Notes for a Statement by Mr. J.A. Beesley,
Legal Adviser/Director General, Bureau of Legal and Consular Affairs,
Department of External Affairs

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RIGHTS AND RESPONSIBILITIES OF ARCTIC COASTAL STATES: THE CANADIAN VIEW

ARCTIC SOVEREIGNTY

The term "Arctic sovereignty" has recently gained in currency, and nowhere more so than in Canada. Unfortunately, however, the term suffers from an inherent imprecision which has been aggravated by misuse. Indeed the very term "the Arctic" is itself used and understood in different ways in different contexts, thus compounding the confusion surrounding the notion of Arctic sovereignty.

What geographers refer to as the Arctic comprises the islands and continental fringes north of the Arctic Circle as well as the more than five million square miles of the Arctic Ocean (which itself is often referred to simply as "the Arctic"). Here precisely is the fundamental difference between the Arctic and Antarctic regions: whereas the Arctic consists of an ice-covered sea surrounded by land, the Antarctic is an ice-covered continent surrounded by open sea. The distinction is an essential one not only in geographic terms but also in terms of the applicability of legal principles to the two regions. Unfortunately, however, there is too often a tendency to treat the Arctic and Antarctic together from the legal point of view.

To speak of Arctic sovereignty in a generic sense, with reference to everything north of the Arctic Circle, is to suggest,

... 2

contrary to all geographic, climatic, legal and political realities, that there exists a single Arctic region and that the sovereignty of that region remains somehow unsettled. In fact, of course, the Arctic comprises many distinct and widely varying continental, insular and marine regions. So far as the land regions are concerned, there are few if any questions of Arctic sovereignty which remain unsettled. While I cannot speak for other Arctic states, I must say that Canada is aware of no challenge to its sovereignty over the mainland and islands of the Canadian Arctic. Canada's sovereignty over these territories has been established beyond dispute under every test of law and fact since Canada fell heir to the rights of Great Britain in the 1860's and progressively extended its administration to the vast and complex system which today covers every sphere of activity throughout the whole of the Canadian Arctic. Similarly with respect to Canada's exclusive sovereign rights to explore and exploit the resources of its Arctic continental shelf. These rights, in the Arctic as elsewhere, are firmly established under both customary and conventional international law and flow from Canada's sovereignty over the lands adjacent to the shelf areas concerned.

I raise these non-issues only to dispose of them at the outset in order to ensure that our discussion here is not diverted down any false trails connected with popular misconceptions about "Arctic sovereignty".

What, then, are the issues of international law which arise in the current debate on Arctic policy? The essential issue, and the one which I propose to examine, relates to the present and potential

uses of the various regions of water and ice which together comprise the Arctic Ocean. Those uses are assuming ever greater importance as a result of the quickening pace of Arctic development, particularly as regards the large-scale commercial maritime traffic which will almost inevitably follow that development. The issue can be stated in these terms: Under what authority will the uses of the Arctic waters and ice be regulated and controlled (leaving aside the question of the exploration and exploitation of the continental shelf)? This, of course, is what is often loosely referred to as the "Arctic sovereignty" issue. It is also directly related to issues of international environmental law which in turn reflect national shipping policies and policies of resource development. Finally, the possible approaches to these matters are linked with the varying perspectives which have been adopted in considering the nature and status of the Arctic waters and ice from the legal point of view.

ARCTIC WATERS AND ICE: VARYING PERSPECTIVES

A number of states, and the USA in particular, have made clear their view that the Arctic Ocean as a whole is an ocean like any other. The proponents of this view hold that beyond the traditional narrow maritime belt of the territorial sea and contiguous zone (in the sense in which the latter term is used in the relevant 1958 Geneva Convention), the Arctic Ocean constitutes high seas and thus the regulation and control of activities therein is subject to the usual regime of the freedom of the high seas, that is to say to flag state jurisdiction so far as shipping is concerned.

... 4

Other views of the nature and status of the Arctic waters and ice have been expressed in other quarters. Professor Johnston of the University of Toronto has recently written that the Arctic "is an ocean because people have thought of it as such for a long time. More exactly it is a unique geographical area with some important oceanic properties.... The Arctic Ocean is largely hypothetical, a peculiar combination of hypothetical waters and hypothetical islands, the distinction mostly covered over by large masses of ice."

The importance of the ice factor is also emphasized in an article in the US Naval Institute Proceedings of September, 1961 by Commander Partridge (a Law Specialist then on duty in the Executive Office of the Secretary of the Navy). He wrote that "the Arctic ice pack is, in fact, subject to occupation and usage very similar to that of certain land areas" and made the point that many Eskimos "are born, live and die on the ice pack without ever having set foot on any form of land or even on ice supported by land". In spite of limited operations by vessels within the Arctic Ocean area, he asserted,

> 'the ice pack cannot be accurately described as freely and completely navigable by any known type of vessel. As a route of trade and commerce between nations, the pack ice is more likely to be traversed by dog sled and snowcat than by seagoing vessels. The forcible navigation of this area by icebreakers is more in the nature of a rape of the frozen seas than it is the free movement of seagoing commerce upon which the doctrine of the freedom of the high seas is based. That is no more navigation in the accepted high seas sense of the word than is the creation and navigation of a canal or ditch by a floating clam shell dredge. The ice so penetrated does not become sea any more than the land so penetrated becomes sea."

... 5

The views of Professor Johnston and Commander Partridge as quoted above are very similar to those of the Canadian Government as expressed in a Note to the US Government of April 16, 1970 (in reply to a US Note objecting to Canada's Arctic waters pollution legislation). In that Note the Canadian Government stated that traditional concepts of the law of the sea were irrelevant "to an area having the unique characteristics of the Arctic, where there is an intimate relationship between the sea, the ice and the land". The Canadian Note added further that it is "idle to talk of freedom of the high seas with respect to an area, large parts of which are covered with ice throughout the year, other parts of which are covered with ice most of each year, and where the local inhabitants use the frozen sea as an extension of the land to travel on it by dogsled and snowmobile far more than they can use it as water".

The permanent or quasi-permanent presence of ice in vast parts of this "hypothetical ocean" gives rise to yet further special characteristics having legal implications. Thus, there are many Arctic regions - such as Canada's Northwest Passage and the USSR's Northeast Passage - where no international shipping routes have developed. Where shipping routes do exist in these regions they have been developed through the efforts of the adjacent coastal state, for which these routes have a vital significance. Navigation through such routes can normally be carried out only with the provision by the coastal state of a complex of special facilities and measures of assistance (such as meteorological and communications services, ice reconnaissance, aerial escort and ice-breaking and pilotage services).

... 6

A final special characteristic of the Arctic waters and ice relates to what might be called the environmental perspective. The Arctic waters and ice have been described by Prime Minister Trudeau (in a statement made in April, 1970) as "one of the most significant surface areas of the globe, for it controls the temperature of much of the Northern Hemisphere and thus its continued existence in an unspoiled form is vital to all mankind." The unique environmental characteristics of the Arctic, with its minute rate of decomposition, its relatively low restorative capacity, and the hazards it presents for navigation, all make it particularly susceptible to pollution, and led the Prime Minister to observe on the same occasion:

> "Involved here, in short, are issues which even the more conservative of environmental scientists do not hesitate to describe as being of a magnitude which is capable of affecting the quality, and perhaps the continued existence, of human and animal life in vast regions of North America and elsewhere."

If all these special characteristics are such that the Arctic waters and ice do not constitute high seas to which the traditional freedoms apply, what then is the status of these areas and what regime should govern their use? So far as Canada is concerned, the special characteristics of the Arctic waters and ice combine to give them a special status - however defined - which implies special rights and responsibilities for the Arctic coastal states. Accordingly, for many years Canada has exercised effective control over the uses of the waters of the Canadian Arctic archipelago and over a wide range of activities carried out on their ice-cover. Indeed, as was most recently reaffirmed

... 7

by the Secretary of State for External Affairs in April, 1970, "Canada has always regarded the waters of the Arctic archipelago as being Canadian waters [and] the present Government maintains that position."

It should be noted here that Canada's view of the special status of Arctic waters and ice and the concomitant special rights and responsibilities of Arctic coastal states is very similar to the attitude of the USSR as revealed in the writings of Soviet jurists and in Soviet state practice. Soviet jurists have gone so far as to describe the Kara, Laptev, Chukchi and East Siberian seas as internal waters, although the Soviet Government has never officially advanced such claims. The Soviet Government, however, has administered the Northeast Passage which crosses these seas as a national shipping route of the USSR. The Soviet Government has also clearly indicated its support for Canada's Arctic waters pollution legislation, to which I shall now turn.

CANADA'S ARCTIC WATERS POLLUTION LEGISLATION

The Arctic Waters Pollution Prevention Act which received Royal Assent on June 26, 1970 manifests in legislative terms Canada's view of the special status of Arctic waters and ice and the special rights and responsibilities of the Arctic coastal states, with particular respect to the preservation of the Arctic ecology. It reflects also the Canadian Government's policy on the environmental implications of economic development. As was stated in the Speech from the Throne by the Governor-General on October 23, 1969:

... 8

> "With resource development, and the benefits it entails, may come grave danger to the balance of plant and animal life on land and in the sea, which is particularly precarious in the harsh polar regions. While encouraging such development, we must fulfil our responsibility to preserve these areas, as yet undespoiled and essentially in a state of nature."

This position was further elaborated by Prime Minister Trudeau in the House of Commons on October 24, 1969. He said then that the Canadian Government would never sacrifice, in the name of progress, a clean and healthy environment to industrial or commercial development. With reference to the water, ice and land areas of the Canadian Arctic archipelago, he said:

> "We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of that environment from pollution or artificial deterioration. Canada will not permit this to happen.... It will not permit this to happen either in the name of freedom of the seas, or in the interests of economic development."

It was against this background that the Arctic Waters Pollution Prevention Act was adopted. That act makes clear the Canadian Government's determination to discharge its responsibilities for the preservation of the Arctic environment, but without denying access to shipping from all nations in the waters of the Canadian archipelago and the Northwest Passage in particular. It seeks in essence to preclude the passage of ships threatening pollution of the environment. Commercially-owned ships intending to enter waters of the Canadian Arctic designated by the Canadian Government as shipping safety control zones will be required to meet Canadian design,

... 9

construction and navigational safety standards. These zones may extend up to 100 miles offshore. The owners of vessels and cargoes will be required to provide proof of financial responsibility and will be liable for damage caused by pollution. Their liability will be limited but will not depend upon proof of fault or negligence. In the case of ships owned by another state the necessary safety standards will be given effect by arrangement with the state concerned. Similarly, protective measures will apply to exploration and exploitation of the submarine resources of Canada's northern continental shelf.

In introducing the Arctic waters pollution legislation in the House of Commons, the Secretary of State for External Affairs, the Honourable Mitchell Sharp, emphasized that the problem of environmental preservation transcends traditional concepts of sovereignty and requires an imaginative new approach based on objective functional considerations rather than territorial imperatives. While reaffirming that Canada has always regarded the waters of the Arctic archipelago as Canadian waters, he made clear that the Arctic waters pollution legislation did not represent an assertion of sovereignty but rather a constructive and functional approach whereby Canada will exercise only the jurisdiction required to achieve the specific and vital purpose of environmental preservation.

The Arctic waters pollution legislation does not make and does not require an assertion of sovereignty, no more than it constitutes a denial of sovereignty or is inconsistent with any basis for sovereignty. Together with this legislation, however, the Canadian Government adopted

... 10

another act extending the territorial sea of Canada from three to twelve miles. An important affect of this action is that it brings two key "gateway" areas of the Northwest Passage, Barrow Strait and Prince of Wales Strait, indisputably under complete Canadian sovereignty under any realistic and reasonable view of existing international law, regardless of differences of views as to Canada's claim to sovereignty over the whole of the Northwest Passage.

INTERNATIONAL ENVIRONMENTAL LAW

Canada's Arctic waters pollution legislation responds to Canada's view of the special status of Arctic waters and ice and the special rights and responsibilities of Arctic coastal states. However, even if viewed from the perspective of the traditional law of the sea with all its deficiencies in terms of environmental preservation, the legislation finds support in both principle and practice.

The traditional law of the sea in general is oriented towards the concept of unfettered freedom of navigation on the high seas and thus favours flag-state jurisdiction while seeking to limit the jurisdiction of coastal states. As a result this essentially laissez-faire system is inadequate in its provisions for the prevention and control of marine pollution. Those provisions, as they are found in various conventions, do not properly recognize the paramount need for environmental preservation and do not strike a proper balance between the interests of the flag states in unfettered rights of navigation and the fundamental interest of the coastal

... 11

states in the integrity of their shores. Flag-state jurisdiction does not carry with it, for instance, the logical consequence of flag-state responsibility for damage to the environment. The whole system is particularly inadequate, as the principle on which it rests is particularly irrelevant, to the special situation pertaining in the Arctic.

At the same time, however, the freedom of the high seas has never been applied in absolute terms and has been qualified, for instance, to provide for universal jurisdiction with regard to crimes of piracy. Moreover, state practice - and the practice of the major maritime powers in particular - conclusively establishes that states may and do exercise authority over foreign vessels on the high seas in order to prevent injury to their territory and to defend their security and well-being. In the view of the Canadian Government a serious threat to the environment of a state represents a threat to its security. The right to environmental integrity corresponds, after all, to the right to territorial integrity. Thus the fundamental principle of self-defence permits the state so threatened to take the reasonable preventive protective measures which may be appropriate to the situation. This principle of self-defence against a threat to environmental integrity was invoked by the Canadian Government in bringing forward its Arctic waters pollution legislation, which stresses preventive measures of protection above all and accordingly is at variance with the 1969 Brussels Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties which in effect stipulates that the stable door should be locked only after the horses have been stolen.

... 12

It should be recalled here that one of the primary justifications for President Truman's unilateral assertion of United States jurisdiction over the resources of the continental shelf was the principle of "self protection" which compelled the "coastal state to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources". Security and self defence are concepts which have been broadly interpreted within the framework of the law of the sea, as noted by McDougal and Burke (in "The Public Order of the Oceans"): "In terms of impacts on its total value position - that is, security most broadly conceived - coastal states commonly and realistically perceived that acts beyond the territorial sea may have harmful effects". These learned authors go on to state:

> "The proposed limitation of permissible purposes for contiguous zones in the reference to 'customs, fiscal, sanitation, and immigration' is certainly no accurate summary of the purposes for which states have in the past demanded, and been accorded, an occasional exclusive competence in contiguous waters. Their mutual demands, and reciprocal deferences, have extended, as we have seen, to important common interests in relation to security and power, as well as to other forms of wealth protection. With developing technology and expanding enlightenment, new uses of the oceans, portending also new benefits and harms unique to particular states bordering on the oceans, would appear certain to emerge. It can scarcely be regarded as an appropriate clarification of the common interests of states to project a formulation of the purposes for which they may exercise a reasonable exclusive competence which both omits important contemporary shared interests and forecloses the future protection of new, emerging interests, whatever their importance or urgency....

... 13

> "The projection of a single permissible width of twelve miles, similarly, bears no discernible relation to the flexibilities in widths demanded and honored in past practice. States have in the past found very different widths necessary to the reasonable protection of different interests under different circumstances, and upon occasion have insisted upon, and been accorded, an exclusive competence at distances much beyond twelve miles from their coasts."

With specific reference to the pollution of the marine environment, McDougal and Burke conclude as follows:

> "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."

It would be a distortion of the freedom of the high seas to view it as a license to pollute the marine environment and the shores of other states, and to argue that states are barred from taking preventive protective measures against polluting activities on the high seas. Such a view runs counter to the fundamental principle of international law laid down in the Trail Smelter Arbitration more than thirty years ago. The tribunal in that case declared that "under the principles of international law....no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence." Many of the precedents

... 14

cited in this case related to water pollution controversies, and it is not unreasonable to assume that what the Tribunal had to say about pollution by fumes is equally applicable to water pollution. Indeed it has long been accepted that the users of a common water resource should not pollute this water so as to cause damage to one another. This is one of the fundamental provisions of the 1909 Boundary Waters Treaty between Canada and the USA and has been recognized as a rule of general applicability by the IAEA panel of experts on the disposal of radioactive waters in fresh water. Further authority in this field is also provided by the decision of the International Court of Justice in the Corfu Channel Case which held that every state is under an obligation "not to knowingly allow its territory to be used for acts contrary to the rights of other states."

If a state is forbidden to use its own territory, where it enjoys full sovereignty, in such a manner as to cause injury to another state, it would be only good law and good logic for this same principle to apply even more forcefully to areas not under its sovereignty or exclusive authority, such as the high seas. Canada like many other states has been the victim of incidents arising from an irresponsible use of the seas which have resulted in serious damage to the marine and coastal environment. For Canada, with its long coastline, much of it within Arctic areas, remedial measures are not enough. Preventive protective steps such as those embodied in Canada's Arctic Waters Pollution Prevention Act are required.

CONCLUSION

There is, in the Canadian view, an urgent need for concerted international action to accelerate the pace of development of a body of international environmental law capable of meeting the challenges of modern technology and the requirements of modern society. So far as the marine environment is concerned, in the absence of international regimes capable of providing the necessary protection for coastal states, unilateral measures based substantially upon customary international law but to some extent breaking new ground, have imposed themselves. State practice is an essential part of the international law-making process and, where there is a lacuna in the law, may be the only means for a state, acting reasonably and responsibly, to protect itself. This applies with particular force to the Arctic waters and ice in view of their special characteristics and the special rights and responsibilities to which they give rise for the Arctic coastal states, especially with regard to the preservation of the uniquely vulnerable Arctic environment. Thus the Canadian Government embarked upon a unilateral course of action which is both compatible with existing law and in advance of it; both based on the most fundamental principle of the law and pressing against its furthest frontier. It is for this reason that the Canadian Government, at the time of introducing the Arctic waters pollution legislation, simultaneously terminated its declaration of acceptance of the compulsory jurisdiction of the International Court of Justice and submitted a new reservation excluding disputes related to the control of marine pollution and the conservation of the living resources of the

... 16

sea. In a statement to the House of Commons on April 8, 1970, the Prime Minister reaffirmed that Canada strongly supports the rule of law in international affairs. He pointed out, however, that Canada was not prepared 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. In this connection it should be noted that the new Canadian reservation does not apply to the establishment by Canada in June, 1970 of a 12-mile territorial sea, since the Government considers that international law on the latter question, while unsettled, is sufficiently developed to permit the Court to arrive at a judicial decision in any dispute on this matter.

Meanwhile Canada is not ignoring the multilateral approach to environmental protection. The Canadian Government is consulting and cooperating with a number of other states on the possibility of convening an international Arctic conference which might develop internationally agreed standards of navigational safety and pollution control in Arctic waters both within and beyond the limits of national jurisdiction, to complement the protective action taken by Canada itself under its own legislation. This multilateral initiative, it is hoped, would cast an international legal umbrella over the exercise of the special rights and responsibility of Arctic coastal states with respect to the preservation of the Arctic environment, while avoiding any prejudice to the positions of contracting states on the law of the sea and the appearance of a precedent for unwarranted encroachments on the freedom of the seas.

... 17

In summary, Canada's position with respect to the protection of the Arctic environment rests upon the special situation pertaining in the Arctic, the fundamental right of self-defence, and the general principle that states have a duty not to use or permit the use of their territory or of areas beyond national jurisdiction in such manner as to cause injury in or to the territory or environment of another state. These latter two points apply as well to the protection of the coastal environment generally. On the basis of these concepts, and with its combined unilateral and multilateral approach to the Arctic waters problem, Canada is seeking to contribute to the progressive development of international environmental law. It was with the development of such a body of law in mind that Prime Minister Trudeau described the Arctic waters pollution legislation as "an assertion of the importance of the environment, of the sanctity of life on this planet, of the need for the recognition of a principle of clean seas, which is in all respects as vital a principle for the world of today and tomorrow as was the principle of free seas for the world of yesterday."