in such a conference, which would seem essential to its success, may raise special problems. The Canadian Government has frequently indicated its disenchantment with past efforts for effective international action to control pollution and might conceivably refuse to attend the conference absent some assurance that the results will ratify, or at least not undermine, its claim to control pollution threats off the Arctic coasts.¹²⁴ If Canada takes such an inflexible position, the United States may be faced with a difficult policy decision. On the one hand, there is a possible line of

forcement of ship construction and equipment and crew-training standards might best be made the responsibility of the flag state. Enforcement of antipollution rules involving a ship's actual operations might be most effectively entrusted to the coastal state affected.

123. It is not easy to anticipate the Soviet position on the conference. While Soviet interests in freedom of the seas have often paralleled those of the United States, the Soviet Union has traditionally been sensitive as regards its own Arctic coasts and may be reluctant to support international arrangements tending to limit its own authority in offshore waters. Cf. the Soviet position with respect to the Vilkitski Strait incident, referred to in note 84 *supra*.

124. For some expressions of the Canadian Government's views, see note 90 *supra*. The Government probably would be under strong domestic political and public pressures not to make any substantial concessions on this question. See, e.g., the editorial on Arctic Pollution in the *Toronto Daily Star*, July 23, 1970, at 6:

The only way we can guard against disaster in the Arctic is to create our own stringent rules

To assert this kind of control, we must make our claim to 100 miles of Arctic water stick. Ottawa must convince the Americans it means business.

Canada is into a war of nerves with the U.S. State Department. The State Department is fronting for the oil companies

The State Department's attempt to push through a couple of weak international treaties [the 1969 Brussels Conventions] is only the first round. From here on, the fighting is likely to get heavier and dirtier.

We hope Prime Minister Trudeau has the heart for what is coming. He's shown himself to be pretty tough talking to Canadian postmen and unemployed workers and old-age pensioners. We hope he will be just as tough when he is talking to President Nixon about the Arctic.

See also, in a similar vein, the editorial on Obstacle to Pollution Control, *Montreal Gazette*, July 24, 1970, at 6, cols. 1-2.

argument that the United States should agree to a conference on whatever terms Canada will accept. Under this theory, the United States should face up to the fact that, as a practical matter, Canada is unlikely to back down from its claim of the right to control pollution off its Arctic coasts, and that continued friction on this subject will only needlessly exacerbate United States-Canadian relations. However, given this *de facto* situation, there may be advantages, from the standpoint of international legal policy, in Canada taking such measures pursuant to a specific international arrangement rather than by unilateral action. Most important, an international agreement—even one rubber-stamping the Canadian legislation—might restrict the precedential effects of Canada's action by indicating that the international community is prepared to recognize the legitimacy of the pollution-control-zone concept only in the limited Arctic context and when approved by formal international action.

On the other hand, there are also strong arguments that, from the standpoint of United States policy, it might be preferable that the conference not be held at all, rather than that it be held simply to ratify the Canadian position. In this view, any United States concession to the Canadian claim, particularly one embodied in an international agreement, will only buttress the legitimacy of the pollution-control-zone concept and increase the likelihood that other states will copy Canada's actions. Broader American interests in freedom of the seas might require that the United States not compromise on this issue and that it make clear that it will strongly oppose such jurisdictional assertions on the high seas whenever and wherever they occur.

It is difficult, in this context, to assume that an international solution to these problems will be quickly or easily reached. The differences between the United States and Canada are substantial and each government publicly has taken rigid positions from which it may prove politically difficult to back away. Thus, at least one possibility is for a continuing United States-Canadian controversy over this issue and perhaps a gradual broadening of the arena of conflict as other coastal states with similar concerns follow Canada's lead. However, discussions between the two governments are currently continuing, and one may hope that the good will and good sense that has typically characterized United States-Canadian relationships will ultimately bring an acceptable compromise.

APPENDIX

TEXT OF THE CANADIAN ARCTIC WATERS
POLLUTION PREVENTION ACT

An Act to prevent pollution of areas of the arctic waters adjacent to the mainland and islands of the Canadian arctic

Whereas Parliament recognizes that recent developments in relation to the exploitation of the natural resources of arctic areas, including the natural resources of the Canadian arctic, and the transportation of those resources to the markets of the world are of potentially great significance to international trade and commerce and to the economy of Canada in particular;

And whereas Parliament at the same time recognizes and is determined to fulfil its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic;

Now therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Arctic Waters Pollution Prevention Act*.

INTERPRETATION

2. In this Act,
 - (a) "analyst" means a person designated as an analyst pursuant to the *Canada Water Act* or the *Northern Inland Waters Act*;
 - (b) "icebreaker" means a ship specially designed and constructed for the purpose of assisting the passage of other ships through ice;
 - (c) "owner" in relation to a ship, includes any person having for the time being, either by law or by contract, the same rights as the owner of the ship as regards the possession and use thereof;
 - (d) "pilot" means a person licensed as a pilot pursuant to the *Canada Shipping Act*;

(e) "pollution prevention officer" means a person designated as a pollution prevention officer pursuant to section 14;

(f) "ship" includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion;

(g) "shipping safety control zone" means an area of the arctic waters prescribed as a shipping safety control zone by order of the Governor in Council made under section 11; and

(h) "waste" means

(i) any substance that, if added to any waters would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by an animal, fish or plant that is useful to man, and

(ii) any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man,

and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act*, is deemed to be waste.

APPLICATION OF ACT

3. (1) Except where otherwise provided, this Act applies to the waters (in this Act referred to as the "arctic 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 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.

(2) For greater certainty, the expression "arctic waters" in this Act includes all waters described in subsection (1) and, as this Act

applies to or in respect of any person described in paragraph (a) of subsection (1) of section 6, all waters adjacent thereto lying north of the sixtieth parallel of north latitude, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or such adjacent waters are in a frozen or a liquid state, but does not include inland waters.

DEPOSIT OF WASTE

4. (1) Except as authorized by regulations made under this section, no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters.

(2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the *Canada Water Act* if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph (a) of subsection (2) of section 16 of that Act with respect to that water quality management area.

(3) The Governor in Council may make regulations for the purposes of this section prescribing the type and quantity of waste, if any, that may be deposited by any person or ship in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters, and prescribing the conditions under which any such waste may be so deposited.

5. (1) Any person who

(a) has deposited waste in violation of subsection (1) of section 4,
or

(b) carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters that, by reason of any accident or other occurrence, is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section,

shall forthwith report the deposit of waste or the accident or other

occurrence to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

(2) The master of any ship that has deposited waste in violation of subsection (1) of section 4, or that is in distress and for that reason is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under that section, shall forthwith report the deposit of waste or the condition of distress to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

6. (1) The following persons, namely:

(a) any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters.

(b) any person who carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters, and

(c) the owner of any ship that navigates within the arctic waters and the owner or owners of the cargo of any such ship,

are respectively liable and, in the case of the owner of a ship and the owner or owners of the cargo thereof, are jointly and severally liable, up to the amount determined in the manner provided by regulations made under section 9 in respect of the activity or undertaking so engaged in or carried on or in respect of that ship, as the case may be,

(d) for all costs and expenses of and incidental to the taking of action described in subsection (2) on the direction of the Governor in Council, and

(e) for all actual loss or damage incurred by other persons

resulting from any deposit of waste described in subsection (1) of section 4 that is caused by or otherwise attributable to that activity or undertaking or that ship, as the case may be.

(2) Where the Governor in Council directs any action to be taken by or on behalf of Her Majesty in right of Canada to repair or remedy any condition that results from a deposit of waste described in subsection (1), or to reduce or mitigate any damage to or destruction of life or property that results or may reasonably be expected to result from such deposit of waste, the costs and expenses of and incidental to the taking of such action, to the extent that such costs and expenses can be established to have been reasonably incurred in the circumstances, are, subject to this section, recoverable by Her Majesty in right of Canada from the person or persons described in

paragraph (a), (b) or (c) of that subsection, with costs, in proceedings brought or taken therefor in the name of Her Majesty.

(3) All claims pursuant to this section against a person or persons described in paragraph (a), (b) or (c) of subsection (1) may be sued for and recovered in any court of competent jurisdiction in Canada, and all such claims shall rank firstly in favour of persons who have suffered actual loss or damage as provided in paragraph (e) of subsection (1) (which said claims shall among themselves rank *pari passu*) and secondly to meet the costs and expenses described in subsection (2), hereof, up to the limit of the amount determined in the manner provided by regulations made under section 9 in respect of the activity or undertaking engaged in or carried on by the person or persons against whom the claims are made, or in respect of the ship of which any such person is the owner or of all or part of whose cargo any such person is the owner.

(4) No proceedings in respect of a claim pursuant to this section shall be commenced after two years from the time when the deposit of waste in respect of which the proceedings are brought or taken occurred or first occurred, as the case may be, or could reasonably be expected to have become known to those affected thereby.

7. (1) The liability of any person pursuant to section 6 is absolute and does not depend upon proof of fault or negligence, except that no person is liable pursuant to that section for any costs, expenses or actual loss or damage incurred by another person whose conduct caused any deposit of waste described in subsection (1) of that section, or whose conduct contributed to any such deposit of waste, to the degree to which his conduct contributed thereto, and nothing in this Act shall be construed as limiting or restricting any right of recourse or indemnity that a person liable pursuant to section 6 may have against any other person.

(2) For the purposes of subsection (1), a reference to any conduct of "another person" includes any wrongful act or omission by that other person or by any person for whose wrongful act or omission that other person is by law responsible.

(3) Notwithstanding anything in this Act, no person is liable pursuant to section 6, either alone or jointly and severally with any other person or persons, by reason only of his being the owner of all or any part of the cargo of a ship if he can establish that the cargo or part thereof of which he is the owner is of such a nature, or is of such a nature and is carried in such a quantity that, if it and any

other cargo of the same nature that is carried by that ship were deposited by that ship in the arctic waters, the deposit thereof would not constitute a violation of subsection (1) of section 4.

8. (1) The Governor in Council may require

(a) any person who engages in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters,

(b) any person who carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters that will or is likely to result in the deposit of waste in the arctic waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters,

(c) any person, other than a person described in paragraph (a), who proposes to construct, alter or extend any work or works on the mainland or islands of the Canadian arctic or in the arctic waters that, upon completion thereof, will form all or part of an undertaking described in paragraph (b), or

(d) the owner of any ship that proposes to navigate or that navigates within any shipping safety control zone specified by the Governor in Council and, subject to subsection (3) of section 7, the owner or owners of the cargo of any such ship,

to provide evidence of financial responsibility, in the form of insurance or an indemnity bond satisfactory to the Governor in Council, or in any other form satisfactory to him, in an amount determined in the manner provided by regulations made under section 9.

(2) Evidence of financial responsibility in the form of insurance or an indemnity bond shall be in a form that will enable any person entitled pursuant to section 6 to claim against the person or persons giving such evidence of financial responsibility to recover directly from the proceeds of such insurance or bond.

9. The Governor in Council may make regulations for the purposes of section 6 prescribing, in respect of any activity or undertaking engaged in or carried on by any person or persons described in paragraph (a), (b) or (c) of subsection (1) of section 6, or in respect of any ship of which any such person is the owner or of all or part of whose cargo any such person is the owner, the manner of determining the limit of liability of any such person or persons pursuant to that section, which prescribed manner shall, in the case of the owner of any ship and the owner or owners of the cargo thereof,

take into account the size of such ship and the nature and quantity of the cargo carried or to be carried by it.

PLANS AND SPECIFICATIONS OF WORKS

10. (1) The Governor in Council may require any person who proposes to construct, alter or extend any work or works on the mainland or islands of the Canadian arctic or in the arctic waters that, upon completion thereof, will form all or part of an undertaking the operation of which will or is likely to result in the deposit of waste of any type in the arctic waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters, to provide him with a copy of such plans and specifications relating to the work or works as will enable him to determine whether the deposit of waste that will or is likely to occur if the construction, alteration or extension is carried out in accordance therewith would constitute a violation of subsection (1) of section 4.

(2) If, after reviewing any plans and specifications provided to him under subsection (1) and affording to the person who provided those plans and specifications a reasonable opportunity to be heard, the Governor in Council is of the opinion that the deposit of waste that will or is likely to occur if the construction, alteration or extension is carried out in accordance with such plans and specifications would constitute a violation of subsection (1) of section 4, he may, by order, either

(a) require such modifications in those plans and specifications as he considers to be necessary, or

(b) prohibit the carrying out of the construction, alteration or extension.

SHIPPING SAFETY CONTROL ZONES

11. (1) Subjects to subsection (2), the Governor in Council may, by order, prescribe as a shipping safety control zone any area of the arctic waters specified in the order, and may, as he deems necessary, amend any such area.

(2) A copy of each order that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette*; and no order may be made by the Governor in Council under subsection (1) based upon any such proposal except after the expiration of sixty days following publication of the proposal in the *Canada Gazette*.

12. (1) The Governor in Council may make regulations applicable to ships of any class or classes specified therein, prohibiting any ship of that class or of any of those classes from navigating within any shipping safety control zone specified therein

(a) unless the ship complies with standards prescribed by the regulations relating to

(i) hull and fuel tank construction, including the strength of materials used therein, the use of double hulls and the subdivision thereof into watertight compartments,

(ii) the construction of machinery and equipment and the electronic and other navigational aids and equipment and telecommunications equipment to be carried and the manner and frequency of maintenance thereof,

(iii) the nature and construction of propelling power and appliances and fittings for steering and stabilizing,

(iv) the manning of the ship, including the number of navigating and look-out personnel to be carried who are qualified in a manner prescribed by the regulations,

(v) with respect to any type of cargo to be carried, the maximum quantity thereof that may be carried, the method of stowage thereof and the nature or type and quantity of supplies and equipment to be carried for use in repairing or remedying any condition that may result from the deposit of any such cargo in the arctic waters,

(vi) the freeboard to be allowed and the marking of load lines, (vii) quantities of fuel, water and other supplies to be carried, and

(viii) the maps, charts, tide tables and any other documents or publications relating to navigation in the arctic waters to be carried;

(b) without the aid of a pilot, or of an ice navigator who is qualified in a manner prescribed by the regulations, at any time or during any period or periods of the year, if any, specified in the regulations, or without icebreaker assistance of a kind prescribed by the regulations; and

(c) during any period or periods of the year, if any, specified in the regulations or when the ice conditions of a kind specified in the regulations exist in that zone.

(2) The Governor in Council may by order exempt from the application of any regulations made under subsection (1) any ship

or class of ship that is owned or operated by a sovereign power other than Canada where the Governor in Council is satisfied that appropriate measures have been taken by or under the authority of that sovereign power to ensure the compliance of such ship with, or with standards substantially equivalent to, standards prescribed by regulations made under paragraph (a) of subsection (1) that would otherwise be applicable to it within any shipping safety control zone, and that in all other respects all reasonable precautions have been or will be taken to reduce the danger of any deposit of waste resulting from the navigation of such ship within that shipping safety control zone.

(3) The Governor in Council may make regulations providing for the issue to the owner or master of any ship that proposes to navigate within any shipping safety control zone specified therein, of a certificate evidencing, in the absence of any evidence to the contrary, the compliance of such ship with standards prescribed by regulations made under paragraph (a) of subsection (1) that are or would be applicable to it within that shipping safety control zone, and governing the use that may be made of any such certificate and the effect that may be given thereto for the purposes of any provision of this Act.

13. (1) Where the Governor in Council has reasonable cause to believe that a ship that is within the arctic waters and is in distress, stranded, wrecked, sunk or abandoned, is depositing waste or is likely to deposit waste in the arctic waters, he may cause the ship or any cargo or other material on board the ship to be destroyed, if necessary, or to be removed if possible to such place and sold in such manner as he may direct.

(2) The proceeds from the sale of a ship or any cargo or other material pursuant to subsection (1) shall be applied towards meeting the expenses incurred by the Government of Canada in removing and selling the ship, cargo or other material, and any surplus shall be paid to the owner of that ship, cargo or other material.

POLLUTION PREVENTION OFFICERS

14. (1) The Governor in Council may designate any person as a pollution prevention officer with such of the powers set out in sections 15 and 23 as are specified in the certificate of designation of such person.

(2) A pollution prevention officer shall be furnished with a certificate of his designation specifying the powers set out in sections

15 and 23 that are vested in him, and a pollution prevention officer, on exercising any such power shall, if so required, produce the certificate to any person in authority who is affected thereby and who requires him to do so.

15. (1) A pollution prevention officer may, at any reasonable time, (a) enter any area, place or premises (other than a ship, a private dwelling place or any part of any area, place or premises other than a ship that is designed to be used and is being used as a permanent or temporary private dwelling place) occupied by any person described in paragraph (a) or (b) of subsection (1) of section 8, in which he reasonably believes

(i) there is being or has been carried on any activity that may result in or has resulted in waste, or

(ii) there is any waste

that may be or has been deposited in the arctic waters or on the mainland or islands of the Canadian arctic under any conditions where such waste or any other waste that results from the deposit of such waste may enter the arctic waters in violation of subsection (1) of section 4;

(b) examine any waste found therein in bulk or open any container found therein that he has reason to believe contains any waste and take samples thereof; and

(c) require any person in such area, place or premises to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom, any books or other documents or papers concerning any matter relevant to the administration of this Act or the regulations.

(2) A pollution prevention officer may, at any reasonable time, (a) enter any area, place or premises (other than a ship, a private dwelling place or any part of any area, place or premises other than a ship that is designed to be used and is being used as a permanent or temporary private dwelling place) in which any construction, alteration or extension of a work or works described in section 10 is being carried on; and

(b) conduct such inspections of the work or works being constructed, altered or extended as he deems necessary in order to determine whether any plans and specifications provided by the Governor in Council, and any modifications required by the Governor in Council are being complied with.

(3) A pollution prevention officer may

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

(b) order any ship that is in or near a shipping safety control zone to proceed outside such zone in such manner as he may direct, to remain outside such zone or to anchor in a place selected by him,

(i) if he suspects, on reasonable grounds, that the ship fails to comply with standards prescribed by any regulations made under section 12 that are or would be applicable to it within that shipping safety control zone,

(ii) if such ship is within the shipping safety control zone or is about to enter the zone in contravention of a regulation made under paragraph (b) or (c) of subsection (1) of section 12, or

(iii) if, by reason of weather, visibility, ice or sea conditions, the condition of the ship or its equipment or the nature of its cargo, he is satisfied that such an order is justified in the interests of safety; and

(c) where he is informed that a substantial quantity of waste has been deposited in the arctic waters or has entered the arctic waters, or where on reasonable grounds, he is satisfied that a grave and imminent danger of a substantial deposit of waste in the arctic waters exists,

(i) order all ships within a specified area of the arctic waters to report their positions to him, and

(ii) order any ship to take part in the clean-up of such waste or in any action to control or contain the waste.

16. The owner or person in charge of any area, place or premises entered pursuant to subsection (1) or (2) of section 15, the master of any ship boarded pursuant to paragraph (a) of subsection (3) of that section and every person found in the area, place or premises or on board the ship shall give the pollution prevention officer all reasonable assistance in his power to enable the pollution prevention officer to carry out his duties and functions under this Act and shall furnish the pollution prevention officer with such information as he may reasonably require.

17. (1) No person shall obstruct or hinder a pollution prevention officer in the carrying out of his duties or functions under this Act.

(2) No person shall knowingly make a false or misleading statement, either verbally or in writing, to a pollution prevention officer engaged in carrying out his duties or functions under this Act.

OFFENCES

18. (1) Any person who violates subsection (1) of section 4 and any ship that violates that subsection is guilty of an offence and liable on summary conviction to a fine not exceeding, in the case of a person, five thousand dollars, and in the case of a ship, one hundred thousand dollars.

(2) Where an offence is committed by a person under subsection (1) on more than one day or is continued by him for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

19. (1) Any person who

(a) fails to make a report to a pollution prevention officer as and when required under subsection (1) of section 5,

(b) fails to provide the Governor in Council with evidence of financial responsibility as and when required under subsection (1) of section 8,

(c) fails to provide the Governor in Council with any plans and specifications required of him under subsection (1) of section 10, or

(d) constructs, alters or extends any work described in subsection (1) of section 10

(i) otherwise than in accordance with any plans and specifications provided to the Governor in Council in accordance with a requirement made under that subsection, or with any such plans and specifications as required to be modified by any order made under subsection (2) of that section, or

(ii) contrary to any order made under subsection (2) of that section prohibiting the carrying out of such construction, alteration or extension,

is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars.

(2) Any ship

(a) that navigates within a shipping safety control zone while not complying with standards prescribed by any regulations made under section 12 that are applicable to it within that shipping safety control zone,

(b) that navigates within a shipping safety control zone in contravention of a regulation made under paragraph (b) or (c) of subsection (1) of section 12,

(c) that, having taken on board a pilot in order to comply with a regulation made under paragraph (b) of subsection (1) of section 12, fails to comply with any reasonable direction given to it by the pilot in carrying out his duties,

(d) that fails to comply with any order of a pollution prevention officer under paragraph (b) or (c) of subsection (3) of section 15 that is applicable to it,

(e) the master of which fails to make a report to a pollution prevention officer as and when required under subsection (2) of section 5, or

(f) the master of which or any person on board which violates section 17,

is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars.

(3) Any person, other than the master of a ship or any person on board a ship, who violates section 17 is guilty of an offence punishable on summary conviction.

20. (1) In a prosecution of a person for an offence under subsection (1) of section 18, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

(2) In a prosecution of a ship for an offence under this Act, it is sufficient proof that the ship has committed the offence to establish that the act or neglect, that constitutes the offence was committed by the master of or any person on board the ship, other than a pollution prevention officer or a pilot taken on board in compliance with a regulation made under paragraph (b) of subsection (1) of section 12, whether or not the person on board the ship has been identified; and for the purposes of any prosecution of a ship for fail-

ing to comply with any order or direction of a pollution prevention officer or a pilot, any order given by such pollution prevention officer or any direction given by such pilot to the master or any person on board the ship shall be deemed to have been given to the ship.

21. (1) Subject to this section, a certificate of an analyst stating that he has analysed or examined a sample submitted to him by a pollution prevention officer and stating the result of his analysis or examination is admissible in evidence in any prosecution for a violation of subsection (1) of section 4 and in the absence of evidence to the contrary is proof of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court require the attendance of the analyst for the purposes of cross-examination.

(3) No certificate shall be received in evidence pursuant to subsection (1) unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of such intention together with a copy of the certificate.

22. (1) Where any person or ship is charged with having committed an offence under this Act, any court in Canada that would have had cognizance of the offence if it had been committed by a person within the limits of its ordinary jurisdiction has jurisdiction to try the offence as if it had been so committed.

(2) Where a ship is charged with having committed an offence under this Act, the summons may be served by leaving the same with the master or any officer of the ship or by posting the summons on some conspicuous part of the ship, and the ship may appear by counsel or agent, but if it does not appear, a summary conviction court may, upon proof of service of the summons, proceed *ex parte* to hold the trial.

SEIZURE AND FORFEITURE

23. (1) Whenever a pollution prevention officer suspects on reasonable grounds that

- (a) any provision of this Act or the regulations has been contravened by a ship, or
- (b) the owner of a ship or the owner or owners of all or part of the cargo thereof has or have committed an offence under paragraph (b) of subsection (1) of section 19,

he may, with the consent of the Governor in Council, seize the ship and its cargo anywhere in the arctic waters or elsewhere in the territorial sea or internal or inland waters of Canada.

(2) Subject to subsection (3) and section 24, a ship and cargo seized under subsection (1) shall be retained in the custody of the pollution prevention officer making the seizure or shall be delivered into the custody of such person as the Governor in Council directs.

(3) Where all or any part of a cargo seized under subsection (1) is perishable, the pollution prevention officer or other person having custody thereof may sell the cargo or the portion thereof that is perishable, as the case may be, and the proceeds of the sale shall be paid to the Receiver General or shall be deposited in a chartered bank to the credit of the Receiver General.

24. (1) Where a ship is convicted of an offence under this Act, or where the owner of a ship or an owner of all or of part of the cargo thereof has been convicted of an offence under paragraph (b) of subsection (1) of section 19, the convicting court may, if the ship and its cargo were seized under subsection (1) of section 23, in addition to any other penalty imposed, order that the ship and cargo or the ship or its cargo or any part thereof be forfeited, and upon the making of such order the ship and cargo or the ship or its cargo or part thereof is or are forfeited to Her Majesty in right of Canada.

(2) Where any cargo or part thereof that is ordered to be forfeited under subsection (1) has been sold under subsection (3) of section 23, the proceeds of such sale are, upon the making of such order, forfeited to Her Majesty in right of Canada.

(3) Where a ship and cargo have been seized under subsection (1) of section 23 and proceedings that could result in an order that the ship and cargo be forfeited having been instituted, the court in or before which the proceedings have been instituted may, with the consent of the Governor in Council, order redelivery thereof to the person from whom they were seized upon security by bond, with two sureties, in an amount and form satisfactory to the Governor in Council, being given to Her Majesty in right of Canada.

(4) Any ship and cargo seized under subsection (1) of section 23 or the proceeds realized from a sale of any perishable cargo under subsection (3) of that section shall be returned or paid to the person from whom the ship and cargo were seized within thirty days from the seizure thereof unless, prior to the expiration of the thirty days,

proceedings are instituted in respect of an offence alleged to have been committed by the ship against this Act or in respect of an offence under paragraph (b) of subsection (1) of section 19 alleged to have been committed by the owner of the ship or an owner of all or part of the cargo thereof.

(5) Where proceedings referred to in subsection (4) are instituted and, at the final conclusion of those proceedings, a ship and cargo or ship or cargo or part thereof is or are ordered to be forfeited, they or it may, subject to section 25, be disposed of as the Governor in Council directs.

(6) Where a ship and cargo have been seized under subsection (1) of section 23 and proceedings referred to in subsection (4) have been instituted, but the ship and cargo or ship or cargo or part thereof or any proceeds realized from the sale of any part of the cargo are not at the final conclusion of the proceedings ordered to be forfeited, they or it shall be returned or the proceeds shall be paid to the person from whom the ship and cargo were seized, unless there has been a conviction and a fine imposed in which case the ship and cargo or proceeds may be detained until the fine is paid, or the ship and cargo may be sold under execution in satisfaction of the fine, or the proceeds realized from a sale of the cargo or any part thereof may be applied in payment of the fine.

25. (1) The provisions of section 64A of the *Fisheries Act* apply, with such modifications as the circumstances require, in respect of any ship and cargo forfeited under this Act as though the ship and cargo were respectively, a vessel and goods forfeited under subsection (5) of section 64 of that Act.

(2) References to "the Minister" in section 64A of the *Fisheries Act* shall, in applying that section for the purposes of this Act, be read as references to the Governor in Council and the phrase "other than a person convicted of the offence that resulted in the forfeiture or a person in whose possession the vessel, vehicle, article, goods or fish were when seized" shall be deemed to include a reference to the owner of the ship where it is the ship that is convicted of the offence that results in the forfeiture.

DELEGATION

26. (1) The Governor in Council may, by order, delegate to any member of the Queen's Privy Council for Canada designated in the

order the power and authority to do any act or thing that the Governor in Council is directed or empowered to do under this Act; and upon the making of such an order, the provision or provisions of this Act that direct or empower the Governor in Council and to which the order relates shall be read as if the title of the member of the Queen's Privy Council for Canada designated in the order were substituted therein for the expression "The Governor in Council".

(2) This section does not apply to authorize the Governor in Council to delegate any power vested in him under this Act to make regulations, to prescribe shipping safety control zones or to designate pollution prevention officers and their powers, other than pollution prevention officers with only those powers set out in subsection (1) or (2) of section 15.

DISPOSITION OF FINES

27. All fines imposed pursuant to this Act belong to Her Majesty in right of Canada and shall be paid to the Receiver General.

COMING INTO FORCE

28. This Act shall come into force on a day to be fixed by proclamation.