Arctic Legal Tides: The Politics of International Law in the Northwest Passage

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Abstract

The politics of international law should be seen as a constant condition of international affairs within which the practices of international law and world politics unfold. This work aims to uncover several ways to understand the politics of international law, and in particular, to understand how law and politics interact within extended foreign policy sequences. These long foreign policy episodes are generally centered on a particular component, or body of, international law. Yet they are also subject to numerous elements and functions of international law which give form and content to a state’s policy development. These include complex compliance decisions, repeated public justifications over the terms of legal validity, learning what the law requires to meet thresholds of compliance, and states’ engaging in forms of legal rhetoric known as creative legal arguments: legal justifications that attempt to change international law when states face difficult policy choices.

These various areas of international law highlight, in part, how international law ‘works’, or has effects within world politics. This project attempts to consolidate recent scholarship in this subject area by employing eclectic theorizing to explain the politics of international law as it unfolds in policy deliberation and choice. This task involves utilizing many insights from social constructivism and critical international legal theory, but also capturing the central ideas of legal realism, rationalism, and interactionalism in their ability to explain compliance decisions. From this point of departure, this work attempts to build theoretical bridges through a genuine interdisciplinary engagement with international relations and international law.

Such an endeavor brings clarity to empirical events and historical legal phenomena. To demonstrate this claim, the analysis offered evaluates the foreign policy sequence in Canadian legal policy over the Arctic waters known as the Northwest Passage, a forty year legal dispute between Canada and the United States. The case study sheds light on how international law-making unfolds over time, by virtue of the numerous iterations between Canada and the United States in bi-lateral settings, international conferences, and the third codification conference on the Law of the Sea (UNCLOS).
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I owe a sincere debt to Michael Byers, who brought this topic to my attention and allowed me to see that even the law of the sea is a dynamic phenomenon where the intricacies of international law and politics are present. Michael forced me to comprehend how the law works and has effects in international affairs. But more importantly, he allowed me to understand how central the Arctic region is in Canada’s social and legal history and how critical it will be in the future in global politics. I thank him gratefully for his guidance, patience, counsel, and most of all, sincere kindness and support as an intellectual mentor. My thanks also go to Katia Coleman and Richard Price of the University of British Columbia, two incredibly enlightening and inspiring academics. I wish to offer my gratitude to the University of British Columbia and the faculty of political science for a remarkable educational experience, and also to ARCTICNET for their generous funding over two years of this project’s research.

In accordance with the problem-driven approach adopted in this thesis, much weight is given to empirical investigation through the use of numerous primary and secondary sources. Many acknowledgements are due. Included, for example, are the historic memoirs of Ivan Head and Pierre Trudeau, along with articles written by Alan Gotlieb, Alan Beesley, and Len Legault on their Arctic involvement, Canada’s more broadly, and how they (Gotlieb in particular) interpreted the relationship of international law to Canadian foreign policy. There are several written interviews used from many of the main individuals in the Canadian government, some of which were pieces of research carried out by other scholars. I was also privileged to have many first-hand discussions and interviews with numerous Canadian and American international lawyers who dealt with the Arctic policy directly at critical moments. These individuals are cited when necessary and appropriate to do so without breaking a prior agreement of non-attribution. The thesis also benefits from perhaps the most revealing stock of evidence yet produced on the negotiation of Article 234 at the United Nations Law of the Sea (UNCLOS) deliberations. I owe a deep debt to Armand De Mestral, from McGill University’s Faculty of Law, for providing access to many of the policy documents the Canadian government assembled over the course of the UNCLOS negotiations. These
documents, cited in depth in chapter seven, bring into sharp relief much of Canada’s thinking and strategy on how Article 234 was negotiated, Canadian perspectives on other states’ legal positions, and how international law was understood at the time. I am grateful to Armand for his generosity and reflections of many phases of the negotiation of which he was a part. These documents will in many ways shed precious light on the background assumptions and legal interpretations that surrounded the Arctic clause at UNCLOS.
Dedication

To Kerry: my love, my light...forever...
Chapter One: Introduction

It is common practice in international relations scholarship, when thinking about whether or not international law ‘matters’ in political deliberation and strategic calculations, to provide answers on the basis of why states did or did not comply with their legal obligations, or the conditions under which they are likely to do so. Indeed, the question and puzzle of compliance for international law remains the central focal area of interdisciplinary debate and perhaps, for many, its deepest theoretical contribution. A range of critical insights have been accumulated to this end, even though the fundamental inquiries of what compliance is, or represents in practice in relation to legal rules, and whether compliance is structured by theoretical prerequisites, continue to be vexing points of departure for empirical analysis. However, scholarship focused on the broader role of international law has recently begun to move beyond these questions. One now encounters theory examining, for example, the law’s discursive effects in shaping the processes of communication, ideas and political vocabularies, the law’s use as a template for ethical judgment, political justification, and policy choice, and its ability to provide content to material structures and regimes within international institutions. International law is thus understood from this new perspective as having a multiplicity of effects and therefore ways in which it may ‘matter’ to world politics. Indeed, this new trend in academic inquiry serves as a point of departure for the work presented here.

This book has three specific objectives. First, it attempts to develop legal and political thought in the interdisciplinary debate between international law and international politics. This task involves being carefully attuned to the limits of such integration, and in particular, acknowledging the pitfalls and caveats that authors from both sides of the divide warn against as imprudent or costly. I argue in what follows that the interdisciplinary project is not only viable, but indeed the only promising route to understanding the politics of international law in states’ foreign policy development. This claim is substantiated largely by demonstrating that constructivism and critical legal theory can provide a range of

1 See generally, Kingsbury (1998); and Koskenniemi (2007a).
important knowledge about the interactive domain of law and politics, and in particular can be aligned to show how states come to develop “creative legal arguments” to solve problems of national interest. These “creative legal arguments” are forms of dynamic juridical discourse founded in both elements of formal legality and international political legitimacy, intended to destabilize both existing legal orthodoxy and the terms of foreign policy debate between states. In developing the concept of creative legal arguments the aim of this work is to furnish the interdisciplinary debate with a new conceptual tool that allows scholars to interrogate a perplexing problem in international legal creation: how should diplomatic historians understand the reasoning and range of choices that structure a policy decision within states’ foreign ministry legal departments? How do lawyers attempt to navigate legal, political, and normative terrains and reconcile overlapping obligations when evaluating international law in difficult cases?

This line of inquiry leads to a second scholarly objective, which is to gain a truer understanding of the practice of international law. In recent years, international legal scholarship’s focus has shifted directly toward empirical examinations to uncover how law is seen through the eyes of its practitioners. But while this move has been welcomed by critics of the interdisciplinary project who complain that international relations scholars consistently fail to understand how lawyers, foreign legal departments, and the international legal system operate, understanding the every-day life of law by its primary participants remains problematic for a variety of reasons. Fundamentally, states carry out legal analysis largely in a secretive manner behind the corporate veil of the state. As Akehurst wrote famously decades ago, “we cannot know what States (or those who speak for them) really think, but only what they say they think.”2 This point complicates how to understand materially structured behavior upon which judgments about the normative contents of international law are made because scholars lack evidence about what states’ genuine motives and intentions

are in carrying out a political or legal practice. But perhaps more critically, when states make public pronouncements about international law in public forums to explain legal validity, audiences are provided with a public justification of circumstances, but not accurate knowledge of what a state’s action may mean.\(^3\) In short, for objective legal interpretations to be comprehended broadly, the diplomatic historian requires knowledge of the intentions behind states’ diplomatic, political, and legal practices as these are conveyed to other actors in international society. And this involves evaluating international law through the lawyer’s inner thoughts and beliefs as embedded within reconstructed domains of action, or working environments. Legal historians must therefore be able to theorize and explain events from a privileged position that provides subjective distance from the facts being assembled and evaluated. As Anthony Carty has recently described, “[t]he international law practice of a country and its other standards, ethical, political or whatever, together make up the ethos which permeates the context within which all officials (legal and political) work.”\(^4\)

Carty’s claim serves as a direct point of departure for the analysis offered in this book. The politics of international law unfolds, is managed, and is discursively organized within these domains of statehood and bureaucratic institutionalism. And yet, even within these boundaries of context and national history the practice of international law is far more nuanced and ultimately complicated than is prima facie understood. For within these overlapping structures, foreign ministry legal officials are also located within the broader domain of what Oscar Schachter famously called the ‘invisible college of international lawyers’.\(^5\) This refers to the community created between those lawyers tasked with carrying out a government’s legal functions and the wider audience of academy-based international lawyers busy critiquing and building the possibilities of law in new and variegated directions. It is this interactive engagement within the invisible college, the range of learning that is exchanged between its subjects, which genuinely constitutes the practice of international law. What follows is an attempt to uncover how this dynamic unfolds within real policy processes as understood by a range of agents engaged in the international legal system.

\(^3\) Carty (2009), at 87.
\(^4\) Ibid, at 88.
As a third objective, this work aims to provide a newly illuminating case study of the process of international law-making over an extended historical time frame. For over forty years, two of the world’s greatest allies and partners, Canada and the United States, have at times been locked in an arduous and tempestuous struggle over the legal status of the Arctic region known as the Northwest Passage, a series of waterways between Canada’s Arctic islands that connect the Atlantic to the Pacific Ocean. The analytic objective of the thesis is to capture this complex diplomatic history between the two neighbors, and in particular to understand both how and why Canadian foreign policy over the Northwest Passage has been subject to policy construction and policy change historically. What explains such transformation, and how have international law and the climates of domestic and international politics structured one another in producing policy outputs? In what follows I argue that understanding this element of change and consolidation in Canadian legal and political circles involves perceiving policy processes through the politics of international law.

The concept of the politics of international law is dealt with in a number of ways in current (inter)disciplinary discourse. Constructivist international relations scholars have introduced the term to refer to the interplay between the relatively autonomous ‘domains’ of international law and world politics. In this vision, there are feed-back effects between these areas depending on the determinacy of law, with politics informing legal judgment and jurisprudential choices, and international law structuring political beliefs, interests, and collective identities about right conduct and legitimate political agency. For constructivists, the degree of legality, or level of law involving a policy choice, gives rise to the type of politics that can and will emerge in political deliberation. By some contrast, for critical international lawyers, the politics of international law is the natural or inevitable condition of the international legal system. For its central exponent Koskenniemi, international law bends towards indeterminacy due to its liberal orientation and basis as a political project structured by the particularist grammar of international lawyers. International law is constituted by its inability to escape political choice even while retaining a veneer of legality through lawyers’ disciplinary reasoning. In modern parlance, international law appears “less as rule or

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institution than as placeholder for the vocabularies of justice and goodness, solidarity, responsibility and - faith.”⁷ In this light, international relations scholars continue only to reproduce this reduction in legal autonomy in their arguments for seeing how law can be made to fit better within institutional frameworks to produce compliance. As a result, law loses its formal character. Scholars in this discipline view treaties as ‘cooperative frameworks’, ‘legalization’ as a policy choice, and regime design as a bulwark against legal formalism.⁸ For critical legal scholars, the politics of international law thus turns on the inability of international legal vocabularies to escape from structural indeterminacy and international law to defend its autonomy against the ‘new natural law’ of regulatory functionalism in global governance.

Both readings of the role of international law in political life must be retained in uncovering historical legal process, I argue here, for each highlights distinctive elements of international law unfolding over time. More specifically, both ideational frameworks on the politics of international law capture the distinctly interconnected nature of law and politics. As Beck has written, interdisciplinary scholarship grounds its thinking in the belief that international law is not only “an ‘object’ that is created and influence by external factors, but also as a ‘subject’ that exerts effects…”⁹ I defend the position here that constructivism and critical legal theory undoubtedly support this proposition, though in different ways. Whether they can be viewed as complementary rather than incommensurable is essential in providing foundational consistency to the interdisciplinary effort, but remains unexplored. As a point of departure in demonstrating both where and why minimal common ground exists, this work anchors itself in a distinct submission made by critical legal theorists. For Koskenniemi in particular, even if international law is structurally indeterminate, it nevertheless follows that international lawyers allow the practice of law in world affairs to continue while concomitantly believing in the relative autonomy of law in common legal affairs and institutional expressions. Constructivists adopt a relatively congruent position in suggesting

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⁸ Koskenniemi (2009).
⁹ Beck (2009), at 23.
that we ought to see states empirically as believing that international law is a separate realm and distinct system within which political issues play out consistently, including in instances involving the use of force. Provisionally, then, between constructivists and critical legal scholars there is a range of theoretical terrain, and similarity in conceptual foundations, that can be examined which draw productively on both approaches to the politics of international law. This includes several elements that appear in extended legal foreign policy sequences.

First, both theories conceptualize international law as more than a structural constraint on a state’s range of policy choices or limit on policy objectives. Constructivists take this line of thought directly from H.L. A. Hart, and go on to point out with Hart that international law, like all law, provides emancipatory opportunities for state agents to realize their wishes given that the law can provide only a minimal form of contractual obligation from which agents may guide their intentions, legal or otherwise, in preferred directions. Second, through constructivism and critical legal theory scholars are furnished with the ability to conceptualize how international jurisprudence, or legal theory, functions as a template for the selection of valid legal norms. Critical legal scholars have adopted this idea from the seminal work of Joseph Raz, who argued that legal theories are really theories of legal systems from which the validity of norms and rules becomes constituted. When jurists engage with a legal theory they are caught up in the process of having theory ‘suggest’ or ‘guide’ their selections of valid legal norms. Third, a further area of overlap involves understanding the ways in which law is a form of communicative reason that allows agents to express and deliberate on legal beliefs and the proper ordering of societies and broader content of justice in political affairs. Law here functions as a medium of exchange that not only can assist in pulling states towards compliance through persuasion, but also as a form of learning that allows through the transfer of legal concepts and forms of legal argument the thresholds of legal validity to be intersubjectively understood. Finally, a deepened interdisciplinary interchange between constructivism and critical legal theory also yields knowledge about certain forms of strategic legal forms states use to defend difficult policy circumstances. Elements of these theories lend themselves to reconstructing new legal categories, such as the idea of creative legal arguments, developed in the work here.
However, while the politics of international law and foreign policy decisions reveal many interconnected elements of politics and legal processes, how the terms of compliance decisions are theorized remains problematic. This is exemplified in instances that can be termed ‘complex compliance decisions’, where states invariably attempt to significantly the definition of compliance in a given instance. The challenge of precisely understanding state evaluations of this nature has been sharply put by Alvarez:

> for all the attention on quantifiable fact, the new empiricism often appears oddly disconnected to the real world of states - where actors undoubtedly respond both to threats and inducements, to modes of discourse as well as hegemonic threats, in contexts where their interactions alter their perception of interests (as constructivists claim).

This work demonstrates that uncovering the strategic calculations and normative evaluations behind complex compliance judgments is undertaken with most efficiency through the use of eclectical theorizing. Comprehending the political motivations, social linkages, and legal commitments that inform a state’s decisions about international law requires borrowing the central tenets of the major holistic theories of law and politics. This involves adopting concepts of power and self interest from legal realism; the idea of reputation from legal rationalism; and the appreciation of the role of obligation between states as set out in interactionalist theory. When taken together, these elements provide theoretical sophistication and depth to any understanding of complex compliance decisions by states. They will all be drawn upon in this book.

In what follows, I defend a position centered upon analytical eclecticism, one that is orientated toward borrowing and re-combining productive elements of existing theory. The reasons for this eclectic approach to theorizing are straightforward. In cases involving diverse elements of international law, eclecticism gets around the problem of forcing a narrow range of theory to explain a wider domain of empirical events. Specifically, eclecticism lends itself to the idea that the aim of research must be to let the problem under evaluation guide the selection of theoretical approaches useful for its resolution. It does not allow theory to dictate the terms of engagement with research puzzles. Such a position

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follows from a belief that the interdisciplinary project being built between law and politics needs to be humbled by its theoretical limits and re-constituted as an area which progresses through the pragmatic use of theoretical re-combination.

The merits of eclecticism will be here measured against its ability to evaluate the case of the Northwest Passage in Canadian legal policy. A law of the sea dispute, this case provides rich, largely unexamined terrain upon which to theorize and contribute to the new empiricism in international law. The Northwest Passage waterways are intimately tied to the current issues of the Arctic region, the subject of resurgent interest in recent years due to climate change, melting sea ice, and the scientific uncovering of vast levels of natural resources. However, the history of the Northwest Passage is long, and the forty year policy dispute between Canada and the United States itself is extensive and diplomatically acrimonious. It has been a divisive exchange at many historical junctures, one in which issues of Canadian identity, American freedom, the idea of territoriality, the politics of sovereignty, ecology, and international law have combined to produce a tepid but manageable diplomatic outcome.

The Northwest Passage has been conceptualized for centuries through its majestic landscape and mariners’ narratives centered on nature’s hostility, isolation, madness and death. Indeed, the Arctic waters are a site of unimaginable beauty where nature exists in its rawest, most challenging form. But the Arctic has also represented for centuries, and indeed since the 1576 voyage of Martin Frobisher, a route from Europe to Asia, the “Arctic Grail” of transit that carries with it the possibility to reduce distances between the world’s sea ports and provide new wealth and prosperity.11 Numerous nineteenth Century quests for the “Arctic Grail” resulted in unimaginable tragedy. Such was the case for John Franklin and his crew, who in 1845 died a slow and frightening death in the ice, despite the launch of several rescue missions to save them from that fate. The first successful transit was finally completed by Roald Amundsen in 1906, a trip that lasted three years, including two winters which pinned the ship in the ice and tested the endurance and resolve of all aboard. Indeed, it is the promise and danger of the Arctic ice that continue to capture the imagination and dictate the

11 See Burton (1988).
terms of humanity’s engagement with the region. For centuries, the ice has been considered
as part of the land linking the Arctic archipelago into a relatively harmonious whole,
providing a frozen environment within which the ancient civilization of the Inuit continue to
chart their course with nature and the Canadian state.

But things are changing on the Arctic’s horizon. First, the ice is melting at a quickening
pace, even though it has existed for perhaps fourteen million years. Over the previous thirty
years, sea ice cover has reduced by 15 to 20 percent, and the existing ice continues to thin at
variable rates. The extent of summer sea ice in September, 2009, represented the third lowest
total in the past thirty years, with the lowest two being the two years prior.12 There is what
scientists refer to as a ‘multiplier effect’ being generated. The melt spirals when, not only
longer summers prevent new ice from forming, but older, multi-year ice accumulated over
decades slowly erodes. Thus, the overall time for thicker ice to reconstruct itself through the
winter is consistently restricted. September, 2007, was the first time in memorable history
that the Northwest Passage was free from all ice from the east to west coast. Many scientists
now speak of the Arctic ice being caught up in a ‘death spiral’ approaching imminent demise,
and forecast that the Arctic might be ice-free for most of the year by mid century and
temporarily ice-free in late summer as early as 2013.

Amid a growing appreciation of the Arctic’s new climate is the emerging realization of the
Arctic’s true mineral and energy wealth. Estimates suggest that energy resources in the
Arctic represent perhaps 25% of the world’s undiscovered oil and gas reserves. The United
States Geological Survey (USGS) recently concluded with ninety-five percent probability
that there are forty-four billion barrels of oil and 770,000 billion cubic feet of natural gas
(770 trillion) in the Arctic.13 Much of the oil is believed to be within United States’
jurisdiction north of Alaska, while the gas is probably largely Russian. As a result, numerous
international companies are investing heavily in unlocking petroleum from off-shore areas,
and Arctic states are moving to map their extended continental shelves in preparation for

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filing submissions under the UN Law of the Sea Convention (UNCLOS). Underway is not, as is typically cast in the media, a ‘clamor’ or ‘scramble’ for the Arctic and its resources, but a concerted effort by all Arctic states and new interested actors such as the EU and China to advance their interests within the region. Indeed, at the recent May 2008 Ilulissat Declaration in Greenland, the five central Arctic states declared their intent to have all matters of the continental shelf solved by the legal rules contained with the UNCLOS legal framework, even though the United States has yet to ratify the treaty.

However, existing disputes about Arctic affairs continue. And one of these is the right to control entry to and activity through the waterways of the Northwest Passage, a five part series of waterways that run through the Canadian archipelago adjacent to the Arctic Ocean. As the Arctic ice continues its reduction, the possibility of shipping routes moving into the Arctic becomes more likely due to the costs savings accrued from not having to transit the Panama Canal. At some point a situation may well materialize where the United States and Canada will have to resolve the regulatory dispute surrounding control of the Northwest Passage. How this resolution will be pursued, on what basis the question will be answered, and in accordance with what bodies of law, remain uncertain. Such efforts may take the form of a final negotiation structured around an Arctic shipping regime, or litigation before an international court or arbitral tribunal. Either way, the diplomatic and/or legal result will emerge from the complexity of the policy processes that have structured the dispute for the last forty years, all of which have been subject in varying degrees to the politics of international law.

Controversy over the status of the Arctic waters began formally in 1969 when the United States’ vessel the Manhattan, owned by private shipping interests, decided to test the waters of the Northwest Passage to see whether new oil discoveries off the east coast of Alaska could be shipped to eastern United States’ ports. The newly elected Canadian Prime Minister, Pierre Trudeau, was caught in a bind at the time, both in legal and political terms.

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14 For legal appraisal and trends within continental shelf claims, see McDorman (2009).
The North was then, and is even more so today, a central component of Canadian collective identity and national heritage, owing to the Inuit scattered throughout the archipelago and the folklore surrounding the history of maritime transits through the interconnected webs of ice and land. Canada responded to the United States measure in 1970 with a novel piece of domestic legislation, the Arctic Waters Pollution Prevention Act (AWPPA), which avoided a newly asserted Canadian claim to sovereignty over Arctic waters, but did provide Canada with the right to exercise jurisdiction over pollution prevention and ship design up to 100 miles beyond the coasts of the Arctic archipelago’s 19,000 islands. The legislation was considered illegal by many at the time, but was also seen by numerous audiences as reasonable and legitimate in light of the need to re-calibrate the unequal balance between the rights of shipping states and the environmental interests of coastal states. Canada then spent the early part of the 1970’s attempting to institutionalize in international law and non-binding agreements its Arctic pollution prevention legislation in order to provide a layer of legal validity in consolidating its claim to sovereignty over Arctic waters. During this period, Canada also claimed the Arctic waters as internal waters, or areas of sovereign possession, under the principle of historic title. Because the criteria for assessing claims to historic title was in the 1970’s difficult to clarify and assess, which remains the case today, Canada believed that through the use of historic doctrine it had a possible basis in international law to ground its sovereignty claims. Concomitantly, as support from many states continued to materialize behind the need for international law to reflect in some capacity the Arctic legislation on environmental grounds, Canada sought to have the AWPPA codified at UNCLOS from 1974-1982.

After lengthy negotiations, principally with the United States, but also the Soviet Union in a three party effort, in 1976 Article 234 was constructed, validating in international law the AWPPA and giving Canada the ability to administer over ice-covered areas for the purposes of environmental protection. For Canada, the question of its claim to sovereignty was put on hold as the UNCLOS treaty became finalized and the United States and Canada engaged in consensual litigation at the International Court of Justice over the Gulf of Maine. In 1985,

however, this situation once again changed. The United States sent an American Coast
Guard vessel, the *Polar Sea*, through the Arctic archipelago. The implications of the voyage
were taken by the Canadian Department of External Affairs as complicating under
international law Canada’s case for sovereignty over Arctic waters. In response, in 1986,
Canada enacted straight baselines around the Arctic, the effect of which for some
international lawyers was to create a zonal area where Canada might be able to treat the
Arctic waters as tantamount to internal waters subject to complete sovereignty. The United
States and the European Community lodged immediate protests, further calling into question
this final act in Canada’s formulation of its legal case.

The thesis presented here is concerned with interpreting and understanding from 1968-1989
the historical processes structuring these events in the Northwest Passage. More particularly,
it addresses the following questions: In what ways have international law and domestic and
international politics contributed to Canada’s policy? What explains why Canada’s policy
over the Northwest Passage has been the subject of change, and how has this been brought
about? As noted, the argument presented is that it is the many areas of the politics of
international law which have driven, consolidated, and ultimately forced change in Canada’s
Arctic policy over the past forty years. It is the interplay between the legal and political
domains, along with the flexibilities and structural capacities of international legal
discourses, which have guided Canadian policy over time. In arriving at these conclusions, I
suggest that in many ways the case of the Northwest Passage must be understood as a story
of international politics in which the role of international lawyers interacting within a variety
of ideational structures is paramount. Canada’s Arctic history is best explained as a series of
engagements where Canada’s greatest legal minds grappled with their international brethren
for judicial authority. The Northwest Passage is thus an example of international lawyers
within the broader international legal college defining the rules for the Arctic while being
cought simultaneously within a series of political, legal, and diplomatic domains. It is a case
in which international law and political necessity could not be more intertwined in producing
legal reasoning and the rules to guide the conduct of the parties.
To be sure, many political and historical authorities on Arctic matters may be perplexed by these statements. For it is often assumed that international law mattered little to the case and in particular to Canadian thought and strategy when constructing its foreign policy. This argument turns principally on the belief that Canada acted unilaterally in 1970 in contravention of international law in constructing the AWPPA. Canadian officials were crafty in that they were able to shroud a claim to sovereignty over Arctic waters by wrapping its legal defense in a justification centered upon the necessity of legislating for environmental purposes. Canada had a weak legal case and used a political argument grounded in moral obligation in light of outdated international rules to buy time. The intended result was to let new international law reconsolidate and be rewritten in Canada’s favour in the early phases of pre-codification prior to UNCLOS. Similarly, when Canada enacted straight baselines around the archipelago in 1986, it could have done so years earlier if, as assumed by many Arctic experts, Canadian officials believed that the application of baseline law to the Arctic archipelago had already crystallized in customary international law. External political intervention therefore caused a policy response in 1986 rather than international law playing any constructive or explanatory role. As I seek to show, both of these points are somewhat true, but narrow in their understanding. Central to comprehending the case of the Northwest Passage are the multifaceted roles that international law played at various historical points, including these two critical junctures. Indeed, while the two occurrences are pivotal in explaining policy trajectory and sequencing within Canadian thought, they are again examples that are critiqued strictly on the basis of whether legal compliance was carried out. As is demonstrated, the questions of compliance are central to understanding Canadian policy in the Arctic and add depth to interdisciplinary thought in this area. However, the role of international law in these compliance decisions is largely misunderstood, and the range of effects international law had in other areas of policy formation has yet to be fully explored. The thesis seeks centrally to fill these gaps in its empirical, analytic and theoretical contributions.

To date, it has been written and assumed that what has driven Canadian policy in the Arctic is simply that of an ‘American threat’, the existential uncertainty constituted by or derived
from Canada’s loss of recognition, governing authority, or legitimate control over the Arctic archipelago, understood in political rhetoric as a loss of sovereignty. Canadian policy is sequentially driven, so the argument goes, in that the United States takes action to unsettle the Canadian claim of sovereignty over Arctic waters, followed by a Canadian reaction combining a variety of diplomatic and legislative approaches. As I demonstrate here, there is undeniable truth to this claim that a perception of threat gives rise to alterations in Canadian policy. However, the underlying structure of events is much more variegated than such a parsimonious reading would prima facie suggest.

The orthodox explanation in the literature of the United States threatening Canadian sovereignty or collective identity(ies) by running maritime vessels through the Arctic is, in reality, tied to a larger concept of threat. Canada is threatened by not only a loss of sovereignty and legal control, but Canadian politicians forced to make decisions in the Arctic are driven in addition by a range of fears. To ‘lose the Arctic’ on one’s political watch would be ruinous in Canadian political history, tantamount to losing a large swath of territory. Indeed, that the Arctic waters are the ‘territory’ of Canada has largely become embedded in the domestic psyche, not only because the sea-ice represents a tangible territorial entity upon which ‘peoples’ carry out livelihoods and imagined communities are considered connected, but also because the maps of Canada illustrate what appears to be a contiguous land mass extending through to the summit of the Northern polar region. The Arctic waters are considered to be ‘geographical territory’ in Canadian public consciousness, whether rightly or wrongly, legally or ethically. As a result, this fear of losing the Arctic to the Americans or other internationals represents an unshakable passion in Canadian electoral politics far beyond concerns that arise in relation to the topic in the Canadian Department of External and (later) Foreign Affairs.

Anchored within this overarching concern is a second fear permeating Canadian thought for decades. Canadian officials concerned with the case have always understood that, for a

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17 See Griffiths (1987); Honderich (1987); Roth (1990). Franckx (1994: 106) in his seminal work has written that “one can state that the Canadian policy with respect to the legal regime of the Arctic water expanses has been consistently guided by one and the same moving vector over the years, namely the action of foreign individuals in the area.”
variety of historical, political and legal reasons, Canada’s legal claim is both controversial and perhaps not entirely valid under international law. In stating that the case may not be ‘entirely valid’, it should be apparent that the conditions for validity in the case are very uncertain, largely owing to the fact that over the past forty years the Canadian case has appeared weak and riddled with contradictions, to being at times largely, if not entirely, legally acceptable.\textsuperscript{18} Positive legal appraisal has therefore oscillated considerably over the forty year period. Due to the uncertainty of the case, Canada has been forced to learn through a range of discursive interactions between international lawyers how to accomplish the task of making its sovereignty claim rest on a sound legal basis. As legal critique has mounted from a variety of areas, Canada had been presented with alternative perspectives intended to both problematize and add consistency to the case. Once this dialectic became understood by Canadian officials, elements of these debates were adopted in order to bring about a more accommodating reading of international law as it relates the Arctic to the broader framework of the law of the sea. But the inconsistencies in Canada’s legal case have been unshakable to many audiences. This hesitancy to rest the case as a result of learning the problems of legal validity, coupled with the threat of political embarrassment and historical disrepute should the Northwest Passage be ‘lost’, have both structured and driven forward Canadian policy adjustments over the past forty years. The threat Canadian officials encounter is therefore translated into distinctive types of fear: a fear of territorial loss or geographic surrender; public ridicule and historical chastisement; and political and legal ineptitude associated with failing to discharge administrative legal obligations for an ancient and vulnerable Northern people. In no uncertain terms, losing the Arctic would be only a short distance behind for many Canadians of losing Quebec (and would be considered a serious loss by many Quebeckers, too). Having theoretically ‘won’ the legal case over Quebec succession in 1998, to lose to the United States at an international court or tribunal would be a historic loss of unimaginable proportions.\textsuperscript{19}

\textsuperscript{18} See, for example, Rothwell (1993).
However, this work will not dwell at length on the concept of fear and its relation to Canadian thought. ‘Fear’ as an independent variable is most difficult to prove empirically and replicate analytically, as are all emotions not directly cited and explained by those to which they are purportedly attached. Rather than going as far as recent scholars in international relations in claiming that cognitive processes such as motive cannot be known, I adopt an alternative approach and take the element of fear as a given in an interpretive history of the Northwest Passage. At many points, the thesis demonstrates how fear is centrally associated with the politics of international law in an explanatory sense, both producing it, while also being the product of it. But fear is not a central point of theoretical or interpretive departure here. I also assume that it is largely the case that external events, namely United States’ interventions in the Arctic on several occasions, are the primary causal factors giving rise to the dynamics and processes of Canadian policy change. Moreover, much commentary examining the origins of Prime Minister Pierre Trudeau’s policy decisions of 1969-70 maintains that Canadian Arctic policy was based on a “reaction” to aggressive American action. Because Trudeau was concerned with constituting and consolidating a national identity during a fragile political period, unilateral action akin to Trudeau’s 1970 policy response to the *Manhattan* voyage across the Arctic was certainly possible.

The argument presented here does not diverge widely from these conventional claims. While it is undeniable that Canadian policy was reactive rather than proactive in its responses to United States’ Arctic policy in 1969 and 1985, it is also possible that the political vision and in some sense ‘radical enlightenment’ of Trudeau’s ‘nationalized’ foreign policy created the possibility for the 1970 Arctic waters legislation to materialize in Canadian legal deliberations. Depending upon how ‘political vision’ is interpreted as a representation of idiosyncratic political beliefs, a case can be made that Trudeau’s revolutionary thought contributed to the eventual trajectory of Arctic policy and to Canada’s subsequent shift towards an instrumental use of international law in the 1970s. This is in many ways the orthodox reading of Canadian foreign policy history in relation to its international legal development. However, I argue in what follows that this historical interpretation is limited

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20 For an engaging probe into the idea of fear, however, see Bleiker and Hutchinson (2008).
and in many ways mistaken in explaining why Canada adopted its novel role for international law in the early 1970s. It was, more centrally, the legacy of the Northwest Passage policy interaction of 1969-70 which forced Canada down a path towards creative legalism and jurisprudential anxiety, providing it with the ability to reform an international legal identity as a state traditionally governed by classical ideas of international legal positivism.

Beyond this historical revision however, I am additionally interested in explaining several more remarkable and intricate factors that describe Trudeau’s ability to produce a particularly creative piece of legal policy in 1970. As the thesis outlines, Canada’s Arctic policy in 1969-70, in response to the Manhattan voyage, should be seen as a creative legal argument. These forms of jurisprudential rhetoric are examples of strategic legal techniques used by states when faced with difficult policy situations. Creative legal arguments have four central ontological characteristics: 1) the meditative capacity of legitimacy discourses to supplement the validity claims of arguments in law; 2) the use of overlapping legal regimes to unsettle the question of what a case is representative of, and shift the centrality of legal principles to solve cases; 3) the use of interstitial norms to fill gaps in legal arguments; 4) and the adoption of progressive forms of jurisprudence that ‘fit’ with a state’s international legal identity. I argue that we may expect these types of legal arguments to emerge when the fundamental institutions of international society are the subject of significant contestation. 1968 was an historical moment when Canada was furnished with this window of possibility to successfully deploy such an argument. This description sets the stage to answer the primary constitutive question driving this thesis: how was it possible for Canada to advance its legal position in the policy formulation of 1969-70?

From the position of history, when Canada acted creatively with international law in 1970 and attempted to frame the existing law of the sea as an ancient relic, a series of ‘rusty chains’ which ignored the risks of ocean pollution and contradicted the dictates of ocean science, Canada emphasized the relationship between territory and water and followed a pattern unfolding for some time. As D.P. O’Connell explained, there emerged in the Nineteenth Century a fundamental distinction between dominium and imperium. He writes:
Territory ceased to be regarded as something owned and came to be regarded as a spatial area within which the faculties of sovereignty could be exercised. Police powers could be exercised outside this spatial area to the extent international law permitted, and hence jurisdiction ceased to be spatially coterminous with territory. It now became possible to speak of “jurisdiction” over coastal waters without imparting the notion of property or territory to justify it.21

This was very much what Canada was arguing in 1970 should be considered legitimate in the Arctic context. Canada would claim jurisdiction in the Arctic on a functional basis, an approach that made no express or corresponding claim to whether the waters under consideration could be considered as sovereign or internal territory. Sovereignty could now be classed as ‘relative’ in ‘special areas’, and as a result, the extended boundaries of oceans claims moved further outward in deepening what became the final rush of the ocean enclosure movement. In 1970, Canada ushered in and deepened a new phase of the historical demarcation between land and water, territory and administrative authority, somewhat falsely impressing upon the world and the United States in particular that its Arctic legislation made no specific designs towards a claim of sovereignty. In Canada’s formal rhetoric, domestic law sought only to serve as a necessary placeholder against which current international law had to be both protected and measured. This thesis sheds light on whether Canadian officials were speaking genuinely in attempting to provide domestic legal capacity over Arctic waters without attempting by fiat to claim sovereignty in the region.

As mentioned, in many ways this thesis is an explanatory narrative about the legal and political practices that many of Canada’s greatest international legal minds have engaged in. They are the late Alan Beesley, Ivan Head, Pierre Trudeau, and Paul Martin Sr. and also, among many, Alan Gotlieb, Len Legault, Donat Pharand, and Donald McRae. The thinking and volition of these jurists represents in the clearest sense the law and legal practice in action through the creative process of norm construction and legal reasoning. It is these jurists, rather than the international legal rules within which they interact, that are the “law’s nucleus”, exercising their interpretive discretion and deploying political values when possible and appropriate.22 In being saddled with identity-driven obligations, bureaucratic balancing

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21 O’Connell (1971), at 325.
acts, and complex policy and legal environments, these jurists illustrate an archetypal case of
the drama being played out within the domain of the politics of international law, an area in
which the authority between Canadian non-governmental international lawyers and officials
in Canada’s External Affairs Ministry became blurred and overlapping.

Outline of the Thesis

The thesis is organized into nine chapters. Chapter two outlines the theory for explaining and
interpreting extended foreign policy sequences. There are two major claims made in
justifying this approach. I first construct a broad typology of the primary functions of
international law in political affairs, derivative of classical and contemporary theory, to show
generally how law operates in particular conditions. In addition to drawing on many
prominent jurists, I set out the theory of creative legal arguments, rhetorical devices used to
secure difficult policy. Second, understanding the range of effects of law over time within
foreign policy episodes involves using certain elements of holistic interdisciplinary theories
to explain, in particular, compliance decisions. Here I defend the position that analytical
eclecticism for international law is critical to this end, and that the concepts of power,
reputation, and legal obligation, from the major theories of realism, rationalism, and
interactionalism respectively, must be retained.

Chapter three focuses on the empirics of the year 1968, and the contextual frameworks
within which the initial Canadian policy was eventually shaped. I show to what degree the
argument can be made that the fundamental institutions of international society existing in
1969 (when the Arctic policy was constructed) were the subject of contestation.
Fundamental institutions can be considered the architecture of international society, and
consist of hierarchical structures, including the moral purpose of the state, norms of right
conduct and just process, and the twin pillars of international law and multilateralism. In
unpacking these conditions, the chapter shows how and why the nature of public
international law, the law of the sea and marine pollution regime, and the moral purpose of
the state existed in a position of fracture and uncertainty, or general contestation. I
complement these institutional areas by revealing the strained nature of the Canadian-
American bi-lateral relationship and Canada’s Arctic legal assumptions at the start of 1969. The intent is to illustrate the centrality of institutional context in understanding both why and how states make decisions grounded in the politics of international law. Moreover, the analysis has the broader aim of providing the empirical foundations to evaluate the larger constitutive question: how was the 1970 creative legal argument made possible?

Chapter four sets out in detail how Canada’s Arctic policy, in anticipation and response to the Manhattan voyage, was constructed in 1969-70. It reveals the complexity of judgments Canadian policymakers faced in wrestling with international law’s requirements for compliance, and why certain legal approaches were adopted, including Canada’s choice of policy based upon an environmental logic grounded in functionalism. The chapter introduces new archival documents that place Canadian international legal thinking into sharp relief as lawyers weighed Canada’s response options to the American legal challenge in 1969. I also chart the sequence of Canada’s policy as it moved from a position straddled with uncertainty and political strain to an outcome grounded in environmental protection and ultimately political and legal functionalism. The final construction and deliberations surrounding the Arctic Waters Pollution Prevention Act (AWPPA) of 1970 are set out to clarify the historical record on this pivotal event in Canada’s international legal history.

Chapter five is theoretical. It seeks here to evaluate several aspects of international law that unfolded over the period of 1968-70. First, what does Canada’s creative legal argument reveal constitutively in relation to its generic type? Second, what explains how Canada’s policy choice was made possible? This constitutive question is of considerable importance. The theoretical contribution of institutional context set out in chapter four turns on the success of describing whether the ‘how possible’ question of the 1970 policy is properly theorized, and whether creative legal arguments can emerge under such conditions of contestation. Third, how can the many roles of international law in the period be best explained, and can we think about Canada’s inherently complex compliance decision made over the course of many months? This evaluation involves unpacking the specific contents of the politics of international law during the 1970 policy sequence. The aim here is to show the interactions associated with the concept itself, but also to demonstrate that the history of
Canada’s development of international law during the period is somewhat misinterpreted. To recall, it was the 1970 policy of the Northwest Passage which gave rise to Canada’s use of jurisprudential flexibility in its new international legal identity, rather than the novelty of Trudeau’s foreign policy which allowed Canada to move beyond its link to British legal positivism.

Chapter six examines the policy trajectory from 1970-1973, focusing on how Canada continued to learn through engagements with many of the world’s leading jurists about the limits of its legal case. This phase was one in which Canadian officials attempted to persuade the world of Canada’s legitimate intentions and progressive motives to alter the antiquated doctrine of freedom of the high seas. Constructing the international law of maritime pollution was essential in changing the historical current once again between the closed and open seas doctrines that had been shifting since the early debates of Grotius and Selden four-hundred years prior. Though facing a seemingly implacable set of international legal audiences, Canadian officials formed perhaps Canada’s first cohesive international legal college, merging academic and governmental lawyers in an attempt to provide authority to the Arctic legislation and move its contents into the international legal domain. Canada made great strides in making its legislation central to the maritime environmental debates of the day and the multilateral forum more generally in the lead-up phase towards the UNCLOS in 1974.

Chapter seven sets out for the first time empirically the negotiating process for Article 234 by evaluating Canada’s interests, beliefs, and legal and political strategies through a series of primary documents. This interpretation is complemented by the perspectives of key American officials involved with the negotiations at UNCLOS, and both Canadian and American officials’ reflections on the third party to the negotiations, the Soviet Union. Following several years of complicated debates at the highest levels of political office, including interventions by President Ford and Prime Minister Trudeau, Article 234 was constructed, providing the right for states in ice-covered areas to protect the oceans on environmental grounds to a distance of 200 nautical miles. Article 234 was both a policy
success for the Canadian delegation at UNCLOS and a significant security provision in Arctic affairs, as understood by all parties during the Cold War.

Finally, chapter eight explains how Canada’s final policy change and policy sequence was both generated and consolidated. From 1977-1988, Canada’s central Arctic legal specialist was Len Legualt in External Affairs, who worked in close consultation with Canada’s Donat Pharand, perhaps the most eminent Arctic international lawyer. By the early 1980s it had become apparent that Article 234 contained significant measures of legal ambiguity in its textual implications, and due to increasing transit in the Arctic Ocean owing to intensified resource extraction Canada had to make a definitive move towards claiming the Northwest Passage as sovereign territory beyond the rights contained in Article 234. The chapter details how these events materialized, in addition to highlighting the thinking behind the idea to draw straight baselines around the Arctic perimeter, the legal effect of which could facilitate Canada’s internal waters, or sovereignty claim. Legault and Pharand worked closely in the mid 1980s, and were brought together in Canada’s final policy challenge in 1985 when the United States’ vessel the Polar Sea was sent through the Northwest Passage. The 1986 policy response is explained with specific attention paid towards the issue of straight baselines and the nuances of the politics of international law surrounding this judgment. Chapter nine provides conclusions to the theoretical and empirical claims made throughout.
Chapter Two: Uncovering the Politics of International Law

What various roles does international law perform in world politics? How does international law matter to political deliberation and policy choice? How does international work within political affairs? These central questions continue to guide the interdisciplinary debate between international relations and international law, moving it beyond the horizons of compliance orientated research and into more specific understandings associated with legal processes. One such area includes understanding how to conceptualize and interpret the politics of international law: the movement of states’ discourses and policy between the political and legal realms; the use of law as a normative template or authoritative political weapon; and the reliance on political values to guide legal reasoning. The politics of international law are thus a broad domain of inquiry interlinked to the fundamental question of how law works in all areas of social and political life.

There is, however, also a compelling case for both understanding and theorizing a particular set of interactions associated with the politics of international law. These are the dynamics embedded within long foreign policy episodes structured by international legal components. In such policy sequences, states often engage in a variety of practices that incorporate and display a range of different effects and uses of law including, inter alia: complex compliance calculations, extended law making processes, repeated public engagements with legal interpretation, and patterned interactions in which states learn what international law requires in meeting thresholds of legal validity. These are separate instances of international law reacting with political deliberation and policy choice, and in turn, being changed by it. However, the ontology of extended foreign policy sequences bears further examination. As developed in this work, these phenomena are temporally bounded policy processes structured upon a particular subject matter in law. In other words, the constitutive parts of international law and foreign policy, the range of interactions caught up with the politics of international law, are part of a larger historical policy process unfolding over time. The puzzle that guides research orientated towards explaining and interpreting these policy sequences is, how can interdisciplinary theory be used to uncover the majority of international law’s effects on
politics over time? Moreover, what are the limits of theoretical approaches that attempt to explain the capacity of law to structure political affairs?

I argue here that understanding and explaining extended foreign policy sequences of this nature involves examining many of the primary roles that international law performs in politics, functions that are derivative of classical and contemporary legal thought. These ideas stem from the work of venerable authors of jurisprudence, but also components assembled from constructivist international relations theory and international critical legal theory. As this chapter demonstrates, the primary functions of law in foreign policy sequences are constituted by four features: 1) the constraint and enablement of international law on policy choice; 2) the role of international jurisprudence in structuring legal norms and the purposes for which law is directed; 3) the law’s role as communicative discourse and method of learning legal validity; 4) and the use of creative legal arguments in achieving difficult strategic objectives. To be sure, these four legal forms are hardly exhaustive of all of the roles of international law in political affairs and foreign policy. International law has been shown to ‘work’ in various other ways. Customary international law and treaty law, for example, both serve to ameliorate international externalities, solve cooperation problems, generate coordination, produce information, and fulfill credible commitments between states. Moreover, international law at times provides a useful device for resolving domestic political dilemmas and binding future generations to historically conditioned norms. Hence, the framework outlined here is modest in attempting to both partially consolidate recent scholarship in the interdisciplinary debate, flagging many of its most promising elements, while theorizing these primary forms as a basis from which to evaluate how international law has effects in foreign policy episodes.

The most promising approach to handling the politics of international law in episodes where legal effects vary is to be opportunistic with existing theoretical developments. Along with the elements of jurisprudence from Hart and Raz that have been incorporated into international legal theory, producing an aggregated set of functions that explain the politics of international law also involves borrowing extensively from critical international legal
theory and constructivist international relations theory. Koskenniemi\textsuperscript{23} in particular, and others such as Beckett\textsuperscript{24}, Simpson\textsuperscript{25}, Klabbers\textsuperscript{26}, Scobbie\textsuperscript{27}, Kennedy\textsuperscript{28}, Kratochwil\textsuperscript{29}, Byers\textsuperscript{30}, Reus-Smit\textsuperscript{31}, and Kritsiotis\textsuperscript{32} have all enlarged the theoretical domain between these approaches and contributed in some form toward explaining how the politics of international law can be understood within legal practices.

From the perspective of critical legalists, Koskenniemi has brought to light several conceptual innovations that contribute to understanding the functions of law within world politics. These include, the dynamic nature of legal arguments, the role of open ended interpretive legal structures, and the shifting and fragmented nature of legal regimes as these apply to historical events and episodes. Beckett has substantially developed Raz’s insights about the role of jurisprudence in selecting for valid legal norms, and specifically how this process interacts with debates concerned with the proper ontology of customary international law. Scobbie’s work reveals the indispensable role of theory in guiding legal conduct and thought, explicating how legal theory becomes embedded in individual’s views of the world and relations between states. Kennedy highlights the many ways that international legal vocabularies become intermeshed with political dialogues which render the autonomy of international law radically uncertain. And Klabbers, among many accomplishments, has flagged how legal rules function and the distinct reasons for being cautious about the interdisciplinary project.

Similar theoretical productivity has emerged from the constructivist approach. Kratochwil and Kritsiotis have drawn attention to how international law is used and reasoned with over historical periods and within jurisprudential debates. Byers’ research illustrates how states

\textsuperscript{23} Koskenneimi (2002); (2005); (2007a); (2007b); (2009).
\textsuperscript{24} Beckett (2005).
\textsuperscript{25} Simpson (2001); (2004).
\textsuperscript{26} Klabbers (2005); (2006).
\textsuperscript{27} Scobbie (2003).
\textsuperscript{28} Kennedy (2000); (2006); (2007).
\textsuperscript{29} Kratochwil (1989); (2000).
\textsuperscript{30} Byers (1999); (2000); (2005).
\textsuperscript{31} Reus-Smit (2003); (2004).
\textsuperscript{32} Kritsiotis (2004).
engage in intentionally ambiguous legal argumentation to render plausible future legal judgments. And Reus-Smit has outlined a theory of the politics of international law, demonstrating through a constructivist understanding of the political how interrelated movements in policy arguments shift between legal and political domains. In short, many of these ideas from classical legal theory, critical legal theory, and constructivism contribute to explaining international law’s primary functions within foreign policy sequences. I attempt in what follows to add to the interdisciplinary project the concept of creative legal arguments in order to deepen our knowledge about the types of legal arguments deployed by states in policy interactions.

However, getting at complete explanations and deep historic interpretations also involves further theoretical borrowing, a recent innovation in the social sciences known as analytical eclecticism. As a venue for moving methodology and theory building forward in a pragmatic way, eclecticism draws on the prominent authoritative elements of existing theory and grafts these into broader historical investigations. What is lost in parsimony is gained in substance in allowing a greater range of historical effects to be illuminated. Indeed, progress is made not by looking simply for confirmation of one's own favorite theory but in seeing the field more broadly given that other theories have productive concepts to offer. Such is especially true when one realizes that law-making and interactions with law are long-term processes not reducible to particular instances which a particular theory might be able to account for independently. The need for eclecticism therefore resides in realizing that real-world problems are ‘messy’ and complex phenomena which require a range of tools to guide problem-solving and historical recovery.

Yet the central question is what to borrow from existing theory, and what cost to theoretical consistency is paid as a result? If research is to properly focus upon compliance questions within broader aims of understanding international law’s effects, what are the tradeoffs involved in being pragmatic about problem-solving when uncovering historical cases? There are good reasons to be skeptical about the claims to holism and ‘comprehensiveness’ made by realism, rationalism, and interactionalism in their contemporary expositions, propositions
expressly made by their authors. The works of Goldsmith and Posner\textsuperscript{33}, Guzman\textsuperscript{34}, and Toope and Brunnee\textsuperscript{35}, all postulate that their approach can explain \textit{in toto} how international law works, functions and changes behavior within international affairs. Such broad claims are, however, beginning to be chipped away, and in the case of realism, quite significantly. Nevertheless, the aim here is not to argue and make the case that holistic theories cannot ultimately meet the criteria of ‘completeness’. While reasons for such suspicion are drawn out in later parts of the chapter to support the case for theoretical enlargement, the broader objective put into practice in what follows is to retain certain insights of the major interdisciplinary theories. In particular, theorizing extended foreign policy sequences requires drawing on realism’s explanations for the relationships of international law to power and self-interest, rationalism’s treatment of reputation in changing payoffs in compliance decisions, and interactionalism’s concept of obligation as it gives rise to law-making and compliance. In particular, adequately theorizing compliance requires the insights from major interdisciplinary theories given their overwhelming attention devoted to the subject.

It bears noting, however, if there is skepticism about the ‘completeness’ of any single theoretical school, there is mutual skepticism directed back at those reaching across the law/politics divide. Such disenchantment is focused upon a position of theoretical proof and the problems that arise from a vantage point of understanding epistemic knowledge from external domains. Major authors in the field have long and frequently noted that law and politics are simply incommensurate disciplines, as most international lawyers do not ask the types of questions that engross international relations theorists, but address only what the law says under the principle that “there is no specific competence of the lawyer beyond the law itself.”\textsuperscript{36} Other lawyers maintain that interdisciplinary work strips the law of its autonomy and validity, either on the grounds that it promotes international law’s structural bias for forms of liberal politics, or because interdisciplinary engagement reflects a \textit{scholarly need} to

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\textsuperscript{34} Andrew Guzman, \textit{How International Law Works} (2008).
\textsuperscript{35} Jutta Brunnee and Stephen J. Toope, \textit{Legitimacy and Persuasion in International Law} (2010), forthcoming.
\textsuperscript{36} Simma and Paulus (1999), at 306. See Kelsen (1945), pp. 29-45.
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make the law fit hegemonic and managerial compliance patterns. Still others note the
tendency towards seeing neighboring disciplines in flat, unidimensional, and monolithic
terms, diluting the utility of integrative work. These are valuable critiques on many
grounds, but in particular for generating much needed debate about the necessity of
preserving understandings about minimal roles for legal formalism and the ability of political
scholars to comprehend how international law is created and how lawyers reason with law.
However, the central question is, if intersubjective understandings can be met across this
divide and political and legal vocabularies made traversable, can an integrative approach
contribute to broadening the discussions between international law and politics? As this
work attempts to show, theorizing within the politics of international law is an opportunity to
affirm this position and engage in theory building. Indeed, such an exercise can contribute
depth to the already existing stocks of knowledge accumulated within the law-politics divide
over the past several years.

This chapter will proceed in three parts. The first section outlines the four primary political
functions of international law, demonstrating the utility of bringing together classical and
contemporary thinking. The second section turns toward situating this theoretical
contribution within the broader interdisciplinary literature. The idea of analytical eclecticism
is introduced here to demonstrate its utility in theorizing a diversity of international legal
components. This is followed by demonstrating where the fault lines of interdisciplinary
theories are being drawn in problematizing their claims towards holism. Section three
concludes with a defense of case selection and methodology. In order to understand how the
politics of international law may unfold in foreign policy sequences over time, I defend the
choice of a case from an area in which the empirical turn in international legal research has
only recently moved: the law of the sea. The case of the Northwest Passage is an example

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37 Koskenniemi’s work over the past two decades is a reflection of this theme and concern.
38 See Klabbers (2009).
39 Among the latest works from lawyers and non-lawyers alike, see Goodman and Jinks (2004); Hathaway
(2005); Hurd (2007); Benvenisti and Downs (2009); Downs and Jones (2002, 2005); Krisch (2005); Hirsch
(2005); Burgstaller (2007); Raustalia (2005); Simmons (2000); Cogan (2007); Dai (2005); Helfer and Slaughter
(2005); Slaughter (1998); Alter (2008); Price (2006); Yasuaki (2003); Percy (2007); Finnemore and Toope
(2001); Johnstone (2003), (2005); Sandholtz (2008); Cryer (2005); Shaffer (2005a); Koremenos et al (2004);
and Cutler (2005).
containing all the hallmarks of the politics of international law requiring a range of theorizing within a single research project.

**The Primary Functions of International Law in World Politics**

**International law as constraint and enablement**

In so far that law attempts to be and in practice is coercive, law acts as a constraint on conduct. Both fear of punishment or sanction function as a deterrent in changing an agent’s calculations about a preferred course of action, or inform that a particular type of conduct is worthy of sanction. But that law generally speaking, or international law, need not rely upon a coercive principal to distribute threats and punishment for rule violations also points to the law’s authoritative capacity to give reasons for people’s conduct they themselves might not have applied. Thus, through the institutional authority granted to law, and the reasons of authority upon which law stands, law constrains action which might not have been initially consistent with an agent’s self-interests or general dispositions. The rules and norms of law thus function as prohibitive defenses against power and opportunism emerging in social life. International law here makes a particular claim to authority, not only beyond its role of providing reasons for action, moral or otherwise, but through the idea that domestic law cannot be the basis for disregarding international legal obligations whether in the form of treaty rules or custom. Such a position of authority contributes to the law’s ability to bind its subjects. When law consolidates its binding qualities on agents as a property of law, this transference has the effect of obliging from the subjects of law conduct in conformity with a rule’s guidance. Whether bindingness is considered as constitutive or a function of law, in either case, the law’s ability to bind places boundaries on an agent’s choice.40

From a different position, the insights of Hart and Raz highlight in particular how law cannot solely be seen as a set of commands promulgated by sovereign entities but also as a set of rules and norms that provide unique types of social functions. Central to this idea is the role of law in allowing agents to work within legal architectures by understanding how rules

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40 In international law, see Yasuaki (2003), arguing for bindingness to be conceived of in functional terms rather as a property of law.
reflect certain standards of guidance for members of society. As Hart argued, people are expected on a routine basis to understand the law as it applies to them and to conform to its principles, and it is only in the law’s breach that third parties become engaged in identifying the fact of breach and its punishment. Societies are thus left to organically discover rules and apply these to their interactions. This, then, is the default or common condition of law, in which law restricts activity through the use of social reasoning about the scope of rules and the bases for which rules are constructed. It follows that legal restriction and legal bindingness are thus closely associated with forms of social conduct and moral obligation and may function much the same way in directing social activity.

The law’s constrictive role is also brought about and caused by the necessity of legal precedent. For law and courts to retain a sense of legitimacy, it follows that a legal system and court’s jurisprudence must reflect consistent patterns of principles that underscore impartiality and fairness. Legal precedent thus has the effect of ‘locking’ legal actors into relatively fixed and structural patterns of argumentation in which significant deviations from initial positions have the effects of undermining the credibility of a legal position’s cumulative validity over time. Precedent thus forces consistency and legitimacy into the legal domain by forcing both patterned claims and social costs upon actors who deviate from processes of path-dependence. While international jurisprudence does not require strict adherence to precedent either within or between international tribunals, even on this count, there is a marked degree of consistency and widespread practice in precedent guiding cases on procedural and substantive grounds in all areas of international law. The practice of international precedent does not mean however, that international law is removed from substantial theoretical dilemmas which complicate the law’s ability to formally constrain and produce fairness. Yet, while international law is not centrally concerned with precedent, it is a truism that international legal advisors are wary of changing the basis of legal arguments as they unfold over time in order to preclude charges of inconsistency from arising. In large

42 See Hathaway (2001); Stone Sweet (2002).
43 And indeed is expressly outlawed by the ICJ in article 59.
44 See Miller (2002).
45 As Siltala (2000) has demonstrated.
part, international law’s role in world politics has historically been adjudicated by its ability to be effective in providing constraint against state action. And indeed, throughout most of the Twentieth Century, and in particular from 1950-1980 in all jurisprudential areas, the assumption of international law as an instrument of direct control was both the default condition of skepticism and the test by which efficacy of law was measured.

However, as the structural effects of social and legal norms constrain conduct, they also facilitate action by providing the means for action to be generated. As Hart explained, part of the content of law is that many types of rules have emancipatory capacities and impose neither duties nor obligations on legal subjects. Rather, these rules provide people with “facilities for realizing their wishes” through their being conferred with legal powers to create relationships and contracts subject to procedural processes.46 In other words, while working within the law’s coercive structure of rights and duties, agents are able to give shape and purpose to novel varieties of social relationships. This is manifest in the forms of expanded material transactions, or the deepening of legal obligations and claims of rights against political majorities. Moreover, in thinking about the law’s facilitative capacities from an analytic perspective, if social or legal norms ‘regulate’ behavior and thus have the ability to cause occurrences, as many positivists in the social sciences believe, it is also true that norms enable action through their providing reasons for action. As reasons may be multiple and expansive in what they require of an observer, it follows that norms open up possibilities by providing opportunities for an expanding dialogue on what the law requires in a particular situations.47 The plurality of normative and rule based interpretive contestation acts with individual subjectivities in creating the possibilities of agency. From a more limited perspective, it is also common for people to justify action as required by a rule as their reason for performing an action. In so doing, actors do not make use of value based justifications to support their use of a rule, but rely on the role of a rule as a statement of a social standard to explain a form of conduct within the range of possibilities a rule refers to. Rules in this sense

46 Hart (1994), at 27.
47 See Raz (1975); Kratochwil (1989); Ruggie (1998).
do not function formally as reasons, but rather as facts that anchor justifications in law and provide for interpretive possibilities on what rules ought to apply to given situation.  

Constitutive rules

In thinking about international law as an institution, as compilations of norms, principles and rules, perhaps the central insight from social theory to supplement this claim of law’s facilitative contribution is the role of constitutive rules in social and legal domains. Constitutive rules are “designed to enable actors to pursue their own plans”, and can only be characterized as constraining in the weakest sense in that they provide for actions to be seen as falling within a certain class. These forms of rules specify what is to count as a particular social activity, and thus underpin explanations concerning the basic ontological classifications of practices in all human activity. A key example in international law is treaty construction. Rules set the outer boundaries of constraint based upon intersubjective interpretations of the object of the treaty and what certain rules and rule sets require. The constitutive rules of treaties inform of what is to count as legal practice in a particular area, how an obligation or breach can materialize and be interpreted, and the conditions for understanding when compliance is achieved. And yet, as constructivists and critical legal theorists emphasize, all rules, constitutive or regulative (causal) rules, provide minimal guidance in determining conduct. Rules require agency in making them tangible and therefore social, given that all rules do not spell out the conditions of their own application and remain subject to human form.

While interpretively negotiable, constitutive rules do however exhibit their greatest power and effect in creating legal subjects, legal categories and legal interests, displaying both a regulative, constraining effect in addition to constructive possibilities. In this guise, law can be understood as a mechanism of ontological creation as evidenced in the complex relationship of sovereignty to international law. States exist in the paradox of being the creators of law and also subject to the law they write, placing them in a position of arguing
for whether sovereignty creates legal obligations or should be considered subordinate to international rules. This paradox is as old as international law itself, unfolding specifically in modern Supreme Courts.\footnote{See Feldman (2009) on the United States Supreme Court’s jurisprudence.} In making law that states are subject to, states simultaneously construct legal categories that apply to the definition of what it means to be sovereign, and thus contribute to the expanding idea of the basis for acting authoritatively over an area of territory. In making international law, states remake their own capacities as legal subjects, along with re-describing what they are in relation to other types of political and legal entities. Indeed, possessing the ability, albeit partial in many domains, to control the substance of constitutive rules, is perhaps the greatest social power the law grants back to its creators.

Gerry Simpson’s work on the dual roles of liberalism underpinning UN Charter interpretation and its grounds for membership is illustrative of this point.\footnote{See Simpson (2001).} Following the construction of the UN Charter, international society was grounded in the idea of fundamental legal equality in international law for all states regardless of regime type or the democratic character of political institutions. This principled belief helped carve out the basis for seeing sovereignty as a political form that acted as a buffer against external critique and interference, and international law strengthened the ability for states to justify internal political repression on the basis of the institutionalized authority of the Charter. The post-Charter era thus reflected the tenets of a liberalism based upon the equality of states. Over time, however, equality discourses gave rise to new debates on the relationships of equity between and within peoples and international law’s governing principle of sovereign equality became challenged under the norm of “anti-pluralism”, or the incorporation of a minimal role for international moral standards based upon a communitarian ethics. As a result, new liberals now are no longer tolerant of authoritarian politics, insist upon a right to democracy in international law, and have created in legal terminology the criteria for what constitutes an immoral legal subject unsuitable to govern ‘decent peoples.’\footnote{See Rawls (1999).} Accordingly, it is through the insistence of many Great Powers that the idea of ‘outlaw states’ has entered political and legal vocabularies. In using constitutive rules, the “Great Powers often identify or define the norms that place
certain states in a separate normative universe...there is an identifiable connection between the propensity of the Great Powers to intervene on behalf of the international community and the labeling as outlaws some of those states subject to intervention." The idea of anti-pluralism therefore allows states to create legal subjects unworthy of that title and subject them to manipulation and at times the use of force. This form of constitutive rule-making should be seen as a form of legalized hegemony, a term which aptly characterizes the use of international criminal law to construct categories of peoples such as the international war criminal or, in future, the international aggressor.

Constitutive rules of law evidence their power in international affairs primarily as a form of authority that allows certain legal subjects to create constitutive categories. But these can also be expounded as an alternative type of authority used to justify on the basis of good reasons why such a designation is plausible within the framework of international rules. In this sense, constitutive rules create the possibilities for law to emerge and be used by those who control the power of rules. But constitutive rules are also direct forms of legal constraint in their ability to fix the meaning of legal subjectivities of those to whom such rules are applied. In being characterized as an outlaw regime, a state’s conduct is the subject of restriction, as are the choices of many other states in the system pursuant to a designation of obligatory collective sanction. Shedding negative characterizations of the outlaw state may be equally difficult for such a designate, but also from those who first constructed the label. Indeed, the ability for the latter to remain constrained in undertaking certain policies may be equivalent to the difficulty of the former in changing external perceptions of itself.

Law as standards

A further way in which the law both enables and constrains conduct turns on the role of law in setting out the terms for describing what a collectivity should want and their interests should be. This facilitative component cuts a number of ways, but in the aggregate refers to the law as a source of relevant norms and values from which conduct can be chosen and evaluated. As international law selects through its advocates who qualifies as a member in

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the international community and what membership entails, it also constructs and governs what constitutes the basic forms of interaction between its members.\textsuperscript{55} These engagements are subsumed by the practice of diplomacy and treaty construction, for example, along with the obligations and rights that structure the interactions of international institutions and non-governmental organizations. International law similarly defines the objectives which members act towards, such as the achievement of jurisdiction, the solidification of sovereignty through ownership, and the creation of institutionalized authority. International law sets limits on what can emerge as “objects of desire” for actual or potential legal subjects, such as the conscription and attainment of rights, the achievement of self-determination, and territorial possession. In these ways, law is ascriptive in framing what constitutes the good and just within international society, and becomes in many cases the source of credible international norms from which policy can be constructed.

Perhaps as importantly in relation to its structure of authority, international law has also come to function as a template of ethics, presenting itself as a first cut in evaluating intractable moral problems.\textsuperscript{56} If action meets the threshold of law, such judgment tends to deepen the legitimacy of an act given that a characterization of legality allows action to pass perhaps the most vital test of meeting the contents of society’s institutionalized moral framework. Positive endorsement is all the more heightened when there is sharp moral disagreement over ethical principles in societal deliberations. In these historical instances, law plays its most fundamental role as common arbiter in relation to claims concerning moral incommensurability. As law travels further into the realm of ethics, its disciplinary vocabulary changes ethical reasoning and evaluations, enveloping strategic calculations, in armed conflict, for example, with a synthetic dialogue of just war theory and international humanitarian law.\textsuperscript{57} Over time, political practitioners use these discourses in grappling with novel policy problems, giving rise to new structures within which action becomes constrained in future. In becoming embedded in the disciplinary practices of states, law

\textsuperscript{55} Koskenniemi (2005), at 614.
\textsuperscript{56} See Reus-Smit (2004); Coicaud and Warner (2001); and Kratochwil (2001).
\textsuperscript{57} See David Kennedy (2006).
becomes political, thus reversing the causal arrow typically associated with the politics of international law.

**Legal Theory as Constraint and Enablement**

The role of international legal theory in international affairs overlaps with the communicative function of law in political justification, but may be distinguished from it in a variety of ways. Legal theory exhibits both a constraining and enabling effect on politics. In general, uncovering the facilitative impact legal theory has on policy-making requires understanding it as a distinctive form of communicative discourse functioning not only as a rhetorical tool but also as a manner of diplomatic exchange between policy-makers. This exchange is delivered to secure a reasoned outcome on the basis of what part and to what degree the law should inform a given situation. Legal theory communicates a particular vision of law and legal authority, equipping policy makers with interpretive accounts of expert legal and ethical knowledge that can be applied to unique situations. Such transference communicates not only the intentions of states on the basis of their ‘correct’ reading of law, but serves as a ‘menu’ of possible policy options or policy justifications from which decision-makers may choose to make sound legal cases.

The role of legal theory in international politics should be seen as falling under three headings in demonstrating theory’s structural role: 1) a non-volitional component; 2) a structural-ontological role; 3) and as a repository of ethical and legal knowledge upon which policy can be grounded. Analytically, legal theory gives rise to the ability of lawyers to make claims about valid norms and rules in law. As theories of law offer new accounts of the ways in which combinations of legal points and positions of fact can be assembled, disagreement over the terrain of legal validity invites controversy into the broader questions within which theories are anchored. These questions include: What is international law for? What is the relationship of international rules to moral conduct? Should the law be cast as a pragmatic tool to solve problems, or characterized as a functional instrument to further a state’s interests or the international community’s teleological or progressive ends? In providing a menu of possible legal options, international legal theory therefore grants the
possibility of strategic choice within the law to policy-makers. It follows that when international lawyers are engaged in policy related questions, or in other words, when the legal advisor is simultaneously the policy advisor, the application of international law to policy formulation cannot be dissociated nor considered autonomous. Prior to examining these three elements of legal theory’s facilitative component, it is crucial to understand the various policy roles of legal advisors in order to demonstrate the range of vocational possibilities jurists become subject to through the effects of international legal theory.

The role of legal advisors in foreign affairs varies not only between states but also internally depending upon the depth and levels of expertise in a legal department. Generally speaking, legal advisors can be grouped into three headings and exist within three broad types of working environments. Legal advisors can be (either in isolation or in combination): 1) technicians, offering legal advice and avoiding matters of policy; 2) policy advisors, expected to assist in the formation and implementation of foreign policy, but with special responsibility for adducing and explaining the relevant interpretations of international law and their implications; or 3) members of the international legal community, whose domestic pressures and client relationship must be balanced within the broader obligations associated with the international legal system. Advisors may work within a centralized legal system in one department; be kept together with a cadre of lawyers in the foreign affairs department; or come out of the lawyer-diplomat system and integrated into a Foreign Service. Evaluating how a legal advisor arrives at an opinion therefore requires careful examination of the bureaucratic milieu within which they work, and the overlapping professional roles being carried out in a ‘legal process.’ Most international lawyers undertake or adopt elements of all three roles and have attendant obligations and professional identities attached to each, resulting in legal cases being pulled in certain directions of legal formalism, political opportunism, and wider considerations of justice and order. But beyond this, numerous other factors impinge upon the legal advisor’s approach to law and policy including, inter alia, general culture, legal tradition, the structure of power within the political/bureaucratic

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58 See Johnston (2007).
system, possible jurisprudential affiliations and training, and individual personality.\footnote{Johnston (2007) at 68.} Unpacking the idiosyncratic characteristics of jurists, in addition to their historical and institutional-bureaucratic environments, is essential in understanding legal policy and the enabling effects of law. Indeed, whether one can make a systematic evaluation on lawyer’s inclinations towards the obligations of rules and a natural pull towards legal compliance or not, is a subject of contestation. The default condition for the Chayes points towards legal constraint:

> Foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations. Foreign Ministers, diplomats, and government leaders devote enormous time and energy to preparing, drafting, negotiating, and monitoring treaty obligations. It is not conceivable that they could do so except on the assumption that entering into a treaty commitment ought to and does limit their own freedom of action, and the expectation that the other parties to the agreement will feel similarly constrained.\footnote{Abram and Antonia Chayes (1995), at 3.}

Whether or not this postulate holds across cultures and temporal periods is unknowable. Nevertheless, legal theory contributes toward constraining policy while also functioning at times as an enabling device in it impacting upon decision-making and the contents of legal discourses.

The first role of legal theory is its non-volitional, historical-structural component. International jurisprudence has the effect of becoming embedded in the thoughts and approaches of contemporary lawyers engaged in legal interpretation. As Myers McDougal wryly put it in 1967, “theories of international law…have unhappily the power of ruling us from their graves.”\footnote{McDougal, Lasswell, and Reisman (1968).} For McDougal and his associates, there is an opaque, though subtle connection between the role of legal theory and the construction of international law, a point concisely outlined a decade earlier by Professor Brierly. The relationship between theory, law and practice in politics, Brierly wrote, “[is] not always easy to trace because the actors themselves may be easily unconscious of their theoretical prepossessions which, nevertheless, powerfully influence their whole attitude towards practical affairs.”\footnote{Brierly (1958), at 1, in Lauterpacht and Waldock (1958).} In other words, legal theory should be seen as a structural attribute of policy decision-making,
affecting choice habitually depending upon the specific contours of theory and the degree to which it has been internalized by a government official, or more broadly, department of Legal Affairs. While authoritative international jurists have denied the role of international jurisprudence in shaping legal thought, this position has been rebutted in that to disavow legal theory is to engage in a form of self-censorship and rest content with doctrinal forms of the status quo. Ignoring theory entails dismissing the role of unconscious theoretical socialization, an effect that sets the parameters of legal application and interpretation of where and how law is found. These interconnections between theory and practice reveal the problems of negotiating sources of legal hierarchy, what, by extension, counts as relative normativity in relation to formal interpretation, and how, for example, the positions of parties to a treaty are to be evaluated. Indeed, the central point Lauterpacht raised decades ago, one that has been re-articulated by Scobbie is that, “because writers start from different, and often less articulate, premises about the nature and function of international law, it is not surprising that adhesion to different theoretical presuppositions results in different conclusions about what counts as international law in the first place.” And as Higgins has commented, “[t]here is no separating legal philosophy from substantive norms when it comes to problem solving in particular cases.”

By extension, the second role of legal theory is structural-ontological in its demonstrating the necessary relationship between law and legal system. As Raz has conclusively shown, theories of law in reality either are, or are also, theories of legal systems. The implications of this point have profound effects for international law and customary international law in particular, and bring into sharp relief the centrality of understanding jurisprudence in foreign policy decision-making. The role of legal theory in relation to international law has received illuminating treatment from Beckett (2005). The core of what can only be described as an inherently complex defense of jurisprudential effects can be reduced to the following points. First, law exists because we believe in it, rather than humanity believing in it because law

65 Scobbie (2003), at 64, referencing Lauterpacht (1933), at 57.
67 See Raz (1980).
exists. Thus it follows that law has no existence until society defines and decides it to be, and legal rules cannot be determined until there is agreement on what the law is. The principal task of legal theory therefore becomes to describe what forms of power should be classified as law.\textsuperscript{68} For legal theory to become a descriptive discourse that can both set out where the law is to be found and what the law is in particular situations, law must be able to be perceived as a force with a direct effect on the world. However, jurisprudence is split on whether this is possible. To have direct effect would entail that law “be elided with enforced command or institutionalized legal order; so that either the enforcement/obedience of norms can be observed, or the functioning of institutions can be.”\textsuperscript{69} But jurisprudence holds that either law is a brute fact, with empirical effect, as evidenced through the rhetoric or actions of juridical institutions; or law is a counterfactual, thought object “with defined empirical identifiers.”\textsuperscript{70} In international law, this divergence causes significant problems in that to “determine which configuration of phenomena to designate as law (we must define the empirical identifiers of law).”\textsuperscript{71} A chosen definition determines what norms will count as law, given that legal theories define law and dictate instrumentally how to go about identifying valid legal norms. Specifically,

\begin{quote}
[i]n telling us what law is, what it does, and why it does so, legal theories set the ground for their primary functional purpose: the identification of the legal norms applicable to the instant dispute, or the evaluation of particular (presumably contested) actions. All of this means that we must choose the orthodox theory (ie. theory to become, or to be considered orthodox) before we can identify, analyze, or discuss the applicable legal rules.\textsuperscript{72}
\end{quote}

Not only does this conclusion point towards the possible range of jurisprudential interpretations that would be approachable by jurists in historical periods in which legal pluralism prevails, but also extensively deepens the problem of evaluating what customary international law is and how it may be understood.

\textsuperscript{68} Beckett (2005), pp. 214-215.
\textsuperscript{69} Ibid, at 215.
\textsuperscript{70} Ibid, at 216.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid, at 218.
In short, customary international law must be defined before it can be observed. And once this process is accomplished, on the basis of common agreement, it must be further argued that custom binds all legal subjects. While it is typically assumed that custom and customary rule formation rest on a combination of state practice and *opinio juris*, the relationship between these must then be established followed by agreement on the definition of each concept. And here the options developed in jurisprudence reveal that practice and *opinio juris* are either an aggregate or a synthesis.\(^\text{73}\) State practice is either everything states do, or some of what they do, and this decision only follows once there is agreement on what counts as state practice. On this point, jurisprudential options range from congruence of an action with ethical standards in distinguishing practice from conduct; *opinio juris* separating practice from conduct; all action is state practice; or that state practice and *opinio juris* are mutually constitutive. Each theoretical combination focuses on different data when making its claim, and each makes a case for determining customary law by positioning legality on a continuum, or sliding scale, as Kirgis famously put it, arbitrarily between practice and *opinio juris*.\(^\text{74}\) Ultimately, then, answers to the question of what the law says in particular situations must be examined after it has been argued what the law is, and in the case of customary international law, how and to whom legal rules apply. Because legal theory is both the method and technique for identifying, interpreting and applying law in a legal system, it follows that all international law, and by extension, legal argument, is theory-dependent.

The third role played by legal theory is the facilitative and transformative capacity of legal discourse in setting out and the terms for political and legal deliberation. International legal theory functions as a repository of legal, and at times ethical knowledge, in which policy can be anchored and legitimated. Theories set out extensive reasons for thinking about the nature of law in a particular way, revealing how the complex relationship between law and morality is to be understood. This factor complements legal theory’s structural-ontological component by explaining the reasons for why law must either complement moral thought in order to retain its authority and correspondence with justice, or be removed from moral

\(^\text{73}\) Beckett (2005), 620.
\(^\text{74}\) See Kirgis (1987).
reasoning to ensure that conditions are maintained for its institutional autonomy. Implicitly embedded within these argumentative frameworks are perspectives highlighting the general purpose of law and the types of ends law seeks to achieve. In international legal theory, for example, this purpose may be assumed to be the ordering of pacific relations in an international system characterized by pluralism (positivist)\(^75\); or for law to provide a set of rules, principles and norms through which cooperation between states can be achieved and substantive, universal values introduced (Liberal, New Haven)\(^76\); or for law to retain a degree of formalism in order to protect against a claimed ‘particularity disguised as universality’ by international lawyers (critical jurisprudence).\(^77\)

International legal theories thereby provide extensive justification for states and other groups to frame events against the background of how law must operate either alongside or within the demands of political and ethical imperatives. Theories pass on to their interlocutors the ability to harness legal knowledge in the law’s application to situations or cases of ‘pure fact’, transforming the scope of legal justification according to the assumptions of a particular legal theory in relation to its competitors. Finally, they consolidate rhetorical resources and patterns of reasoning in order to assess how a state will approach the subject of international law. The reflexive interchange of law, ethics and politics within particular theories points to the ways in which law and policy have the opportunity, as Koskenniemi has put it, to ‘co-construct’ each other.\(^78\) As legal advisers, scholars and judges are steeped in the law’s generative grammar and thus contribute to its continuous re-constitution, we should expect many aspects of its disciplinary vocabulary to be the subject of legal interpretation and construction by foreign policy practitioners.

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\(^{75}\) Propser Weil (1983: 413) for example, argued that international law should be defined as ‘the aggregate of the legal norms governing international relations’. This definition reveals the nature of international law to be the prescriptive, preventative and permissive legal norms which constitute the sources of legal rights and obligations. As the function of international law is that of governing international relations, it follows that the law is therefore a normative order and a factor of social organization between states as its primary subjects.

\(^{76}\) See Slaughter (1998); Franck (1990), (1995); Teson (1998); McDougal \textit{et al}. (1968).

\(^{77}\) See Koskenniemi (2002), pp. 500-508.

\(^{78}\) Koskenniemi (2007).
International Law as Communicative and Learning Device

Writing in 1965, William Coplin was perhaps the first to introduce to lawyers and policymaking skeptics the idea that parallel to domestic law having a primary role of socialization, international law functioned as an “institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system.”\(^79\) International law was a ‘quasi-authoritative’ device of communication in assembling arguments from a set of international community norms representing an “imperfect consensus” of world opinion. Contemporary authors have broadened this proposition in referring to international legal argument and persuasion as a form of justificatory discourse that in many cases ‘jawbones’ states into compliance through discursive interchanges.\(^80\) For the Chayes’, the interactions between legal parties structure the interpretation, application, elaboration and enforcement of international rules. This discursive function of law, in the opinion of some authors, reduces the range of possible legal arguments available to audiences, what contents are legally relevant within shifting collectivities, and who can make such claims about authoritative interpretations.\(^81\) Other scholars hold that it is through the communicative endeavor that law can be shown to ‘live’ and exist in relation to other social kinds. Law is realized through its distinctive patterns of argumentative reasoning, and thus more deeply materializes itself through its performative use among common actors.\(^82\) Law becomes an object constituted by an expressive function that describes which social values and norms are critical in social affairs, and through its expression of punishment in penal matters, for example, criminal law reveals its range of capacities in demonstrating punishment as a form of communication.\(^83\) Here international law takes on its formative role as a mechanism of persuasion through which legal norms can change actor’s beliefs and ideas about right conduct and legal validity.

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\(^{79}\) Coplin (1965), at 617.
\(^{80}\) Antonia and Abram Chayes (1995).
\(^{81}\) See Toope (2000); and Ian Johnston (2003); (2005).
\(^{82}\) See Kratochwil (1989).
The languages and discourses of law should also be seen as enabling devices which contain the possibility of engendering transformative processes about the normative content of legality and how rules are relational. Engaging in legal discourses provides the ability for agents to learn about law’s boundaries, mechanics, and applications to social facts. Law is thus an interactive and rhetorical engagement through which legal arguments come to be understood as possessing validity or weakness. Legal exchange, moreover, becomes a problem solving exercise in which the parties arrive at and defend positions of what constitutes a valid legal argument. Hence, in learning what the law requires through dialogue, actors are able to adjust their substantive beliefs and strategic courses of action in arriving at favorable legal outcomes. In short, techniques of legal reason thereby force actors to learn the contents of law, what it requires, and how legal requirements are constituted.

By way of extension, for Koskenneimi, international law is a discursive exercise in which international lawyers learn how to grapple with the contents and argumentative elements underpinning the grammar of international law. The politics of international law is what competent international lawyers do in being consistently able to marshal reasonable arguments to their cause. It is skilled jurists who possess the competence “to use grammar in order to generate meaning by doing things in argument.”84 International law is by necessity indeterminate because no rule is more important than the reason for which it is enacted, allowing lawyers to defend “any course of action – including deviation from a clear rule…”85 All legal decisions are therefore “free” and cannot strip away “choice” that accordingly, for critical theorists, is political. By extension, then, learning what arguments lie at the boundaries of legal discourse and how these legal defenses will be perceived by those in the international legal college involves understanding both how legal techniques can move an argument to the limit of validity and also where an accommodating middle-ground position lies. Learning the law requires comprehending where gaps exist within and between legal regimes, how these can be exploited or filled with normative propositions or supplementary legal positions. Moreover, understanding international law involves knowing where

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84 Koskenneimi (2005), at 571.
85 Ibid, at 591.
ambiguity arises in relation to central legal terms or principles, how these elements can be handled within a broader legal defense, and whether analogies will be considered reasonable within specific legal contexts. Beyond the areas of distinct legal interpretation that relate to how international works through its practitioners, the concept of learning in law should also be seen as comparative to other social domains in which “communities of practice are learning communities”, as constructivists and rationalist international relations theorists have demonstrated.  

In Wendtian constructivism, for example, learning refers not only to the updating and internal incorporation of new ideas about a specific environment within which one is situated, but also that learning has a “complex” dimension in which identities and interests change over time. This arises as a result of agents interacting with significant others and thus understanding through others their own interests and ideas of what constitutes their true ‘selves’. Agents learn through the process of “mirroring” or “reflected appraisal” what others think of their interests, beliefs, and identities. Such interaction produces subjectivities within agents that transfer into relatively permanent collective identities and roles, eventually becoming practiced in extended interactions. Actors therefore learn about other’s intentions in addition to revising their own information about themselves and the environments which structure collective engagements. For constructivists such as Checkel, learning should also be seen as a quintessential collective enterprise involving much more than the updating of information. That is, the functions of learning must include the range of socialization effects that accompany interactions structured upon argumentative persuasion. When actors engage in deliberate attempts to persuade on the basis of reasoned arguments, their preferences, in addition to their strategic interests can be altered, which provides space to think about how learning involves change within all aspects of social action and self-evaluation. Learning about international law thus entails coming to grips with the contents and limits associated with the politics of international legal grammar, but also the types of

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86 Adler (2005). On social learning in constructivist thought, see Checkel (2001); Wendt (1999); and from rationalism, see Simmons, Dobin and Barnett (2006).


social circumstances under which the law will resonate or perhaps be rejected by another agent.

**International Law as Strategic Policy**

The ontology of creative legal arguments

A further role for international law in foreign policy interactions is the ability for states to construct strategic legal responses, characterized as creative legal arguments, when faced with difficult policy predicaments. These forms of legal discourse embedded with distinctive types of ethics, politics, and moral power, are legal defenses made by states to justify particular foreign policy actions that would normally be perceived as skirting the limit of international law if not crossing into terrain of illegality. While international law, like all law, addresses questions about what is valid in a particular instance “upon the criteria for validity that a legal system uses to define its substance”\(^89\), it is apparent that international law, due to its nature as an open system, relative nascence as a legal system, and plurality of competing jurisprudential theories, possesses a wide scope for legal validity. However broad this sphere, states are not always exclusively concerned with matching the substantive criteria for validity with compliant actions because they are, in the course of offering creative legal reasoning, in part arguing that what is “just” in a particular case exists outside the boundaries of law but ought to be brought within the legal sphere. As states never justify their arguments as illegal, they use claims of justice in these instances to supplement formal legal rules. By advancing law creatively, states problematize and attempt to render opaque the intersubjective threshold of compliance which must be met under an orthodox reading of law. States then move one step further, and submit that international law ought to be extended to allow for a particular claim to hold, not necessarily as an exception to the rule, but to modernize and improve a dated and inappropriate rule or set of regime rules. In part, then, in making creative legal arguments, states are registering that a change is needed in either re-interpreting the law, or more broadly, in re-crafting the law’s contents in a formal manner.

\(^89\) Koskenneimi (2002), at 495.
Faced with the problem of upholding the law and maintaining a position that could remain within the intersubjective boundaries of validity, creative legal arguments compensate for a lack of legality by relying upon mediated concepts of international legitimacy that exist within international society at a particular moment to attain preferred legal outcomes. The historical and institutionalized nature of the creative arguments allow states to frame their core justifications around what should be considered “reasonable” by the international society of states within the context of events rather than on grounds of what is strictly legal. Because the instances around which policy is being defended are based upon what justice requires of a situation, the “order” that existing international law will invariably produce by being conservative and backward looking is characterized as subordinate to the imperatives of driving the international legal system forward. In this way, creative legal arguments are attacks on legal conservatism, in addition to the fairness and legitimacy content within which legality has been anchored. Such arguments take aim at the middle ground that Roscoe Pound voiced in holding that “the law must be stable, and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the needs of stability and the need of change.”

Some level of explanatory weight must, however, be granted to self-interest in considering creative legal arguments. A state may not be genuinely concerned that the law is fundamentally unjust but use a creative claim to marginalize criticism that it is acting either unilaterally or beyond the limits of law. And because state’s motives, legal or otherwise, are unknowable with perfect certainty, it cannot be concluded that creative legal arguments always represent complete forms of self-interest. However, deriving what states sincerely intend to achieve through non-compliance may indicate motive to some degree. For example, absent an express statement made public, whether a state intends to change the law in future as a result of a breach through a unilateral act could be indicated in how that state intends its act to affect the legal system. If an explanation for a breach is express, we can expect states to rely on the justification that customary international law in some instances can only be amended through its being disregarded. In these instances, we may hypothesize

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90 Pound (1922), at 1.
that states’ view the law as lacking legitimacy and/or authority. If, however, it is reflected through a state’s actions their attempt to circumvent and work beyond the confines of law and not accept legal consequence and responsibility for action, then perhaps states are not concerned with the promotion of the rule of law and demonstrate no fidelity to it. Thus, whether states will incur penalties for legal breaches and remain concerned for the overall health of the legal system may indicate whether a unilateral action is done from a basis of good faith. At root, however, all instances of creative arguments contain a degree of self-interest motivating action and should be seen largely as the subordination of law to desired political gain. They are legal choices and representations of what Hurrell has referred to as “part of a strategic power-political game” being played out in matters at times of high politics. As such, their content embodies and reflects a resource grounded in the social nature of power, tantamount to how moral authority has been deployed historically as a form of utility when institutionalized as a convention to influence transnational outcomes.

In relation to the broader realm of legal reasoning, these creative legal forms should be seen as deriving from one of the two primary types of legal cultures in international law from which legal arguments are generated. Koskenneimi has referred to these as “formalist” (orthodox, positivist readings of sources doctrine, for example) and “dynamic” (embracing the idea that law and its rules have social purposes, a teleology, which is of greater importance than the rule itself). In advancing this typology, creative legal arguments are dynamic in being pitched and branded by their authors as “progressive”, or as moving against legal thresholds, while simultaneously being aligned with the jurisprudential claim that law must be interpreted on the basis of its social purpose. Four central criteria define the substance and illustrate the dynamism of creative legal arguments: 1) an overwhelming reliance on legitimacy as a basis to bring about a claim to legality; 2) the unconventional use

91 For intriguing evaluations of how to distinguish states’ proposing amendments in good faith, versus that of explicit law-breaking based upon intent toward the rule of law, see Buchanan (2001); and Goodin (2005). See also Cogen’s argument that states ‘fill gaps’ in the international legal system through acts of “operational non-compliance” when the system “will not or cannot act.” Cogen (2006), at 195.
92 Hurrell (2003), at 41.
93 See Hall (1997).
94 This is not to say that creative legal arguments are the only type of strategic rhetoric in law states deploy. For an alternative account in the Security Council featuring states’ use of “intentional ambiguity”, see Byers (2004).
95 Koskenneimi (2002).
of separate bodies of international law to complete a legal case (such as the use of international environmental law to support a case dealing with international trade law); 3) the use of interstitial norms (dominant international norms used to fill gaps in legal reasoning); 4) and the reliance on a dominant and authoritative form of international jurisprudence that can be considered dynamic and be aligned with a state’s international legal identity. These components will be considered in turn.

Legality and legitimacy

For the purposes of unpacking this specific component of creative legal arguments, two questions must be addressed. First, how do legality and legitimacy relate within creative legal arguments and more broadly within international legal discourse? Second, do answers to these questions reveal how states think of this relationship and use legitimacy when engaging in legal practices? If the answer to the latter is negative, then the scope for interpretive inquiry in empirical research is minimal. In getting at this problem, one must start from the supposition that understanding how state’s use legitimacy in legal arguments will reflect the role of historically authoritative discourses about legitimacy and legality when creative legal arguments are constructed. Thus, getting into the ‘heads’ of states involves explaining what they mean when invoking legitimacy in relation to law, and the clarity of these conclusions is contingent upon and reflective of the strength of theoretical assessments. Inquiries into this topic turn on whether it is possible to talk about a state’s beliefs about legitimacy from a detached standpoint. And indeed, such an endeavor is riddled with difficulty. Given that authors are trying to interpret an already interpreted world in the minds of historical participants, a point which constructivists acknowledge in explaining social action historically in a two level interpretive account,96 interpreting legitimacy and its relationship to law is controversial terrain.

However, for the purposes of theory development, it is essential to put to one side two critical issues in grappling with the idea of legitimacy and the relationship of legitimacy to law. The first turns on whether the intersubjective meaning of legitimacy can be properly interpreted

96 See Guzzini (2000).
by researchers. Much of this debate turns on the problems associated with the fact/value distinction, subjective/objective interpretations, and whether a form of detached research-based objectivity can be achieved in stepping away from making judgments about how justice relates to legitimacy. As a case in point, Hurd has expounded a convincing position that a researcher’s sense of a collectivity’s standards for legitimacy can be understood.97 In formulating this conclusion, he asks two primary questions: when do individuals perceive an institution to be legitimate? And when can we say that an institution is just? As is apparent, Hurd therefore refuses to engage in whether he can separate himself (objectively) from the conditions of justice that structured an institution. In his account, justice resides in the eye of the beholder and talking about legitimacy is a form of ethnographic, interpretive reconstruction that can explain a people’s moral thought and practices.98

The second issue involved with theorizing law and legitimacy is the rhetorical role of legitimacy as a functional form of hegemonic administrative technique. Koskenniemi has written powerfully of the trend of authors and statesmen to use legitimacy as a “technique of avoidance or deferral” in order to sidestep issues of law and morality and privilege legitimacy debates over formal but more meaningful dialogues on legal validity.99 Legitimacy is framed by adherents as the idea that a rule or institution is “authoritative”, and as authority is intersubjectively understood as “the denial of one’s rights to deal with the merits of the case”, as Raz has famously argued, it follows that legitimacy both precludes and stultifies reasoned debate.100 In short, legitimacy supplants or sidesteps what the law is or how it may be determined. In policy making domains, the Chayes’ conclusions and Koskenniemi’s revisionist interpretation about legitimacy’s power of moral rectitude are deeply probing. For the Chayes’, “[t]he American people have not always understood that even when the United States has the military or economic power to act alone, the effectiveness of its actions might be undermined if it did not seek and achieve a degree of

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97 Hurd (2007).
98 Authors such as Buchanan (2002) and Coicaud (2002) reject this distinction, and Mulligan (2006) and O’Connor (2008) view the malleability of the concept of legitimacy and its separation from the concept of justice, respectively, as untenable. See also Bjola’s (2008) attempt to reconcile the subjective and objective requirements of legitimacy.
100 Raz (1979), at 27.
international consensus to give its actions legitimacy.”101 Koskenniemi’s response to this point is blunt: “The perspective is control. The normative framework is in place. The action has been decided. The only remaining issue is how to reach the target with minimal costs and delay.”102 It is on this basis, for Koskenniemi, that the critical critique is defended to resist international lawyers from again becoming “miserable comforters” as Kant held previously in 1795.

These debates about the ability to understand legitimacy in relative objectivity, in addition to understanding its potentially manipulative nature, are essential to the interdisciplinary debate and provide assistance in understanding creative legal arguments. However, in thinking about the relationship of legality to legitimacy, if Koskenniemi’s critique is consistent over time historically, that is, if the rhetoric of legitimacy is a constant factor in diminishing the law’s relevance, other jurists posit that legitimacy and legality will relate in different ways within historic periods and across legal traditions. Within competing accounts, the legitimacy of international law is entirely variegated, as it can refer to 1) the duty to obey international law depending upon a state’s legal development103; 2) how far international law “can be worked pure”104; 3) derivative of layered, international, constitutionalized demands105; 4) constitutively embedded within historical beliefs about hegemony and multilateralism;106 5) the procedural components of rule construction;107 6) and the right for international law to command authority and a subject’s obedience.108 Others also outline

102 Koskenniemi (2003), at 369.
103 See Kumm (2004), at 908, arguing that only and if to the extent that international law is legitimate is there a moral duty to obey international law. As international law now competes with the categories within constitutional law’s claim to authority, citizens are caught in a double-bind of obligations at two levels and from two competing sources. See also Goldsmith (2009).
104 Dyzenhaus (2005), arguing that “if legal power is exercised in accordance with the values of the common law, it will be legitimate, which is tantamount to saying that it will have legal authority of the character of legality. It is also tantamount to saying that the law is just, at least from the perspective of legality”, pp. 161-162.
105 See Krisch (2009), arguing that whereas the legitimacy of international law was formerly based upon states’ consent, the divide between the national and international is largely erased leaving a post-national constitutional framework to mediate legitimacy and law.
106 Krisch (2005), arguing that as international law is both an obstacle and instrument of power hegemonic strategies must be formed around these positions.
how legitimacy conditions international rules to become legal practices of precedent in customary international law. Coleman for example, shows how international rules that are not international law, but principles or ‘general rules’ concerning collective understandings in the state’s system, are used as reference points in evaluating illegal actions. If an act in breach of international law is not considered to violate prevailing rules of the game and states are convinced that an action is representative of the application of a new rule to existing circumstances, this judgment allows an action to move towards being considered customary international law or fall short of this point and be classified as illegal and legitimate, or legal but illegitimate.

In sum, as the scope for interpretation is therefore wide given that responses on the relationship of legitimacy to legality turn on the role of historical structures, cultural context, theory dependency, and law to ethics, research must be conducted on the basis that “the problem of legitimacy arises precisely because of the unstable and problematic relationship between law and morality on the one side and law and power on the other” How then may we speak of legitimacy and legality without collapsing them into one another? How can we maintain Vaughn Lowe’s point that “[n]o one - statesman, judge, or whatever - can switch his or her brain into a purely legal or purely non-legal mode. Brains are brains.”

Legitimacy is best theorized by emptying it of as much substantive content as possible. As set out by Clarke, legitimacy is several things. It is first a set of judgments made from international society, but also a constitutive component of international society. That is, in reference to the historically changing principles of legitimacy which make up international society and serve as a basis for the critique of power. But legitimacy also extends itself beyond international law in functioning as a “political framework” through which legality, morality, and constitutionality are mediated. Legitimacy, as constituted by the practices of

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110 Ibid, pp. 27-32. See also Falk (2005).
111 Hurrell (2005), at 17.
112 Lowe (2000), at 221.
113 Clarke (2006).
114 Clarke (2006), pp. 6-7. Constitutionality for Clarke refers to the “mutual political expectations on which international society is from time to time founded, and which are not fixed in legal rules” (209). These norms
international society, is thus a set of the dominant ideas and discourses specific to a cultural system at a moment in historical time. But ontologically, legitimacy is an international political space through which the activity of political, moral and international legal justification is carried out, an active dialogical structure within which discourses compete over the accommodation of what are justified as absolute values. This formulation allows for conceptual transcendence beyond many orthodox understandings of legitimacy as either internal (being ‘right’ on the basis of proper procedure); external (being ‘right’ on the basis of an act’s or institution’s fit with a substantive morality or claim of justice); consequential (based upon consequences being morally superior); or a combination of all types.

If rules, however, either in their substantive content or represented through their behavioral outcomes are seen as flawed, then a rules legitimacy has been lost on the basis of the property of the rule (substance), or the outcome of the process which implicates fault from perhaps both procedure and substance. Either way, as Clarke argues, legitimacy is equated with legality through process, or associated with morality or justice through substance. Given, however, that international public discourse draws on both elements of legality and morality in making complex judgments about institutions and international actions, this confluence must infer that legitimacy exists beyond the concepts of legality and morality and therefore above both procedure and substance. In functioning as a political space through which discursive adjudications critique the substance of legality, morality and constitutionality, legitimacy ‘facilitates’ an arena for normative contestation to flourish and “political brokerage” to emerge from international society’s judgments. The effect of legitimacy, then, is to settle the disputes that arise between competing norms as they move towards accommodation over time. As such, legitimacy is correspondingly best understood as an idea with no normative content or independent standard to which it can be attached, nor one against which it can be compared. It follows that, because legitimacy claims are “mediated” through a “composite” of these other norms, it is fallacious to hold that legality

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appear to coincide in some sense with the “rules of the game” as Coleman identifies, and include for Clarke the example of the balance of power, “political restraints” voluntarily entered into, shared agreements about the principles and rules of order, limits to the exercise of power, and institutionalization of these rules into politics.
and legitimacy can compete or conflict with one another: “legality can never be more than one of the elements of which legitimacy is composed”.\textsuperscript{115}

Conceived of in this manner, legitimacy plays two distinct roles within creative legal arguments. First, whether tacitly or expressly, creative legal arguments begin with the claim that the criteria for legality in reference to a particular case must be altered from a purely formal reading of law because the body of law central to the case has lost its legitimacy (fairness) and thus ceased to be authoritative. In other words, a legal regime has stopped providing independent reasons for states to comply with law along with content independent reasons that stem from the law’s ability to command its subjects independent of the specific normativity of a legal rule. In such situations, through the loss of legitimacy and a corresponding removal of authority, the law is devoid of its primary ability to bind.\textsuperscript{116} Obligations have ceased either from the development of new circumstances, or from the realization that they never ought to have been binding initially. This collapse of authority provides room then for states to argue that a new standard of legality must be derived partially from the remnants of the old legal regime, but in broader reference to new norms and other bodies of relevant law. Such criticism of legality is a direct result of the concept of legitimacy mediating between the requirements of legality, constitutionality, and morality.

Second, while legitimacy has the effect of providing for normative mediation and legal criticism, as a centralized discourse it also contains a distinctly strategic element that states seek to harness. A typical strategy states deploy occurs when engaged in bargaining or attempting to rationalize actions to the international community. Here, actors attempt to harness legitimacy to their claims on the basis of reasons that should be objectively accepted.\textsuperscript{117} States will attempt to inject legitimacy discourses into debates by persuading audiences on the basis of public reasons to support a particular bargaining position. This

\textsuperscript{115} Clarke (2006), at 208.

\textsuperscript{116} See Raz (2006), at 1019: “the pre-emptive force of authority is part and parcel of its nature. It cannot succeed as an authority (i.e. succeed in improving our conformity with reason) if it does not preempt background reasons. The function of authorities is to improve our conformity with those background reasons by making us try to follow their instructions rather than the background reasons. The whole point and purpose of authorities...is to preemp individual judgments on the merits.”

\textsuperscript{117} Goddard (2006), at 40.
allows political interests and preferences to be realized strategically through a dialectical process of claim and counter-claim, which in turn reinforces the process of delegitimating other actors’ political arguments. As Goddard notes, the legitimacy strategies of states have structural effects, locking in policy to paths from which substantial deviation is difficult if policy is to remain credible.118 Legitimacy strategies thus bind states to uphold policy positions by making these appear as credible commitments the deviation from which can damage reputations. This process can be thought of as having much in common with the structural and constraining effects of legal precedent. By way of conclusion, then, we may note that creative legal arguments use legitimacy as international society’s mediating discourse because legitimacy is one instrument for states to increase their normative and persuasive power.

Overlapping regimes and legal fragmentation

In relation to the substantive nature of creative legal arguments, overlapping regimes provide a choice for states of which sets of rules to rely upon and provide additional scope to deepen interchanges between law and politics. The mediating capacity of legitimacy further supplements the ability of states to argue that different varieties of international law found in issue-specific regimes should have application to legal cases. As the International Law Commission (ILC) has noted119, there are two competing pressures, fragmentation and interconnection, within the international legal system, which appear to be increasing over time. Legal fragmentation refers to regimes taking on their own institutionalized priorities and developing sets of rules and precedents that distance regimes from the core principles of public international law (state responsibility, territorial sovereignty, jurisdiction, state recognition, etc.). Regimes are increasingly specialized toward issue areas, and thus being pulled apart from international law’s central elements. However, it is also the case that international practice has never treated specialized rule systems as being independent from the core of international law. Indeed the ILC found that “the very idea of international law

118 Goddard (2006), at 40.
has implied a systemic view of the materials: the application of any one rule presumes the presence of principles about how to determine the rule’s validity, whom it binds, how to interpret it, and what consequences might follow from its breach.”120 The relationship of regimes to the core of international law still remains therefore one of dependence and reliance. And indeed, this claim was reflected in the first case at the WTO where it was held that WTO agreements “should not be read in clinical isolation from public international law.”121 As the ILC has commented, “international law is a legal system”, one in which the functionalization of specialized law was perhaps inevitable but not detrimental to the system itself.

Two problems arise from the historical confluence of fragmentation and reliance between specialized regimes and the core of public international law. The first turns on the question of which regime will apply to specific cases. For example, should trade or environmental law in matters of hormone beef imports be paramount?122 Because rules do not spell out the conditions of their own application, every rule requires an interpretive frame and corresponding body of law to which it is attached to provide meaning. In turn, because rules require the creative judgment of law-appliers, this further implicates states’ legal advisors in making choices about the interconnection of legal regimes. For jurists, two further problems arise as a result. First, how should one decide upon which regime to choose when regimes provide conflicting principles to problems? As all cases are unique constellations of facts to which abstract norms have no direct application, jurists must evaluate what a case is a problem of, and thus what regime to apply given that characterization. Once a decision has been made, a secondary problem is raised given that if normative conflict arises between special and general rules whether within or across legal regimes, should “the special [regime/rule] … be read as an exception to or as an application of the general?”123 How this

120 See Koskenniemi (2007), at 19.
122 Regime overlap was dealt with in the 1998 in the Beef Hormones Case by the Appellate Body of the WTO in which it was asked whether the precautionary principle under international environmental law had become subject to WTO law. A parallel instance occurred in the ICJ’s Nuclear Weapons Case in 1996 where the Court was faced with finding the law either in human rights treaties of within international humanitarian law.
123 Koskenniemi (2007a), at 28.
hierarchical relationship is decided is never clear due to the decentralized context of international law. In legal practice, then, decisions prioritizing legal rules become particular to cases caught up with the practice of legal “balancing.”

In difficult foreign policy cases that appear to be subject to elements of competing legal regimes, states will initially be tempted to situate a case under the rules of a preferred regime. But even if this strategic act fails on grounds that empirical facts are best explained and adjudicated through the prism of an adjacent legal regime, states will have recourse to argue that a competing regime/s must allow for some measure of equivalent application. As the depth of legal sophistication in a regime grows, it ought to be more difficult for states to insist upon the application of other types of rules given that the hardening of a regime is likely to have in part occurred through reconciliation with other norms in other issue areas. Such a process would appear likely unless the process of fragmentation in the international legal system outpaces the rate of consolidation occurring in a regime. Apart from this possibility, the deepening of a regime results from refinement of the core area under consideration along with adjacent issues within other areas that were adjudicated in previous legal cases or state practices. But as the interdependence of issues in international politics grows, it also follows that there will be situations in which major legal regimes clash in reconciling their principles to problems. Indeed, the level of international interdependence within the current age reveals how international regime complexity continues to grow in both depth and scope.124 Due to the lack of consistency and inherent ambiguity between rules, the tendency for states to exit legal regimes (most likely in the form of non-compliance), and a disassociation between local and international identities, states can see themselves as both “law abiding” and as a “promise keeper” even while they violate international legal rules.125 Such flexibility provides an opportunity for states to further creatively use law between issue areas in meeting difficult benchmarks of compliance.

124 This is revealed in how contemporary regimes exist in complex frameworks such as: “overlapping regimes” (the existence of multiple institutions having authority over an issue); “nested regimes” (in which issue-specific international institutions are part of larger multilateral frameworks); “parallel institutions” (where institutions are not explicitly connected yet which at points overlap or create a multiplicity of obligations that may or may interpret each other). See Alter and Meunier (2009); Raustalia and Victor (2004).
125 Alter and Meunier (2009).
Interstitial norms

A third component of creative legal arguments is their ability to incorporate certain types of norms which complete and supplement an argument’s composition. Interstitial norms, or “modifying norms, as Lowe has characterized them, refer to the use of socio-legal norms operating within the interstices of international law’s primary norms.\textsuperscript{126} Core rules are supplemented and thereby modified by the content and scope of interstitial norms in order for lawyers to arrive at legal conclusions that are reasonable and avoid a situation of a non-liquet. The international legal system in particular, parallel to all legal systems, depends upon interstitial norms to solve cases due to the inherent possibility that rules and principles will overlap. As Lowe notes, because the international legal system is becoming associated with maturity (or “completeness“) given that its foundational architecture is now constituted and settled, the legal construction of law’s regimes involve using its core norms in conjunction with new and powerful norms in order to make and adjudicate law. Hence, the basic elements of the system, including its rules for legal creation, concepts of statehood, sovereignty and jurisdiction, serve as a basis for regimes to be built and expanded upon. Interstitial norms are now central in driving international legal processes and norm development forward.\textsuperscript{127}

Interstitial norms direct the manner in which primary norms interact to produce fair and reasonable outcomes. In addition, international norms allow legal reasoning to proceed. Their power is such that when adopted in difficult cases the “very idea” represented is enough to point cases towards coherent approaches of legal reasoning.\textsuperscript{128} If thought of as the defining “reconciling principle” that illuminates on the basis of reasonableness the relationship between adjacent concepts such as the right to trade and environmental protection, then their effect is all the more pronounced in legal conclusions and specifically

\textsuperscript{126} ‘Socio-legal’ refers to Lowe’s (2000) terminology given that their description as both social (having no distinct legal origins) while also subject to change through “non-legal factors.”

\textsuperscript{127} The Gabcikov Case (1997) is good example as sustainable development was considered a primary norm by the Court that allowed it to mediate between the protection of the environment and the right to economic development. Indeed, to arrive at an equitable solution and preserve the need for principles to resolve internal tensions and conflicts, the Court used sustainable development to, as Lowe puts it, establish “the relationship between neighboring primary norms when they threaten to overlap or conflict with each other” (216).

\textsuperscript{128} Lowe (2000), at 217.
in instances in which interstitial norms “occupy the field” and exercise “immense gravitational pull.”\textsuperscript{129} While the origins of interstitial norms remains opaque as they simply ‘emerge’ from within the legal system itself, critically, they are however “drawn out” as Lowe puts it, by jurists when reasoning before tribunals and in their foreign legal exchanges. Ultimately, this process revealing the social basis of legal norms is extracted on the basis of discursive exchanges within the boundaries of the politics of international law. And yet the act of making interstitial norms authoritative reveals how they will interact and become shaped by the discourses of international society and its various bodies of experts. Sustainable development, for example, was only thoroughly understood as a possible legal principle in conceptual construction by economists, biologists and ecologists, politicians, and lawyers. Scientific thought fed directly into understanding how the norm of sustainable development could serve as a political position and as a mediating legal norm. The eclectic formulation of interstitial norms from a variety of international authorities explains their power in shaping juridical discourse. In their broadest sense, then, interstitial norms can be seen as the points in which “general culture obtrudes most clearly into the process of general legal reasoning.”\textsuperscript{130}

Progressive jurisprudence

The fourth component of creative legal arguments is their use of progressive jurisprudence to frame both the overall context of how international law ought to be thought of (the nature of law) along with the specific contents of law itself. Progressive jurisprudence refers to law that captures elements of functionalism and the legal purpose of rules. That is, a jurisprudence that accentuates the purposes both \textit{of} law and \textit{for} law rather than relying upon textual readings of rules being applied to situations of fact. A state’s history of international jurisprudence and its political and international legal identities contribute to the form and substance of jurisprudence chosen when states deploy creative legal arguments. States accomplish this task by selecting from a menu of jurisprudential options that are considered authoritative within historical periods. In other words, dominant legal theories provide sets

\textsuperscript{129} Lowe, relying on the phrase “occupies the field” as generated within European Community Law.

\textsuperscript{130} Lowe (2000), at 221.
of options for states engaged in framing a case in legal terminology. However, not all states at all periods can rely upon a wide selection of international jurisprudence from which to choose. The problem states may face turns on their current political identity in relation to foreign policy, and how the history of their international legal practice, or legal identity, has been constituted. Key to understanding this relationship is that identities have the effect of giving rise to interests, but also constrain choice on the basis of their limiting the section of norms that apply to a singular identity. In telling us who we are, social identities have the effect of structuring what agents can do in particular instances based upon types of norms and roles that either correspond or generate expectations about what an identity requires. In the international legal domain, a state’s legal identity is at points in history relatively fixed, but also interacts with external or environmental factors in re-constituting new parameters for legal argument. A good example of this evolutionary process is the re-creation of legal positivism in international law.

Over the past two decades there has been a significant attempt by states and jurists to reduce the rigidity of positivism through the use of soft law sources, the dialogue of international law as universal law, the role of international court’s jurisprudence having a declaratory effect as both a legal source and as interpretative precedent, and the addition of a variety of new actors with legal standing. The shift has occurred, however, concomitant with states and most practicing lawyers’ reliance upon positivist doctrine and self-admission as positivist lawyers. The result of this transference is that there is greater scope today for states to make progressive claims while retaining flexibility to ground arguments on positivism’s core premises (such as the requirement of consent and exclusive reliance on orthodox sources). Emerging is a positivism that is strained and attenuated by pragmatism in the face of ensuring the maintenance of global governance institutions and dispute settlement mechanisms among numerous novel global realities. However, fifty years ago, this was not the case. Positivism was still dominant in many circles, and particularly within British international law, but it existed alongside alternative theories competing in the mainstream which states could rely upon, such as policy school jurisprudence and the tenets of the
Columbia school. In the 1990s, and in the United States in particular, a shift was again felt in the rise of the new liberalism and its orientation toward liberal anti-pluralism. In the last decade, Western legal skepticism has again risen in a new guise to occupy a central place in jurisprudential debates focusing on particular foreign policy issues and subjects of broader constitutional importance over legal interpretation and hierarchies of law.

The central point is that states can use legal theory as it fits either with their past legal practice or reflects their new foreign policy orientation. And this process has become easier to accommodate as international law has become expansive. To be sure, states have also managed to possess multiple and overlapping legal identities which can draw on several jurisprudential theories. The United States, for example, due to its history of positivism and policy-orientated jurisprudence, has at times made use of this overlap when it provided legal advantage. Similarly, with Canada’s foreign policy shift towards a more nationalist framework in 1968 arose an opportunity for dynamic jurisprudence to replace legal positivism as Canada’s reference point for international law. Canada became a dynamic legal state virtually overnight in 1970, and maintained this jurisprudential position for years to come.

As outlined in this section, creative legal arguments are constituted by four primary criteria that are classed as dynamic discourses of law and centered upon progressive legal ideas. These separate elements set the parameters for how creative an argument is, which, in turn, is a function of how difficult a legal case is to make. Moreover, the historical context within which these arguments are constructed plays a critical role in determining what legitimacy may refer to at a given moment in relation to international law. While critical legal theorists such as Koskenniemi would counter that due to the structural characteristics of the international legal system the politics of international law is omnipresent and creative legal arguments are accordingly always policy options for states, what is being suggested here is that these discursive legal techniques denote a more intricate ontology than would be revealed if categorized as generic legal forms subject to constant political interference. As a

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132 See Chapter Three.
final step, then, I argue that creative legal arguments are likely to emerge under certain conditions of institutional contestation unfolding within international society at particular moments.

The Historical Conditions enabling Creative Legal Arguments

When are legal arguments that appear to be *prima facie* invalid able to receive a claim of legitimacy from many audiences and even meet the test of legal validity with some international jurists? While Koskenneimi would hold that this possibility exists by virtue of legal structure, and Coleman that legitimacy principles position themselves against scrutiny of legal precedents to produce public assessments that combine legality and legitimacy, a further response turns on the nature of international society’s fundamental institutions and constitutional structures at a given moment historically. As conceptualized by Reus-Smit, constitutional structures and fundamental institutions constitute the architecture of the international system and the basis for legitimacy claims to be voiced in the name of international society. They are the underlying or foundational principles, norms and rules that “make the world hang together.” These forms can be conceived of as institutional structures that form an overarching framework analogous to a structure of international constitutionalism from which normative and legal state conduct is both measured and produced.

In the constitutive hierarchy of modern international institutions, the apex is formed at the level of constitutional structures (the meta values defining legitimate statehood, sovereignty, and rightful state action); below this exist the fundamental institutions of public international law and multilateralism (the elementary rules of practice that states formulate to solve both cooperation and coordination problems); with the third level consisting of issue specific regimes, such as the WTO, environmental, use of force, or human rights regimes (understood

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133 See Reus Smit (1998), (2003), (2004). While there have been other suggestions as to how to categorize and characterize fundamental institutions (Buzan, 2004), Reus-Smit’s theoretical integration of law and institutions provides the most comprehensive theory on which to build interdisciplinary knowledge.

134 To borrow from Ruggie’s (1998a) characterization of the role of social kinds in the international system. See also Krasner’s idea of this being the organized component of sovereignty’s constitutive embodiment of organized hypocrisy. See Krasner (1999); and Hurrell (2002).
as the basic institutional practices in particular realms of interstate relations). Together the three strata form a hierarchy or ‘generative structure’, which conforms to Ruggie’s idea that deeper structural levels have causal priority in a complex causal sequence or causal chain. The theoretical payoff brought into relief through this ontological frame of international society is that all of the characteristics which constitute a state’s identity, purpose, and interests are not located or referenced merely at the explanatory level of sovereignty, but revealed within the numerous ideational configurations and interpretations existing in the complex of institutional hierarchies. States’ values and ideas must be therefore understood not as self-referential and derivative solely of domestic politics such as some liberal theorists argue, but result from the contestation of intersubjective meaning that exists once legitimate agency and action became discernable within the framework of institutional organization and international society.

The logic of this interconnection between institutional levels flows from a general point about justificatory discourse and international communicative action. Sovereignty is not a free-standing concept, contains no purposive content, and cannot in and of itself outline actions and strategies for states to follow without reference to some higher order values.135 States therefore rely on the substantive values contained in public international law and intersubjective discourses that exist within international society to clarify and provide a basis for their actions and remarks. Accordingly, there is an intimate connection between these institutional levels in terms of normative hierarchy, which illuminates the significant degree to which many international legal rules and principles will require reference against a secondary level of analysis to determine their content. The nature of these institutions within historical periods, the degree to which they are the subject of harmony, principled consistency, normative fracture, or value pluralism, matters considerably in how a state’s beliefs and actions will be carried out. Given the proposition of downward causation within the institutional hierarchy, several implications can be drawn out. If there is an intimate connection between these hierarchical levels of international society, there then ought to be pressure brought to bear on lower level institutions resulting from pressures forming at the

upper levels. In other words, when the normative content associated with the moral purpose of the state becomes challenged, pushing aside former limits on what legitimate state conduct is, it out to follow that areas of international law will be unsettled which reflect this tension within the practices of statehood. Hence, for example, as issues of territorial jurisdiction associated with state practice become contested, international law will also become marked by tensions which require political and legal adjustment. As the normative content of resource allocation within states changed from the period of decolonization and emergence of new states, the law on resource entitlement began to be challenged as states’ extended their sovereignty outward from territorial boundaries to include the sea. Moreover, when the idea of sovereign equality became pronounced in this same period stemming from debates on what entities could be considered to be international legal subjects granted statehood, pressure with the domain of the moral purpose of the state impacted upon how the practice of multilateralism was understood. In the law of the sea, for example, new states demanded an inclusionary voice into international law making in order to produce within the ocean regime an element of justice and fairness. Multilateralism required full participation if international law was to bind states to rules they had not expressly consented to.

This type of interconnection within institutional hierarchies points towards the fact of downward causation and institutional pressure within such relationships. Given the states’ central priority in ordering and organizing international relations, when ‘the’ state’s purposes (stemming from the domain of the moral purpose of the state) as directed by ethical demands begin to expand, pressure is brought directly upon the secondary levels of international law and multilateralism. And this force has a direct bearing upon when states may be able to use creative legal arguments to their advantage. Given the interconnected nature of international society’s fundamental institutions, it follows that creative legal arguments emerge at certain periods of institutional crisis. When at historical junctures there are significant forms of institutional contestation occurring within the overall strata of these institutions, such intellectual crises provide a window of opportunity for states to deploy creative legal arguments in response to difficult policy choices. To be sure, there is always divergence historically in the types of contestation unfolding within institutional hierarchies, leading
unique combinations of institutional interactions to provide opportunities to states at different moments. However, when the norms at the constitutional levels become strained when linked to uncertainty within specific international legal regimes, the possibility for states to harness legal ambiguity strategically is increased. Creative legal arguments are thus born within temporal periods where the subject of statehood and elements of international law become extensively controversial. In what follows, I attempt to situate this contribution within the broader range of interdisciplinary theory in order to demonstrate its integrative potential.

**Situating the Primary Functions of International Law in Theory**

While many of the primary functions of law listed above are classical in nature, derivative of positivists and naturalists alike, most are novel forms intermixing constructivism and critical legal theory. In using these theories for productive ends it does not however follow that there exists commensurability between the approaches and specifically when referring to the politics of international law. Nevertheless, there is a certain consistency between constructivism and critical legal theory. For example, both are grounded in the assumption that agents and structures are co-constitutive, thus prioritizing neither component, but taking the variegated roles of structure and the complexities of agency as a focal point in revealing social conduct. Theorizing from this perspective gets around not only the problem of viewing law as relatively determinative in its application to social contexts, but also in conceptualizing the institutional development of international law in ahistoric terms. As Del Mar as argued, an analytical and interpretive problem arises when scholars:

> overemphasize the role that legal language plays in determining the outcome of a legal dispute – whether that be under the guise of a defence of formalism (where syllogistic reasoning is said to exhaust the process of legal work), or via an exclusively purposive account of legal interpretation (ascertaining, for example, policy directive), with no other option offered outside this battle between formalism and purposiveness. Put another way, where legal systems are imagined as consisting exclusively or even dominantly of rules or norms that float in an analytical atmosphere, they make invisible, or at the very least de-emphasize, the inevitable and necessary judgment that real human beings, situated in specific institutional contexts, exercise when they engage in legal work. ¹³⁶

¹³⁶ Del Mar (2008), at 30.
In countering this tendency, constructivism and critical legal theory attempt an historical recovery of understanding the language of law and legal arguments as embedded in an “institutionalized history of application (ie. the factual adaptability legal language accrues in specific institutional environments).”

Hence, the totality of factors driving legal processes in political thought can be captured through the interactions between agents and structures.

Towards this end, constructivism has made agency and the complexities of social mechanisms a central focus in complementing the largely structural orientation of research to date. Critical legal theory has implicitly taken a complementary focus. When Koskenniemi writes that “[i]nternational law is what international lawyers make of it”, he takes a constructivist position that practitioners are embedded within structural impediments that, in this case, refer to doctrinally limiting legal frameworks from which lawyers negotiate courses of action. In either theoretical approach, jurists are co-constituted by structural bias and their own inclinations of what justice requires when wrestling with law. Moreover, in relying on the idea of mutual constitution between agents and structures both approaches endeavor to forefront the role of context in explaining the politics of international law. That is, both align with the ‘new legal realists’ in arguing that the first step in understanding the role of law is to study the social and institutional context in which law operates and has effects. For these theories, the analytical necessity of embedding law in context gives rise to the complementary purposes of uncovering propositions about what the law is, what it means and should do, and why actors choose particular forms of legal argument. Moreover, there is only a slight gap between the absolute nature of indeterminacy in legal reasoning voiced by critical legal realists and the constructivist claim that “because rule structures do not apply themselves, they are always at least relatively indeterminate.”

While some critical scholars would find cause with the proposition that all law is radically indeterminate, most would grant that the structural elements of legal rhetoric provide for a minimal level of

137 Ibid, at 31.
138 For recent engagement with explanations of social mechanisms in international organizations, see Iain Johnston (2008).
139 Koskenneimi (2005), at 615.
140 See Shaffer (2005b) for the contours of the new legal realism in international law.
141 Sandholtz and Sweet (2004), at 242.
juridical consistency and relative autonomy in practice. Finally, both approaches examine the ‘relative autonomy’ of international law: how movement between the domains of law and politics occurs and contributes to understanding the phenomenal rise of legalization unfolding over the past several decades.\footnote{Kennedy (2005: 2) has recently put the point well: “it is easy to think of international affairs as a rolling set of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn - and only the most marginal opportunities for engaged political contestation.” On legalization generally, see Goldstein et al (2001), and Toope and Finnemore (2001).}

However, the integration of constructivism and critical legal theory has limits in theorizing the politics of international law in foreign policy episodes. There are firmly developed theories of compliance within these approaches, if one includes Franck and Koh, for example, as constructivists. And indeed, their theories remain two of the primary contributions within the compliance debate. However, Franck and Koh have largely side-stepped examining at length the components of power within law and the role of reputation in states’ construction of compliance judgments.\footnote{For critique of Franck, see Koskenniemi (1992), and Toope and Brunnee (2002a); for critique of Koh, see Spiro (2004).} And it is these central elements which require theoretical scrutiny and empirical development given their centrality in guiding decisions with international law in relation to foreign policy predicaments. Hence, there are strong grounds to rely on realism and rationalism to supplement theoretical gaps associated with theorizing the politics of international law. This conclusion flows from the various problems that arise in attempting to explain historical perspectives with a limited range of analytical tools.

**Avoiding Preferential Theory Choice through Analytical Eclecticism**

There is a tendency in international relations to let ones preferred theory guide research decisions rather than allowing a problem under evaluation delimit what theoretical orientations ought to be preserved in generating theoretical progress. Analytical eclecticism seeks to move scholarship beyond this conceptual limitation. As set out by Katzenstein and Sil, analytical eclecticism seeks to borrow what is unique and most thoroughly developed by
existing theoretical approaches and research traditions. The intent is to trespass deliberately into other epistemic domains of knowledge in order to highlight how causal mechanisms interact from differing perspectives. At root, eclecticism does not seek to accomplish theoretical synthesis by finding ways to reconcile meta-theoretical, epistemological, and ontological cognitive structures that exist across research traditions. And nor does eclecticism entail a commitment to the construction of a grander interdisciplinary theory combining all productive elements of existing theoretical approaches through a ‘grab-bag’ arrangement. Rather, eclecticism seeks to distinguish itself from pluralism where different theoretical points are considered in order to provide unique contributions to broader empirical descriptions and analytical narratives. These common undertakings are somewhat compartmentalized descriptions of a larger tapestry of reality reflecting the most salient aspects of analytical inquiry and meta-theoretical differences. Eclecticism is based on a form of intellectual robbery: it grafts the most developed areas of existing theory into new and coherent frameworks in order to generate more focused conclusions and analytical probes.

For Katzenstein and Sil, remaining within the boundaries of a single research tradition is limiting and gives rise to a compartmentalization of understandings and beliefs caught up with theoretical traditions. Eclecticism moves beyond this form of reductionism by highlighting the “connections and complementarities” between theoretical interpretations and the mechanisms that ground their theoretical structures and assumptions. In other words, the aim is to perceive theoretical frameworks as tools rather than the instruments for the reproduction of their contents. Adherence to this commitment indicates how analytic eclecticism sidesteps the problem of privileging a particular theoretical position prior to empirical investigation and brings greater consistency to research by better aligning the particular demands of ontology and epistemology upon which a research question is based. If carried out effectively, this process allows, as Hall has stressed, both method and theory to

144 Katzenstein and Sil (2008).
146 Hellman (2003), at 7.
‘catch up’ with the advancements made in ontology when dealing with social theory.\textsuperscript{147} To be sure, there are only fine distinctions between deepening the relationship between social mechanisms through theoretical engagement and conceptual comparisons and simply letting “a thousand flowers bloom” in resorting to theoretical pluralism.\textsuperscript{148} However, due to the fragmentation and overlap between dominant theories in the law/politics debate, eclecticism remains the most rigorous way to continue to produce sophisticated research that allows theoretical assumptions to be broadened, pulled apart, or ultimately put to rest, if required.

The central issue scholar’s face in reaching beyond theoretical boundaries involves understanding how research can commit itself consistently to such an approach. Within the discipline of international relations there is an emerging tendency to pay lip-service to eclecticism or go further and adopt it for the purposes of theory building and empirical clarity. With this aim in mind, part of the problem turns on how one understands the contents of theories and paradigms. In the context of relaxing assumptions about how incompatible contemporary theories are, and “decoupling variables, processes, and mechanisms from the putative boundaries of theoretical aggregates” Jackson and Nexon have recently argued that theoretical re-combinations should focus not on theoretical architectures, but on the implications of a theory.\textsuperscript{149} In following this objective, scholars can put to one side the coherence of a paradigm and move towards a more “genuine ‘analytical eclecticism’” in being “free to interrogate and combine particular mechanisms, processes, variables, and methodologies….”\textsuperscript{150} This supposition is largely congruent with the guiding approach developed here in attempting to make use pragmatically of the central mechanism of power, reputation, obligation as these inform international legal processes.

Analytical eclecticism for international law

If analytical eclecticism sharpens understandings of social complexity and brings a form of humility to historical research, the current relationships between international law and

\textsuperscript{147} Hall (2003).
\textsuperscript{148} Which is a controversial advantage for some. See the debate in International Studies Quarterly (2003). For a successful engagement of theoretical pluralism within international relations, see Sterling Folker (2006).
\textsuperscript{149} Jackson and Nexon (2009), at 926.
\textsuperscript{150} Ibid.
politics are ideally placed to benefit from such theoretical re-orientation. Byers has made a recent plea for this approach, largely on two grounds. First, because interdisciplinary theorizing has trended towards seeing international law as a complex institutional form, constructed, for example, by ethics, political values, and institutionalized hegemony, explanations for phenomena such as legal construction, treaty interpretation, and institutional integration must work from a variety of theoretical postulates. Second, many scholars now tend to see the binary distinctions between normative and rationalist accounts that rest upon ‘values’ and ‘interests’, or the logics of appropriateness and consequences, as overdrawn. As a result of many fundamental distinctions becoming unsettled in the discipline, comprehending broader questions such as how the institutional rise of legalization is affecting the dynamics of rules within specific international regimes, or states’ choices of institutional venues for arbitration, requires bridging rationalist and normative accounts of international law.

Byers’ argument lends itself to the need for scholars to reorganize disciplinary priorities concerning theoretical integration. Central to this aim is the question of why interdisciplinary accounts should be limited to the insights of constructivism and rationalism when scholars are only coming to understand the kaleidoscopic effects of international law in political life. This self-imposed limitation is particularly curious in light of the complexities within law as it unfolds in different types of political environments. More particularly, it inhibits the ability to properly account for the range of interactions and constitutive effects the concept of power and international law take on. These limitations take on different forms given the centrality of the relationship of law to power. For example, whether in reference to the role of power and law in shaping legal regimes and international institutions; law and hegemony placing states in position within the international legal system as largely either law-takers rather than law-makers; or the boundaries, clear or otherwise, of strategic

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152 Ian Hurd’s work (2008) in this respect is seminal. See also Voeton (2005).
153 See Barnett and Duvall (2005); Reus-Smit (2004b); Koskenniemi (2007); Krisch (2005); Alvarez (2005); Barnett and Finnemore (2004).
154 See Vagts (2001); Alvarez (2003).
institutional deliberations\textsuperscript{155}, understanding the interactions between power, institutions, normative creation and legal codification cannot be achieved without acknowledging multiple, overlapping social processes and the use of a range of theoretical approaches. Such a conclusion therefore cuts against the use of theories that aim at theoretical parsimony or holism. In other words, there are good reasons to prioritize greater theoretical diversification and re-combination and be skeptical of grand theory’s claims towards the role of international law within states interactions. This conclusion is only sound, however, if claims to holism cannot be fully substantiated

\textbf{Aggregating Theory for the Interdisciplinary Project}

‘Holistic’ theory in the interdisciplinary debate refers to the proposition that a theory can explain the entire range of legal effects on political deliberation, choice, and policy implementation. Guzman’s point is indicative: “the field of international remains largely without a comprehensive and coherent account that seeks to explain how the system works across the full spectrum. This book offers such a theory”.\textsuperscript{156} Toope and Brunnee argue that in revealing what international law is, how its rules are found, why these are complied with or breached, and how law-making and the application of legal rules are carried out, “the key to understanding the role that law plays in international society lies in understanding the nature and operation in practice of legal obligation.”\textsuperscript{157} The political/legal realist approach, as set out by Goldsmith and Posner, makes similar claims to producing a complete theory for international law, albeit in a form that precludes it from having much if any discernable effect on political choice.\textsuperscript{158} These three theoretical positions represent the broad canvass of interdisciplinary typology, even though they are located within larger theoretical paradigms. Legal realissts, for example, adopts many classical assumptions of political realism, but does not include others such as the balance of power or the use of anarchy to explain legal outcomes. The legal rationalism of Guzman harnesses the insights of reputation on compliance decisions, but does not deal with issues surrounding legalization, for example.

\textsuperscript{155} Byers (2005).
\textsuperscript{156} Guzman (2008), pp. 8-9.
\textsuperscript{157} Brunnee and Toope (2009-10), at 1.
\textsuperscript{158} Goldsmith and Posner (2005).
And interactionalism adopts the core tenet of mainstream constructivism but does not dwell at length upon issues of identity and various communicative processes. As such, holistic theories are narrow and condensed examples of broader theories, and critique of their level of ‘comprehension’ does not denote that of a failed research program. However, making the case for eclecticism involves problematizing elements of the major theories yet acknowledging that there remain good reasons to borrow their key concepts for the purposes of theorizing the politics of international law. This is the primary intent in unpacking these holistic theories in what follows.

Realism

Legal and political realism, working from the assumptions accumulated over decades from the likes of E.H. Carr, Morgenthau, Kennan, and recently Krasner have infamously concluded that, in matters of high politics, international law is ineffectual in not only constraining state action but also in forcing states to comply with legal norms that ‘restrict’ state activity. For all political realists the default condition remains Morgenthau’s pithy remark that governments “are always anxious to shake off the restraining influence which international law might have upon their foreign policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as ready-made tool for furthering their ends.” Of course, the realist view of international law is far more complex than these remarks by its key authors suggest. Realists believe that as anarchy structures the international system international law and international institutions have marginal effect on state thought and action, preferring security concerns beyond moral or legal ideas. Indeed, as Krasner has written, there are a range of realist views informing international law, ranging from law as epiphenomenal to carrying a variety of benefits including reducing transaction costs and providing information. But in the nexus between law and politics, the reflexive

159 Compliance can of course imply carrying out or owing international obligations and thus involve active participation rather than merely constraint on behalf of those who owe obligations. Constraint is thus a form of compliance depending upon what the law requires in a particular situation. I put this quibble to one side for the purposes here.
161 Krasner (2002).
position for realists remains for power to prevail within this relationship. And this supposition is taken to the limit in the realist contribution to the interdisciplinary debate.

The central argument of the new political/legal realists is that interests and the distribution of power alone reveal how international law is generated. Interests are the “sole determinants” of state behavior, relegating law to the outer boundaries of political affairs with no exogenous effect on behavior or decision-making. Legal realists assume that obligations are legal fictions, while acts of compliance are dissociated from normative internalization and carried out in congruence with states’ self-interested ends. However, this critique consciously excludes a preference for states to comply with international law from the menu of states’ choices. For many critics, these assumptions about law and politics are untenable and analytically unsupportable. Collapsing self-interest and legal obligation removes the possibility that normativity and self-interest are interdependent utilitarian calculations. Values, whether political or moral, become bundled within the definition of self-interest, thereby precluding the possibility of a normatively driven theory of compliance. Beyond this move however, the realist line of reasoning cannot describe coherently why states continue to invest vast political and economic capital so heavily in the construction of an array of international legal instruments, legal enforcement, and thousands of international treaty regimes. In other words, realists have at best only a weak explanation for the emergence and overwhelming density of the international legal order, one which borrows many of the insights of liberal institutionalism. As importantly, realists do not deal with terms of compliance in a sufficiently broad manner to incorporate how reputation or a fidelity to law may influence decision-making, and nor can realism account for the increasing range of legal actors that should be properly associated with possessing international legal obligations, personality, or legal effects more broadly.

Despite this attack on the holism of legal realism, its treatment of power and self-interest by political and legal scholars is substantial. Realists have refined scholarship by emphasizing

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163 See, for example, Anderson, Bodansky, and Spiro in *Georgia Journal of International Law* (2005-06); see also Cryer (2006).
the distributive aspect of resource competition between states (Krasner, 1991); the varieties of asymmetrical bargaining power within international institutions (Gruber, 2000); and the role of economic power in structuring legal outcomes within the WTO (Steinberg, 2002). This research extends into areas of international relations which have failed to adequately take into account the role power plays in international institutions and international law (Hurrell, 2003). Moreover, it has built on Schachter’s claim that the omission of power considerations from legal scholarship has diminished the role of legal rules in international affairs and in particular the interactive effects of Hartian secondary rules within the international legal system.164

Indeed, as argued by many of the world’s eminent jurists, the role of power in legal affairs could not be more central. Cassese has explained state conduct as grounded not in obligation but driven primarily by interests. For Cassese, international law is a realistic legal system. It takes account of existing power relationships and endeavors to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal consequences. A situation is effective if it is solidly implanted in real life ... legal rules must of necessity rely upon force as the sole standard by which new facts and events are to be legally appraised.165

Even perhaps the most internationalist of international lawyers, Alain Pellet, echoes this view in that “those who hold the most power and influence” shape international law to guide social conduct in their interest - not in the interest of “all members of society.”166 This again is the reflexive position for states in designing policy, even though the law forces states into the predicament of having to act in a persuasive manner and deploy comprehensive and plausible legal reasoning because one cannot argue a legal case purely on the grounds of state interest.167 States must show fidelity to the law’s ability to command in the spirit of fairness lest the law lose its veneer of authority in areas of foreign policy.

164 Schachter (1999). For accounts having dealt squarely with the relationship of law and power, see Byers (1999), and Steinberg and Zasloff (2006).
166 Pellet (1988-89), at 46.
Yet, law not only reflects power but is a form of power itself. Revealingly, every step in the customary law process is seized of power, as Judge De Visscher noted starkly in the 1960s. Leading states begin the customary law process by suggesting rules that ought to govern all states’ conduct, and then solidify custom in providing the material capacities to ensure that legal norms are complied with when required. As De Visscher wrote, the ‘jurist seeking a principle of legitimation, justifies established custom ex post facto by its concordance with order; the historian uncovers the play of political forces that determined its formation. The two points are not mutually exclusive.”¹⁶⁸ However, law extends beyond its reflective role of power in it actually becoming power itself when legal rules are converted into forms of authority that compel actor’s behavior in relatively habitual fashions. Indeed, the real problem with international law, as realists have outlined, is that its autonomy is almost always held in question. Thomas Franck’s remarks delivered thirty-five years ago strike plainly at the heart of this critique: “[t]he International lawyer’s self-defined task is too often that of a ‘mouthpiece’, finding fragments of treaty or precedent for whatever his master wishes to do at the moment in pursuit of his, his business’s, or his government’s narrowly perceived self-interest.”¹⁶⁹ In Franck’s comments, the politics of international law are striking, pointing towards the necessity of retaining the role of power and self-interest in conditioning legal effects and compliance decisions in matters of high politics in particular.

Rationalism

Regardless of its positional strengths, however, realism cannot contribute fully to the debate on compliance without being in some sense either supplemented or subsumed by alternative rationalist theories. For example, though realists succeed in explaining non-compliance in many cases in which states face crucial dilemmas, realists offer only a thin and weak explanation for its opposite. Rationalist theorists close this gap by introducing into compliance debates the variable of reputation, and by tacit extension, legal identity. Central to the holism of rationalism is the idea that reputational effects contribute directly to explanations of state compliance. When states adhere and comply with all varieties of

¹⁶⁹ Franck (1975), at 181.
international legal rules, their identity as a cooperative actor is enhanced. Conversely, non-compliance impacts upon a state’s international reputation negatively. The payoff from a good reputation allows a state to enter into more thorough and effective cooperative arrangements in greater number, further encouraging others to honor their legal obligations. For Guzman,

[c]ooperative states are more desirable partners and can enjoy the gains of cooperation more easily. The key point is that a reputation model establishes a link between compliance and payoffs. This preserves the assumption that states are selfish, rational actors and yet gives states an incentive to comply with international rules.170

Legal realists overlook this point in dismissing the role of reputation in generating compliance. While they retain the insight of Downs and Jones (2002) that states may have multiple reputations, this move does not allow one to demonstrate how overlapping policy considerations reduce states’ incentives toward multilateral cooperation.171 As a result, legal realists remain tethered to the idea that it is retaliation which explains cooperative outcomes, dismissing summarily the effects of reputation and reciprocity as mechanisms which give international law political and legal consequence.172 By broadening the potential set of mechanisms at work in international law to include reputation, reciprocity and retaliation (any one of which may have singular or overlapping effects on state calculations and self-perceptions when strategizing about law), rationalism extends the range of regimes and situations in which international law can be plausibly shown to have effects on state behavior while also providing grounds for conceptualizing what it means for states to engage in “law talk” that may or not be purposive.

Rationalism is not, however, without its own theoretical limits and inconsistency. For Guzman, the strength of reputation is central to understanding why international law achieves compliance even in situations which might appear beyond the reach of law. Reputation is conceptualized as judgments about an actor’s past behavior used to predict future behavior,

170 Guzman (2006), at 549.
171 And nor can legal realists demonstrate how multiple reputations have a range of effects on different types of states, and in particular the effects on developing states in suffering costs for non-compliance in one issue area in relation to policy decisions across other domains. See Downs and Jones (2004).
and a state suffers reputational sanction when its reputation is damaged. Contrary to normative assertions then, states are at root unconcerned with the legitimacy of the rule of law and its pull towards compliance.¹⁷³ Rather, when making compliance decisions, a state sends signals about its future intention to support legal obligations. In turn, others incorporate these bits of information in their decision-making calculus when constructing policy strategies with respect to that state. Because reputation acts as a form of “bond” for entering into international agreements, it follows that states may opt to forgo short term opportunities in favor of gaining long term political capital that might reap higher payoffs in future; that is, states may accept legal obligations that run counter to current interests in order to elicit cooperation from other states later in issues of greater national importance. These assessments are made on the basis of context and thus an individual basis according to the payoffs that compliance might bring about. While much of this theoretical framework for state action appears plausible, there are however two major gaps in its explanatory power. First, it is clearly overdrawn to assert that states do not ever place value on the international legal system as a good in itself, but only on particular legal agreements as a means to an end. Rather, the international legal system sets many of the boundaries within which order and justice unfold in international relations, and serves as a repository of judgments about how reputations are understood in legal terms. More importantly, Guzman’s reliance upon a state’s reputation runs into serious complications in relying too heavily on the (questionable) existence of the unitary state.

Hence, while the balancing component of rationalism is coherent in that states undoubtedly evaluate decisions through cost-benefit calculations, the narrow analytics of rationalism limit its explanatory power. This critique turns on rationalism conceiving of states as unitary entities rather than as aggregated forms of government and bureaucracies which exist within historical frameworks and political structures constituted by ideas and narratives of statehood. As Brewster (2009) has commented, whether a reputation belongs to a state or government adds significant weight to whether compliance through reputation has explanatory purchase. Governments have shorter and varying time horizons than states, and

¹⁷³ Guzman (2008), at 17.
relying on a unitary state model of international relations creates the false assumption that all states have similar discount rates and concerns about future costs. Because governments rotate, evaluations of states by agents change with each alteration. Potential partner states thus weigh the combination of a government’s particular reputation and the state’s aggregate reputation to identify compliance choices. Moreover, shorter time horizons not only lessen the impact upon reputation costs, but also change the calculations of leaders based upon where they stand in their political tenure. If early into a term, for example, a reputation in legal affairs may mean more as a general expression of legal obligation than it would in the final year of office. Reputation is therefore highly contingent upon the dynamics of domestic political processes and the combinations of audiences within domestic polities both for and about which political leaders make judgments. For Brewster, it follows that “compliance with international rules is a function of domestic support for the goals of the treaty regime as well as respect for international legal obligations.”

Interactionalism builds on Lon Fuller’s thesis of law as a horizontal activity, one blending social and legal categories in capturing authoritative practices. To this end, interactionalism shows how treaty creation, for example, is but one indication and single step in understanding what law is and how it works

174 Brewster (2009), at 12.
175 Their seminal piece (2000) set out the foundations for interactional legal theory. See also (2002a), (2002b), and (2009/10).
over time in generating a state’s fidelity (self-bindingness) towards legal categories. It is through obligation, and the eight tenets of Fuller’s description of internal morality, that the form and content of international law can be discerned from various other social kinds.176 In looking at what legal obligation is, why it exists, and when it will bind, interactional theory posits that understanding the role law plays in international society lies in understanding both the nature and the daily practice of legal obligation.

Interactionalism eschews the entire historical debate on seeing law, and in particular international law, as hierarchical and thus in the latter needing a positive source of legal authority from which legal pronouncements, rules, and punishment emanate. Rather, in the horizontal account, understanding law requires coming to grips with how law as an object gives rise to and is structured by reciprocity. Law has meaning and can be distinguished from other social kinds when the process of reciprocity becomes caught up with the process of legality, which, in turn, leads to the internalization of legal obligation. When there is legal obligation there is law, and this interlocking relationship explains why black letter, or formal treaty law, may not bind legal subjects irrespective of their consent. When the criteria of ‘legality’ are met by being congruent with Fuller’s internal moral requirements for law, become practiced in a sustained manner and on a consistent basis, reciprocity and ‘legal legitimacy’ are generated and derived from legal obligations. It is only then that legal subjects become bound to law.

The theoretical insights from interactionalism are profound given its ability to address many gaps in legal realism and rationalism. Fundamentally, interactionalism gets around the problem of viewing law as requiring formal sanction for legal effects to arise, conditions akin to domestic legal institutions. International law can therefore be integrated into jurisprudential debates without having to defend itself as a hybrid form of law requiring from its subjects ‘extra’ fidelity in order to achieve legal obligation. In explaining the law’s empiricism, interactionalism highlights law as a form of social interaction between a range of

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176 Fuller’s desiderata for the internal morality of law are that law should be: 1) general, (2) publicly promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) actually congruent with the behavior of the officials of a regime. See Fuller (1969), at 39.
actors who are engaged in ethical exchanges about what reciprocity requires from those in power and authority and those subject to it. If obligation underpins law, and is the basis for explaining why law is powerful and binds under certain conditions, this understanding expands the rationalist debate about legalization in showing how factors beyond institutional incentives give rise to institutional design and calculations of compliance. More specifically, interactionalism harnesses itself to basic sociological tenets through its insistence that shared knowledge, epistemes, and collective understandings are the background tapestries from which political choices are made and interactions carried out. And in tracing the approximate process through which social norms move down a path towards legality, interdisciplinary work provides a more thorough understanding of how to separate (to the degree possible) social and legal domains and the processes through which interests and identities emerge. Interactionalism thus contributes in large fashion to understanding how norms function within an international society structured by a horizontal normative order, and how legal norms reveal international law’s real power in generating fidelity rather than on the basis of the gains made to states through the reciprocity of constraint imposed upon all legal subjects.

To be sure, there are limits to the interactionalist claim to holism. The theory appears to collapse the relationship between “legal legitimacy” and obligation and leave marginal scope for figuring out whether law is actually law and therefore whether it can have effects. In the aggregate, following a careful reading of interactionalist theory, law is known in three ways: 1) as a form of rationality, which refers to reasoned argument, reference to past practice and contemporary social aspirations, and the deployment of analogy; 2) a type of ordering through its “adherence to specific requirements of legality” in the form of generality, promulgation, non-retroactivity, clarity and congruence between rules and official action; 3) and in the “creation and effects of legal obligation.” Law is present when it creates legal obligation and the social effects that result from this transfer. By extension then, in the absence of legal obligations, there is no law. However, the process by which law is made, as

177 Toope and Brunnee (2009/10), at 2 and 4.
explained by Brunnee and Toope, is rhetorically opaque. Law is a particular iteration of norm making:

made ‘legal’ through the legitimacy generated by adherence to the internal requirements of legality …. shared norms must meet the criteria of legality and be embedded in a sustained practice of legality for reciprocity among participants in the legal system and legal legitimacy to arise. When this happens obligation is created.178

In the process of collapsing legitimacy and legality, this move blunts the scholar’s ability to trace legal processes and speak to the autonomy of law against politics. The end form of law, a rule being “legal”, results from its transference from legitimacy, which in turn, stems from practices which accord with the central tenets of legality. At the end of this process “legal legitimacy” arises, which, in turn, results in the creation of legal obligations. And yet if this is the direct process leading from social norm to legal obligation, such an explanation begs the question of whether the term “legal legitimacy” either is law or a component of law. If it is not law, then it cannot give rise to legal obligations. Hence the argument can be reduced to the following: law gives rise to legal obligations, and there cannot be law unless legal obligations are present. The central issue for interactionalist theory, then, is whether these two postulates can be reconciled. If obligation is constitutive of law, the end result of the process of legal legitimacy materializing, then it cannot follow that there is a meaningful distinction between obligation and law. Accordingly, the point that obligations indicate or reveal law is moot. This would appear to be the case given Toope and Brunnee’s statement that “[t]o reiterate, it is obligation rather than form or enforcement that accounts for the distinctiveness of law”179, and that “obligation is the ‘value-added’ of law.”180 But that legal legitimacy and obligation are distinct entities is also suggested in that “appreciating law’s grounding in social interaction reveals the real locus of power to shape human behavior, through the generation of fidelity, a sense of obligation…”181 Thus the law’s power is manifest in its ability to obligate and create obligatory effects. And yet if the law had the

179 Ibid, at 5.
180 Ibid, at 27.
181 Ibid.
ability to do this, it follows that it cannot be the case that obligations need to be present for
the law to exist in the first place.

For the purposes of generating progress through eclecticism, interactionalism reveals the complexity between collective expectations and legal processes and sheds light on interactions that lead to the validation of law. And this remains the case even if legal validity is characterized by broader criteria than is typically understood by international lawyers. The interactionalist approach can therefore assist eclectical accounts in being able to privilege different explanations for an historical legal event. In particular, it provides rich terrain from which to theorize how international law-making may lead to obligation and the mechanisms through which this effect may generate compliance. Moreover, interactionalism demonstrates what conditions may have to be met for ‘real law’ to materialize, and how, when this occurs, the pathway from legal legitimacy to internal obligation, to compliance with a legal rule, may be understood.

In sum, compliance theories must be drawn on selectively given the manner in which decision making unfolds in practice across states. Retaining the associated concepts of power, reputation and obligation is centered toward this end. In revealing how interagency dynamics give rise to the messy process of decision making, former US legal-policy official Richard Bilder’s experience in the matter is worth quoting at length:

those involved in making, implementing, interpreting, or evaluating foreign policy decisions…view issues of compliance with and breach of international norms in much more murky, flexible, and unruly ways than conventional international law, international relations analysis…seem to assume. The world of the foreign office is dominated less by form and logic than by function, process, and accommodation. Obligation and no-obligation, compliance and breach, shade imperceptibly into one another and achieve operational definition only in the practical outcomes of the deals between the state concerned. Issues of compliance and breach are frequently part of the ongoing game or process of international interaction rather than something subsequent to and apart from it…. The primary concern of [foreign office] officials will most likely be the integrity of the state’s foreign policy position as a whole…rather than the integrity of the norm itself…. [they] will approach a dispute about international norms not as an isolated transaction, but rather as an incident in the state’s continuing relationship with the other state…  

182 Bilder (2000), pp. 66-68, [emphasis added].
Empirical research must therefore be attuned to broader foreign policy and legal processes unfolding between states in addition to the meanings of legal rules. As Koskenneimi has put the matter, “[a]ttempts to find out whether or not States comply with their commitments presume of course, firm knowledge of what there is to comply with.”\textsuperscript{183} And this is a problem around which political and legal intersubjectivity breaks down, specifically at historical junctures of legal fragmentation and contestation. Bilder confirms the focus here that extended foreign policy sequences and compliance decisions are located in political and legal structures congruent with states’ thinking about the politics of international law. Given this constitutive relationship of policy choice and structural constraints, a range of theoretical insights are essential in producing empirical clarity.

**Choice of Case Study**

Canada’s foreign policy sequence over forty years in relation to the Northwest Passage represents a fascinating case from which to theorize the dynamics of the politics of international law. The Northwest Passage policy sequence involves a remarkably difficult set of compliance decisions made over a period of twenty years; one in particular which drove the policy process forward in 1970, and a second effectively finalizing the policy in 1985. Arctic policy was also structured by a prolonged period of rhetorical exchanges within the international legal college and between a range of governments on what newly emerging norms and legal rules of international pollution law in maritime spaces ought to look like. During this time, Canadian officials and international lawyers were forced to understand where the limits of legal validity were set, and how creative arguments and policy proposals could be marshaled to move Canadian policy towards an agreeable position. In relation to how the politics of international law relates to the case of the Northwest Passage, perhaps most centrally, Canadian policy was significantly re-constructed at the greatest codification conference the world has to date witnessed. The Third Law of the Sea codification effort (UNCLOS III) was no less than humanity’s constitution for the oceans, a negotiation lasting over ten years. Such codification efforts are quintessential representations of political law-making in which the law’s autonomy becomes constricted to perhaps its greatest extent. In

\textsuperscript{183} Koskenneimi (2005), at 565.
these instances, states as the subjects of law become the authors of law, binding both themselves and future governments. It is here where political visions, community values, normative ideals, and policy strategies become fused and worked into legislative outcomes.

For UNCLOS, these variables gave rise to the conference’s highest priority - the necessity of ‘consensus’ on all ocean matters - a principle requiring states to narrow their differences and eliminate to the highest degree possible significant opposition to the treaty text. Such compromise involved states taking on a range of new institutional processes and contrary attitudes, modifying their interests on core issues, adjusting legal texts and drafting interpretations, and withholding critique of other states in issue areas in order to accumulate political capital and achieve gains in other rule sets.\textsuperscript{184} Codification efforts of this nature expose the inherent structure of political inequality in global law-making and reveal how legal strategies extend from structural relationships and the legal regimes they codify.

Canada was forced at UNCLOS to prioritize its Arctic policy in relation to other maritime objectives and negotiate and ultimately construct law within domains governed by power-based relationships and existing quasi-legal norms. Moreover, Canada’s reputation as the world’s natural steward of coastal state environmentalism was at stake internationally in placing Arctic policy at the forefront of its agenda, as was Canada’s relationship to its key ally, the United States. Throughout the forty-year period the politics of international was present in different ways in Canada’s extended foreign policy sequence regarding the Northwest Passage. Accordingly, this entire process of interaction between international law, international and domestic politics, must be understood as a single, long case study. The history of the Northwest Passage policy is therefore an extended process within which the politics of international law unfolded in both unique and orthodox ways.

**Method**

The attempt in this thesis has been to engage in research and methodology from a position of pragmatism and to arrive at conclusions through a constructivist, or interpretivist approach. I fill out what this entails both conceptually and practically below, but provisionally it should

\textsuperscript{184} See Allott (1985).
be understood as being committed to moving through empirical material with an eye to evaluate its various political and legal contents, intersubjective meaning for particular audiences, and impact upon relevant actors. By method I refer here to the “concrete tools of inquiry” and the specific techniques of research being undertaken. Several authors have recently drawn important distinctions between the method adopted and the methodology deployed. While the concept of methodology varies, there is much to be gained in following Fierke’s point that methodology refers to the “basic assumptions about the world” being studied, even though this claim would *prima facie* appear linked to ontological assumptions. 185 There is also insight in the idea that methodology is linked to epistemological and ontological assumptions based on its own “scientific standards and truth conditions.” 186 Hence, Pouliot suggests that we think, *pace* Hacking, that methodologies are “styles of reasoning” which are properly aligned with ontological and epistemological presuppositions. 187 A constructivist style of reasoning needs to be for Pouliot “inductive, interpretive, and historical in order to develop not only objectified but also subjective knowledge about social and international life.” The merging of what he refers to as experience “distant” and experience “near” referent points allows researchers to arrive as close to a position of equilibrium as possible in an effort to uncover “sobjectivism.” 188 This term refers to the attempt to capture the reflexive relationship between structure and agency without bracketing or holding either constant. If carried out carefully, constructivist reasoning provides the benefit of anchoring empirical histories in current epistemic debates about what constitutes proper ontological criteria for investigation and what “truths” can possibly be known in relation to investigative techniques. To be sure, the constitutive relationship between a style of reasoning as distinguished from a methodology is somewhat opaque 189, but there is clear agreement within a constructivist approach toward method and

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185 Fierke (2004), at 36.
186 Pouliot (2007), at 360.
187 Pouliot is drawing on Hall (2003). See also PT Jackson (2008), arguing that in distinguishing method and methodology discussions of the latter should move beyond issues of logical structure and scientific objectivity to reflect the theory-laden perspectival character of the knowledge produced.
188 Pouliot (2007), at 360, drawing on Geertz’s work.
189 As Pouliot (2007: 362) writes, on the one hand, that “any style of reasoning rests [emphasis added] on a particular methodology comprised of a set of methods that are specifically geared towards tackling a particular
theory that the social foundations of knowledge and reality are shaped in large part, and constitutively related, on the basis of intersubjectively agreed social facts and context.

In relation to the modality of induction, several hurdles must be overcome in order to remain consistent with this approach. First, and primarily, in order to arrive at accurate and contextual meanings, researchers must first step back from their subjects and not allow theoretical presuppositions to guide judgment of agents and their structure of context. Apart from this danger of theoretical distortion remains the similar issue of “hermeneutic sensitivity” in adducing evidence on the grounds that all theorizing is in some sense “destruction”. As Hopf describes, the problem is “how to “translate” what is observed into the language of scholarly research without changing the meaning of what is experienced by the subjects themselves.” 190 Literal translation of overheard dialogue would be relatively immune from such linguistic alterations, but all acts of interpretation have some meaning imported into final verdicts. The aim on the subjective side is to get as far as possible into an agent’s feel or characterization of his or her experiential reality. The prudent way to proceed is to be, as Hopf puts it, reflexive, in that researchers must knowingly aim to situate themselves in the evidence and remove as much bias or theoretical noise as possible while not simultaneously treating social structures as autonomous pieces of evidence. The first and central probe in the research process then involves inductively gathering evidence as the subject “saw it”, while keeping one eye on the structural components having effects on agents’ dispositions and discourses in producing their interpretations. In other words, merely asking in hermeneutical form what an agent thought is only a fragment of a larger picture of objectivity.

As such, an agent must be understood in context, and thus embedded within his multiplicity of unobserved structures and discourses to the greatest degree possible. For Hopf, “the observer’s task is to reproduce as evidence both the subject’s actions and the encompassing social structure”, which follows from Taylor’s point that “we can never...have a clear view

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190 Hopf (2007), at 60
of the implications of what we say at a given moment.”

Getting at structure involves “reconstructing the intersubjective meaning of that structure for its subjects of interest…[a] subject’s intentions or preferences or interests, for example, are never understood by interpretivists as emerging directly from the subject. There must always be an accompanying account of the relevant sociohistorical context. Evidence does not consist of the actor’s words alone.”

As argued by Pouliot, we require a historical methodology concerned with the historical processes that allow for it to be shown, in the words of Ruggie, “why things are historically so and not otherwise.”

Focusing on historical interpretation and historical context therefore allows researchers to get at the objectivist side of the ledger while negotiating the interpretive contract concomitantly. In short, through a non-rigid procedure research must begin with the inductive recovery of agent’s realities, followed by the objectification of these worlds through the interpretation of intersubjective contexts and, as research unfolds, attempt to achieve “further objectification through historicization.”

On the explanatory side of the ledger, much constructivist research is driven by the method of process tracing in uncovering causal explanations and the mechanisms that link causal sequences. Process tracing involves uncovering “traces” of fact patterns, or the operation of a hypothesized causal mechanism inductively if required, in order to explicate the entire causal processes of chain and mechanism.

While it has been argued by Checkel (2006) that process tracing is incompatible with methods inspired by interpretive approaches such as genealogy and ethnography due to its being anchored in a form of positivism, Chekel’s claim fails to take into account the high degree of overlap between causal and interpretive accounts. As Hopf notes, interpretive work incorporates (mainstream) positivist methods and assumptions into its analysis. That is, mainstream work extols the virtues of being able to assume complete analytical control over the subject being studied to a high degree, while interpretivists believe that although this is an impossible task there are numerous techniques
to retain sufficient levels of control over empirical histories. Moreover, the mainstream counsels scholars to homogenize subjects and cases after accounting for history and culture. Interpretivists do not disavow this insight entirely, but typically shift the burden of proof and argue that subjects must be proven first as meaningfully comparable either within or across cases. For across case comparisons to be made that are compatible, or even considered a hard case, one must first be demonstrated as a “case of something” rather than being theoretically assumed at the outset. At root, the difference between the two approaches is one of proving at the outset the terms under which comparison can be carried out. Indeed, interpretivists are on weak ground in arguing for the non-comparability of cases and variables and in rejecting the idea that things such as wars and revolutions can be, for example, understood as social kinds. For Hopf, it is:

ironic that interpretivistm objects to mainstream homogenization without often explicitly acknowledging that interpretation itself uses a form of homogenization to make its theory work. Intersubjectivity is really a way of homogenizing various parts of society through common webs of meaning. If people understand the same social practices in the same way, is this not an example of sameness, of homogeneity? If so, then does interpretive not assume that homogeneity exists, at least in some social domains? And does this not demand from interpretivism a methodological technique to deal with both difference and similarity?196

In short, the discipline of international relations has made too much of the explanatory/interpretive divide and a process of accommodation would seek to show where productive intersections can occur within research projects.

In concrete terms, in carrying out this research I have attempted to reconstruct from the primary authors of Canadian policy their beliefs about politics and international law. Many of the individuals were high Cabinet officials, worked within External Affairs, or were prominent international lawyers interacting with External Affairs. The overarching aim of the thesis has to been provide a critical analysis of how these individuals reasoned with international law in their personal capacity, but also in relation to the broader debates unfolding within the international legal college. This involves understanding how Canadian legal policy, and the reasons given for it, can be situated within these two areas, the subjective, and the broadened expanse of the intersubjective that envelops relevant

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196 Hopf (2007), at 68.
international lawyers at the time. In looking at many of the individual’s first-hand comments and accounts of how policy was deliberated upon and constructed, their thinking has been situated in context and within the structural constraints these actors worked within. To that end, what the authors of Canadian international law in the Arctic thought is only part of the story as to why the policy was arrived at and ultimately how it was made possible in the first place. In keeping with the interpretive, historical component of reconstructing Canada’s diplomatic history of this extended policy sequence, in sum, I have evaluated the formation of Canadian policy through the prism of the politics of international law at a given movement by giving weight and explanatory emphasis to the effects of structural and ideational precedents.

**Conclusion**

This chapter has argued that in thinking about how international law matters to political affairs the interdisciplinary debate needs to incorporate elements of new thinking emerging between constructivism and critical legal theory. Much recent work in these areas contributes directly to understanding the various functions of international law in political life. This spectrum is vast, and includes the law’s ability to not only constrain behavior and action, but as importantly, condition the thought of actors as they reason with legal decisions within politics. Through its jurisprudential forms, law as legal theory selects its relevant norms and directs lawyers towards the central purposive elements jurisprudence is grounded upon. Legal theory thus impacts the ways in which jurists carry out deliberations on selecting rules. But jurisprudential orientations can also become unconsciously embedded within decision-makers legal approaches and state’s legal identities, functioning as a structural constraint and discursive guide for legal reasoning. Conversely, jurisprudence provides opportunities for lawyers to make claims beyond the orthodox scope of rule boundaries given that within legal theory lie markers about the real nature of law and how this must be squared when applying legal rules. This productive element of law is also seen in the ability for law’s constitutive rules to give rise to thinking about how entities, practices, and actor can be classified. In this vein, law creates legal subjects through its constitutive and generative capacity.
In reference to its discursive capabilities, law is also a medium of communication through which evaluations about social agency, right conduct and legitimacy are made, and these judgments, in turn, set up how the law can be thought of against its interrelated but opposite frame, that of politics and political institutions. Through this dialogue states learn about international law, its requirements for legal validity, and how good arguments may be distinguished from bad. Moreover, states become proficient at seeing how law can be made pliable and used for strategic purposes when difficult foreign policy predicaments arise that require creative legal responses. Finally, it has been argued that in explaining and interpreting long foreign policy sequences structured within the politics of international law, the central interdisciplinary theories of realism, rationalism, and interactionalism must be used toward productive ends. These theories are part of a broader area of work that theorize the law and politics divide, and can contribute substantially to understanding power, reputation and legal obligation in relation to compliance decisions.
Chapter Three: The Contextual Structures and Fundamental Institutions of 1968

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. Robert Cover, 1983

Evaluating the context within which social processes, political thought, and legal deliberation occur has become central to explanatory and interpretive endeavors in social science. As Charles Tilly wrote at the end of his career:

against the most reductive versions of parsimony, [The Oxford Handbook] argues that attention to context does not clutter description and explanation of political processes, but, on the contrary, promotes systematic knowledge….In response to each big question of political science, we reply “It depends.” Valid answers depend on the context in which the political processes under study occur. Valid answers depend triply on context, with regard to understandings built into the questions, with regard to the evidence available for answering the questions, and with regard to the actual operation of the political processes. 197

Context, by extension, provides the set of background structures and intersubjective assumptions from which discourses, beliefs, norms, and ideas about world politics are drawn upon and become utilized. International relations scholars have expounded similar conclusions in arguing that “context sensitivity” provides a bridge between critical and mainstream constructivist accounts, even though it is contended that mainstream constructivism lacks a distinctive focus upon the social influence of contextual circumstances. 198 Mainstream constructivists note this point to be overdrawn, and counter that a constructivist ontology which underpins most critical and conventional approaches “sees every agent and every moral position as unavoidably embedded in a historical and cultural context.” 199 In a parallel vein, arguments that rest on the idea that legitimacy matters within historical episodes are grounded on the assumption that legitimacy claims require a direct correlation with social context given that for legitimacy to have meaning it by

198 See Jacobson (2003). See also Goertz (1994), explaining in rationalist thought how the modes of context – in the form of changing meaning, as cause, and as a barrier to action - work in explaining political choice.
199 Price (2008), at 211. Kratochwil’s central claim, as interpreted by Zephuss (2002: 94, 96), is that “international politics must be analyzed in the context of norms properly understood…actors refer to the context of norms and rules to give their actions meaning and this same context enables the analyst to, at least partially, understand what is going on.”
necessity reference an existing social framework.\textsuperscript{200} Hence, if constructivists seek to make good on their claim that in thinking about the role of history “actor’s practices of legitimation are constrained by ‘the prevailing morality of their society’”, it follows that the role of institutional and social contexts must be paramount in evaluating collective practices.\textsuperscript{201}

The central question for research, then, is explicating what types of context are relevant in uncovering the historical formations of political thought and policy construction, and how these assumptions concerning the relationship of context to choice can be demonstrated empirically. By extension, the role of international law in relation to the contexts of historical discourses, jurisprudential ideas, and legal interpretation is thus equivalently central to the contexts of political judgment in understanding the synthetic aggregation of ideas within a policy sequence governed by the politics of international law. Jenks cogent point on the matter serves to remind international lawyers of the historical specificity and climate of their work and thought: “[l]egal thought can never be divorced from the general intellectual currents of the age.”\textsuperscript{202} Indeed, Jenk’s proposition is used as a point of departure in the thesis for demonstrating how international law matters in the Arctic case.

Chapter three attempts to harness the interpretive power of context in order to provide a convincing explanation and description of how Canadian political and legal thought were generated and the Arctic policy construction of 1969-70 arrived at. As I demonstrate, the roots of Canada’s Arctic policy originate within the international political and legal contexts of 1968, and result from the effects of normative and institutional contestation occurring in the international realm. It was these unsettled, structural conditions that existed in international society’s architectural framework of 1968-69, the regimes of the law of the sea and ocean pollution, the institution of public international law, and the constitutional structure surrounding the moral purpose of the state, that provided the possibility for Canada to construct a creative legal argument on Arctic affairs and the Northwest Passage in 1970. Chapter three illustrates how these institutional configurations, when given further

\textsuperscript{200} See Clarke (2006), and Franck (1990).
\textsuperscript{201} Reus-Smit (2008), at 409, citing Skinner (2002), at 156.
\textsuperscript{202} Jenks (1969).
interdisciplinary depth through additional layers of political and legal context in Canadian thought and international opinion, explain how the politics of international law unfolded in the early years of the Trudeau regime and its quest to secure Arctic sovereignty under international law. Chapters three and four seek an answer to the question of how it was possible that Canadian arguments over the Northwest passage in 1969-70 were able to be seen by many states, international lawyers, parts of American civil society, and American government officials as either partially or entirely legally valid, even in light of strident opposition from many prominent American international lawyers and the United States government under Nixon.

To the question and puzzle of how Canada’s 1969-70 Arctic policy was made possible, Byers has provided a compelling answer by outlining in general terms a legal rule’s developmental path within customary law. For Byers, parallel to the unilateral assertion over the continental shelf made by the United States in 1945 which also had the effect of changing customary international law, Canada’s framing of the issue “in such a way as to extend fairly easily into a right which all coastal States could claim for themselves, and which most coastal States were probably interested in claiming” is suggestive of the general application of a rule that is based upon the principle of reciprocity. That is, when a rule is seen to be applicable to all of its members, and when a right claimed is viewed as being granted to all other subjects in law, reciprocity legitimizes the core concept of international law that all states in the international system are operating in a domain of sovereign equality. Such perceptions can be true whether or not sovereign equality among states is a legal fiction. That the rule gives rise to belief or feeling of sovereign equality only strengthens the claim upon which it is made. The principle of reciprocity acts, then, to facilitate a strategic approach to law-making through the following logic. As Byers writes:

[Canada’s Arctic legislation] suggests that a State wishing to develop or change a customary rule may, in some circumstances, restrict its claims to something which most states would find unobjectionable, but from which those States are themselves unable to benefit. A State taking such an approach then waits for the principle of reciprocity to transform its claims, and

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To be sure, Byers also suggests that part of the acceptance by states of Canada’s Arctic claim turned on the degree to which environmental concerns were being construed as a threat to coastal climates. That Canada was claiming a restricted application of the rule rather than it being seen as strictly related to the Arctic, only assisted therefore, in securing acceptance of the rule. While the plausibility of Byer’s perspective (itself based upon the principle of reciprocity) is undeniable, there is more to be said about the international institutional conditions, both in politics and in international law, that must form the backdrop against which changes to customary international law are proposed. An examination of the institutional conditions of 1968 illustrates this contextual gap.

From the perspective of theory, as outlined within chapter three, the necessity of context fits within the broader framework of using analytical eclecticism to set out how law unfolded and interacted within sequences of the politics of international law. Chapter two stressed that constructivism and critical theory take as foundational the idea that law, legal decisions and legal policy, must be seen within their contextual and structural frameworks in order to demonstrate how, for example, domestic or international political situations impacted upon legal analysis, or how the application of rules was subject to reasoning within the broader contexts of strategic affairs. As previously mentioned, the emphasis of context moves one step beyond both reading and seeing how law was handled in its black letter status and points towards viewing legal deliberations historically absent a strict reliance on legal formalism. The contexts of law, and the politics of international law and foreign policy sketched in chapter two, reveal the spheres of possibility from which Canada made its crucial decisions on Northwest Passage policy.

**The State of Public International Law**

By 1969, in the West, international law was in many ways in crisis. Weakened by political debate and disciplinary fragmentation, western public international law could be

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204 Ibid, pp. 96-97.
characterized as questionably efficacious on the basis of its relevance, marked by a strongly pluralist framework, and to many authors, the subject of stark interpretive contestation on how it was found and to what purposes it was possibly to serve. While these three classifications can be shown as separate ideas around which much of the subject matter of international law was oriented towards, there was also a distinct sense in which these were critical positions interrelated within the broader scope of international legal study. The underlying concern and proof of the autonomy of law, for example, was only arguable in reference to the varieties of legal theory that conceptualized international law along instrumental lines. Positivist jurisprudence naturally assumed that it was possible for legal autonomy to exist in relation to what international law ought to be and ought to do within world politics. Yet for all other forms of international jurisprudence, legal autonomy was only defined in relation to the role attributed to the instrumentality or purposive ideals attached to international law. For example, if international law constituted rules and norms stemming from authoritative sources, as positivist’s maintained, then the law’s purpose became at most a move toward solidifying and maintaining world order, in addition to preserving the absolute gains of states. If international law was based upon authoritative processes carried out by states’ leaders in the pursuit of ‘human dignity’, by contrast, it followed that the law’s autonomy was circumscribed by the types of broad based purpose/s and arguments of justice associated with what states were for, or what justice required within states or the broader domain of international society.

In large part then, in the legal realm beyond positivism, functional theories of international law in the 1960s gave rise to linking international law to its purpose/s within world affairs, and this framework splintered into particular jurisprudential approaches in interpreting the content and limits of individual norms and principles, rule-sets, and treaty provisions. Given that the practice of international law remained in need of verification and defense alongside

205 On international law’s general penchant towards crisis, see Charlesworth (2002). See Shabtai Rosenne (1984) on the crisis of confidence in the law in the 1980’s and its institutional origins. See in particular Wolfgang Freidmann’s argument that 1965 marked a crisis for international law due largely to three factors: Security Council paralysis which, in turn, attenuated Cold War interactions; the ostensible “equality” of all states; and the relevance of the distinction between civil and international war, and international law’s muted role in relation to the former. See Freidmann (1965), at 860-865.
the domain of political decision-making, explanations of international law’s proof traded between varieties of jurisprudence attempting to set out the distinct nature of proper legal interpretation. And thus, although western international law remained in the late 1960’s largely comprehensible as a result of its primary characteristics as law, argumentative battles raged over how specific modes of jurisprudential inquiry were to be conducted in order to preserve disciplinary approaches of legal thought into the future.

When looking more broadly at the relationship of Soviet international law and developing states’ perceptions of western interpretations of public international law in the late 1960’s, the crisis of world law should be seen as profoundly pronounced. Renowned Soviet jurist Tunkin’s repudiation and reconstruction of Marxism, and a distinct Soviet approach to international law through the principles of peaceful coexistence, had to some extent come to unsettle the absolute authority of existing forms of European jurisprudence and create new space for thinking about how and when historical forms of custom ought to bind developing and socialist states.\textsuperscript{206} This challenge had the effect of shifting for many developing states legitimacy away from doctrinal accounts surrounding “classical” international law, even though the idea that a “necessary antimony, or opposition” between the new and old international order was unfolding naturally in historical time.\textsuperscript{207} There existed after WW2, according to Tunkin, “a new historical type of international law – international law of the period of coexistence of states with two opposite socio-economic systems.”\textsuperscript{208} Soviet jurisprudence continued as quintessentially conservative, positivist, and understated in its interpretive components and nominal contributions towards expanding existing jurisprudential debates in the international legal system. Customary international law was ‘dated’ as an authoritative source of law, and subordinate to treaties and in particular bilateral relationships in light of the historically consistent patterns of “unequal treaties” governing international affairs. “Old” custom, for Tunkin and Soviet jurists, could not bind the “new”, that is, recently decolonized and independent states, absent their express consent being granted. And thus, the theoretical and doctrinal pillars of international jurisprudence

\textsuperscript{206} See Tunkin’s (1974) classical work.
\textsuperscript{207} See McWhinney (1987), at 188.
\textsuperscript{208} Tunkin, letter to The Times (London), Feb 25, 1963.
were problematized and became contested on the basis of their fairness.\textsuperscript{209} As Angie brilliantly chronicled, post colonial states and their legal advocates, including the likes of Anand, Singh, Bedjaoui, and Castaneda, used the idea of sovereignty as a conceptual weapon to argue that ancient European legal doctrines required revision and especially in relation to the emerging right of permanent sovereignty over natural resources.\textsuperscript{210} Abi-Saab’s trenchant prose captured this fervor concisely:

\begin{quote}
For the newly independent states, sovereignty is the hard won prize of their long struggle for emancipation. It is the legal epitome of the fact that they are masters of their own house.\textsuperscript{211}
\end{quote}

For Casteneda:

\begin{quote}
In all that vast body of law having to do with the responsibility of states, the rules now in force, molded by a practices repeated a thousand fold throughout the last century and a half, were not only created independently of the interested small states, but even against their desires and interests.\textsuperscript{212}
\end{quote}

And yet with these foundational challenges, Third World jurists harnessed the insight that the new international legal order needed to be built out of the old, rather than relegating existing law to a subordinate position of authority. Such a move had the effect of casting many international legal regimes into uncertainty and normative conflict, in which revision would be essential for the maintenance of world order and the emergence of novel and necessary relationships of international justice based upon the right to development. The solution became structured upon creating an international law of universality. Here, the Third World would play a formative role in developing legal content through its direct deliberations and consent. Whether and how existing international legal obligations ought to be seen in their relation between transitions of colonial rule only further reinforced the fragility of the international legal order. For if, as Schachter (1967) had argued, Western jurisprudence ought to view international legal obligations and their ability to bind as existing on a

\textsuperscript{210} See Angie (2005), pp. 196-243.
\textsuperscript{211} Abi-Saab, (1962), as cited in Angie (2005), at 196.
\textsuperscript{212} Casteneda (1961), at 39.
continuum between legitimacy and authority, how the remainder of the world’s states fell along this pendulum was distinctly unclear.\(^{213}\)

It was this circumstance of western legal pluralism and global interpretive contestation within international legal thought by 1969 that is central to understanding the Canadian approach to international law historically, and specifically in relation to Arctic policy. The conditions of pluralism and contestation about the proper role of norms had the effect of shifting the basis of authority within the international legal system. If law did not bind in areas of international politics, this position followed from the law’s negligible authority and pluralism of competing world views on international law and global justice. The effect was to unsettle the foundations of authority throughout the international legal system and reconstitute it with dominant visions of ‘progressive’ forms of international relations and legal reasoning. In short, the complex structure of the international order in 1968 revealed a clash of multiple normative systems through which policy could be made and thereafter justified by what the politics of international law required. This institutional setting, as set out in greater detail below, had the effect of opening up argumentative policy space for Canadian law-makers to think about legal validity in novel ways in respect to the complicated nature of Arctic policy.

In relation to the issue of international law’s relevance by 1969, jurists were engaged in an argumentative battle on two fronts. The first was that of proving that there was an ontological entity of international law given the overwhelming tendency to dismiss its status \textit{qua} law as lacking a proper legislative body and institutional mechanism of enforcement. Hart’s criticism from 1961 reinforced centuries of disbelief about international law’s possibility.\(^{214}\) By its very nature, the absence of secondary rules in international law from which legal change and adjudication could be grounded, and any unifying rule of recognition which specified the true sources of law and the identification of rules, rendered international law not a primitive system but one incomplete in its systemic requirements. For Hart, these general apprehensions as to the quality of international law lent themselves to further critiques about its ability to be considered a binding instrument. The conclusion for many

\(^{213}\) Schachter (1967a).

was that, absent a sanctioning mechanism, international law could not be construed as law properly so called. While Hart would dismiss this argument as unreflective of the capacity of all legal discourse to not always be aligned with the ideas of obligation and duty, the problem of international law’s grounding in primary rules continued to restrict its credibility in the minds of theorists and statesmen by the end of the 1960’s.

While international law was upheld by many lawyers and judges as a coherent institutional system, the law’s relevance continued to be questioned by many of its primary advocates within American academies. Writing in 1967, in a series of seminal articles dedicated to Professor Leo Gross, Stanley Hoffmann lamented upon the fact that “the failure of the constraining function has always been at the heart of the weakness of international law. But this failure takes on a new dimension, and constraint a new urgency, at a time when the free resort to violence means the possibility of total war.”\(^\text{215}\) In control over the use of force “international law as a system of constraint is weak law”\(^\text{216}\), a position consistent with the historical idea of the law’s political foundations in matters of national security and global order. Indeed, the derivative point of Hoffmann’s argument, congruent with Richard Falk’s thought at the time, remained the elusive problem of distinguishing and defending a degree of substantial or even partial autonomy for law in decisions of ‘high-politics’. For Falk, history and contemporary empirics continued to reflect Quincy Wright’s 1955 conjecture that “[t]he discipline of international law is in a state of crisis; As understood by traditionalists it appears to be obsolete, and as understood by modernists it appears premature.”\(^\text{217}\) The pivotal aim for international lawyers became how to secure with some degree of certainty the idea that “[i]nternational law, like other branches of law, is not reducible to the political process from which it emerges.”\(^\text{218}\) And yet the relevance of international law in shaping or altering state behaviour or thought, and the continuing problem of defending theoretically the law’s autonomy in light of its detached nature from political reality, were further reinforced by many varieties of international jurisprudence that had risen to prominence by 1969.

\(^{215}\) Hoffman, in *The Relevance of International Law*, at 41.
\(^{216}\) Ibid, at 40.
\(^{217}\) Ibid, at 177.
\(^{218}\) Ibid, at 11.
As Koskenniemi has documented, the turn in the 1950s towards legal pragmatism, as developed through the ideas of Lauterpacht, and the concomitant movement of international legal realism within American academies, gave rise to two competing dynamics of legal thought. These competing interpretations constitute two distinctive ‘legal cultures’, the culture of formalism and dynamism. Vocabularies and doctrinal techniques of these forms were rooted explicitly in the pluralism of 1969 and found further exposition in how policy matters were to relate to legal opinion and legal interpretation. The culture of formalism drew heavily in its understanding on the nature of international law from the postulates surrounding legal autonomy as expressed through the tenets of positivism. Formalism sought the ‘relative’ bracketing of social facts and moral ideas in legal interpretation in order to produce an autonomous space for law to do work and protect against the counter-weight of traditional power politics. Law was to be found through its sources, removed from positions of political policy, and answered on the basis of right and wrong, rather than through a multitude of shades of possibility. That international law allowed for a variety of different interpretations in many cases was not in doubt even to defenders of weak positivism, but that the integrity of law was destroyed when aligned to policy-governed ideology and instrumental justifications in international affairs could not be more greatly underscored by formalists. By contrast, the culture of dynamism manifested an anti-formalism that underscored the purposes for which rules and the regimes of international law were initially orchestrated to achieve. Strict rule textualism was considered conservative in nature, reliance by lawyers on distant ideas of the past required to navigate uncertain future settings that contained possibly radical and alternative predicaments. Discourses of legal dynamism supported the move toward realizing “legislative purposes, community interests, and to the balance of equities … professionals should speak directly to the values, interests, and passions involved - and they could do this by the technical language of effectiveness, optimization, compliance.”

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220 Ibid, at 496. Koskenniemi’s examination of the argument between Professors Wolfgang Friedmann, Adolf Berle (former US Assistant Secretary of State), and A.J. Thomas, in 1966, in relation to the United States’ role in intervening in the Dominican Republic reveals the nature of this cultural-legal divide. Berle and Thomas, in arguing expressly that a legal rule “can never be explained in terms of itself without reference to its purpose” (497), followed this point with the statement that “in international crises, do you want action, or do you want
characterized not only the pluralism of 1969, but the greater schism opened between Continental and American perspectives.

Writing in 1968, Roslyn Higgins was explicit in the dichotomization and relative incommensurability that had emerged in international legal thought. There were now “two profoundly different views on the nature of international law and the role of international courts”, one anchored in British thought and practice, and the other attributed largely to the ‘majority’ of American international lawyers. The former conceptualized law as a set of neutral rules “which it is the task of the judge to apply objectively to the facts before him … to apply the law as he finds it… [as] the task is to ‘apply’ rather than ‘make’ the rules.”221 Conversely, American lawyers ‘know law’ through the “entire decision-making process”, and not just by reference to the trend of past decisions which are termed ‘rules’. Policy alternatives were to be brought to the forefront of the juridical mind when pronouncing upon the substance of legal validity given the range of different interests parties to a dispute bring to an adjudicative forum. For Higgins:

The claimants are all seeking to attain various objectives, and it is the task of the judge to decide the distribution as between them of values at stake, by taking into account not only the interests of the parties, but the interests of the world community as a whole.222

merely words?” (498). Friedmann, himself not a strict positivist but one who saw the changing nature of international law in society moving toward a more cooperative position, replied frankly that ideological and political readings of international law undermined the type of impartiality that the law as a body of community rules was constructed to uphold. For Friedmann, the culture of dynamism’s reliance upon power and ideology not only jettisoned the possibility of there being a set of norms applicable to the use of force in self-defense, but struck at the integrity of the disciplinary practice of the law itself, further deepening the chasm of hypocrisy that had become attached to the opinions of politicians and the wider public when the role of international law was under evaluation. Ultimately the debate marked, and is reflective of legal discourse in the late 1960s, a clash between the use of universalism and particularism in deploying legal arguments. Through legal formalism, Friedmann was relying on the ‘possibilityof universal community’ being secured through the law tempering the pursuit of power by the strong, a practical technique of using law to build “on formal arguments that are available to all under conditions of equality” whereby decision-makers set aside for the moment their preferences “and enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests” (501). Thomas and Berle saw the culture of dynamism as expressing their view of clashing “incompatible particularities”, from which the emancipation of communist threatened states could be secured through the universalist pretense towards a self-determination grounded in the rules of ‘European civilization’.

221 Higgins (1968), at 58.
222 Ibid, at 59.
Higgins attached this reading of jurisprudence to not only its clearest exponent in Myers McDougal, but further to Friedmann, Jessup, Dillard, Henkin, MacChesney, Goldie, Falk, Schachter, and even Hersch Lauterpacht. This group, she wrote, was reflective of the fact that policy-oriented law was “accepted orthodoxy in the US.” Irrespective, however, of the degree to which this position breached the limits of objective reality that divided legal thought in 1969, that the American academies had for two decades structured themselves along policy-centered lines and prominent lawyers were in agreement with Higgin’s characterization of the field, is beyond doubt. Commenting on the role of policy in law, Oscar Schachter distinctly concurred with Higgins’ British (rules)/American (policy enacted towards social ends) dichotomy, and explained further that the British rule-based approach was “inadequate” on the basis that “[i]t is defective as a description of the process of applying law and it is defective as an approach to a more rational use of law.” Legal positivism, Schachter continued, rendered opaque the point that law is a set of norms which includes standards and purposes, whether in conceptual forms such as proportionality, or in the form of broad principles. For policy lawyers, these forms must be acknowledged to “embody policies and social values”. Indeed, as David Kennedy has historically chronicled, Schachter’s views and many of those in the Columbia school in the late 1960s, though distinctly aligned with the policy school of Yale scholars and McDougal in particular, had become the ‘mainstream’ of international legal theory in the United States.

By 1960, all American international law scholars were ‘eclectics’, further removed from the untenable positions of positivism and naturalism that had characterized international jurisprudence since the 1930s. In the academies, the Columbia and Yale schools remained the mainstream and the counterpoint, respectively. The Yale school emphasized the policy end of legal thought in terms of the relationship of policy to legal formalism, while Columbia scholars stressed the virtues of international cooperation and eschewed the possibility of rigid

223 And presumably beyond, in the case of Lauterpacht, a British immigrant from Eastern Europe. To be sure, Higgins perhaps slightly overstated her case on the completeness of such a distinction, as was brought to the forefront of debate in 1972. See the symposium on the ‘Place of Policy in International Law’, Georgia Journal of International Law (1972).
224 As Ian Brownlie and Richard Falk downplayed this distinction in their rebuttals to Higgins. See Ibid.
225 Schachter (1972), at 8.
codification in light of the potential for international law to be realized through principles and legal flexibility. The Columbia school marked its focus with attacks on the conceptual problems associated with political positions based upon sovereign autonomy, while combining, as Kennedy put it, “a weak anti-formalism with a commitment to neutral norms and humanist institutions as law for the modern international community.”\footnote{Kennedy (1999-2000), at 383.} However, within these two broad schools of legal thought there existed a multitude of diverse approaches to international law representative of the plurality of legal opinion throughout the mid to late 1960s.

Writing in 1967, Richard Falk highlighted in his survey of the ‘New Approaches to International Law’ the main methodological orientations that had come to structure the discipline.\footnote{Falk (1967).} The most prominent from Falk’s position was that of the policy-science school of McDougal, whose voluminous writing about international law targeted the primary goal of using law to “help a social system move toward the attainment of its goals.”\footnote{Falk (1967), at 488.} The focus of McDougal’s work on finding and citing the terms of legal validity could not have been more strikingly opposite to that of the British positivists. McDougal’s method was systematic in the sense that the full scope of variables a decision-maker and international lawyer were to take account of were vast in scope and searching in temporal reach.\footnote{See McDougal (1967), and McDougal, et al (1968).} Lawyers and policy-makers, positioned by McDougal as the social and tactical engineers of a new international order, were counseled to take into account nothing short of all of the factors that were to bear upon the common interests of mankind and the international system’s quest for the common dignity of peoples in finding law. The temporal scope of a decision turned on evaluating what had happened in the past, what might be expected in the present, and what might be desired in the future. McDougal’s move was thus parallel to Schelle’s notion of the ‘double-function’ of law whereby the “the content of desired policy [from the international lawyer] should be an accommodation of the global (inclusive) interests of the world community and of the more exclusive interests of the nation-state on whose behalf he acts…the national
decision-maker…can serve simultaneously both national and world policies." In ascertaining law, the test of legality was based on the platitude of the degree to which an action conformed to ‘relevant community expectations’ given that international law itself was defined as the “comprehensive global processes of authoritative decision”. For McDougal, all lawyers were tasked and entrusted with the aim of using their authority to promote human dignity, given that it was only through a teleological reading of jurisprudence that the ends of man would be reached. Yet in denigrating positivism’s penchant and conservative position on validity, McDougal’s jurisprudence collapsed law directly into policy thereby rendering them indistinguishable. And this problematic would accompany his work for decades. While the Yale school had slipped into the position of counterpoint against the Columbia mainstream in the 1960s, the effects of McDougal’s ideas found their way into areas marked out within the Columbia school, an elision which had potentially dramatic implications for political relations between states.

While Schachter’s work was principally indicative of this merger of legal ideas, Louis Henkin’s thought on the role of law in foreign policy decision-making was also illustrative. Writing in 1968, Henkin opined that “[a]ll law is an instrument of policy, broadly conceived. Law is not an end in itself: even in the most enlightened domestic society it is a means - to order, stability, liberty, security, justice, welfare.” Law could not be thought of or worked pure in any sense, and its understandings fell back upon how legal instrumentality represented the ideals and fit between a community’s pursuits of the good, the right, and legitimate sanction. Schachter’s commentary on international legal obligation in 1967 further demonstrated in sharp relief the profound consequences that could arise in merging international law towards policy ends when decision-makers reflected on the nature of international obligations. There were, as Schachter demonstrated, a multitude of bases upon which the idea of international legal obligation could be grounded, ranging from inter alia, consent, the will of the international community, the common purposes of the participants,

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231 Falk (1967), at 490.
232 McDougal 1968, at 1.
233 See Young (1971); Allott (2005); Fitzmaurice (1971); Chimni (1993); and Koskenneimi (2005).
234 Henkin (1968), at 86.
through to shared expectations of authority.\textsuperscript{235} As Schachter noted, for many pragmatic lawyers and legal officials, the plurality of opinion may have been of marginal significance in their task of getting on with ‘doing law’, but the larger problem with sustaining this underlying belief lay in the linkage that connected the basis of obligation to the binding force of international law. If the basis of obligation were multifaceted, correspondingly so were the reasons and arguments behind why the law bound states both generally and in particular instances. In other words, theory mattered concretely in determining whether a rule of law had emerged or had been terminated, whether an event was a violation or precedent in law, or whether a treaty practice became accepted as law. In so far as legal officials were tacitly or expressly aligned to a particular legal theory, their position on the issue of finding law and viewing the basis upon which they were obligated to follow rules remained tied to the theoretical options available within the international college of lawyers. But Schachter’s work also reached into what Falk described as the second primary dimension of legal thought at the time, encompassing parts of the Yale school, but specifically orientating itself toward viewing law as a functional tool, a pragmatic optic, for solving acute policy problems.

In this respect, functionalism, first articulated by Hans Morgenthau in 1940, became incorporated with prominent legal authorities of the 1960’s including Percy Corbett, C. Wilfred Jenks, Wolfgang Friedmann, and Julius Stone, and found its expression in developing international law on the basis of it satisfying social functions through the logic of organizational forms and techniques of pragmatic problem-solving. In its prescriptive capacity as applied to international organization by authors such as David Mitrany, James Sewell, and Ernest Haas in 1964-1967, legal functionalism underscored the ability of international law to circumvent “the propagandist atmosphere of political international assemblies”, and bring “nations together in practical tasks of mutual interest and benefit.”\textsuperscript{236} Functional legalism allowed international law to achieve justice in some capacity, whether through the realization of particular values or the attainment of desired end-states for international societ(ies). In many ways, functionalists assumed that cooperative endeavors

\textsuperscript{235} Schachter (1967a), at 301.
\textsuperscript{236} Friedmann (1965), at 57. On international law and functionalism generally, see Douglas Johnston (1988).
between states would enhance the overall gains of international society when decision-makers thought beyond the orthodox horizons of territoriality and sovereignty. Ultimately, international law was believed to facilitate this effort in two ways. First, functionalism as a method in moving towards cooperative endeavors was intended to place states’ interactions beyond the realm of the “political” and towards end of technical agreements, as Haas had insisted. Second, by clarifying the substantive goals of humans within institutional networks, including the institution of international law, functionalists were able to argue for positions grounded in the purposes for which international law was originally created. Because functionalism did not engage in clarifying the specific content of legal rules, international lawyers possessed substantive leeway in outlining the content of law and the ability to argue that it was not formal rules which made law powerful, but reasons for which rules were originally constructed. In short, international law became a tool in the hands of functionalists, or in the words of Koskenniemi, international law was able to navigate between what was ‘good’ in a particular situation (harnessing the discourses of justice), and what worked (bringing about absolute gains through cooperative endeavors).

Functionalism further allowed lawyers to argue about the relevance of international law, and by extension what the law ought to be in relation to its ‘fit’ with changes occurring within international society. Scholars such as Stone and Jenks in the late 1960s, maintained that international law had to be evaluated as either adequate or inadequate for societal requirements, a move which further deepened the point that the law ought to consist and be reflective of the social ends it was intended to bring about. Such reasoning was supplemented by Falk’s jurisprudence that directly positioned international law within two sets of poles in international affairs. The first was between the positivist idea of legal autonomy and the policy position of legal ‘relevance’ stressed by McDougal; and the second, which had been prevalent since the early 1960’s, in relation to the legalists and anti-legalists of American

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237 Haas (1964) at 6.
238 See Koskenniemi (2000). While Koskenniemi is referring to the use of these ideas by international relations scholars when discussing international law, this characterization can be extended to refer to the underlying approach of functionalist doctrine as well.
foreign policy.\textsuperscript{239} This latter division pitted those who sought greater rules of international law to guide the system against those who dismissed the importance and efficacy of international law in foreign policy decisions. Between these axes Falk posited an ontology for international law – as a rule structured program divined towards specifying the contents of social welfare – and also a purpose, that international law-making existed as a form of social engineering. For Falk, “[i]nstrumentalists join to attack those who exclude social policy from a determination of the content of a legal norm’’\textsuperscript{240}, and this disposition was to be carried out through forms of treaty interpretation which brought clarity to the contextualism of legal rules. Of significant importance to international affairs however, the particular issue of the proper methods of treaty interpretation moved quickly beyond the doors of the academy and spilled out into the international arena in a forum devoted to the construction and interpretation of treaties at Vienna. This fractured debate infused the conference deliberations with the problem of how the role of law ought to be guided by an international framework of pluralist jurisprudence.

Following the International Law Commission’s initial recommendations in 1966 for the draft articles on the Vienna Convention, McDougal and his co-authors penned their own volume on the \textit{The Interpretations of Agreements and World Public Order} based upon the idea that treaty interpretation rested upon two sequential methods of inquiry.\textsuperscript{241} Interpreters were counseled to first attain the genuine shared expectations of the parties subject to a treaty, and in light of the gaps to inevitably emerge in adjudication, make reference to “the basic constitutive policies of the larger community which embraces both parties and the decision-maker.”\textsuperscript{242} The audience of consideration in matters of legal validity was the outer boundary of the international community as reflected through its core component of human dignity, parallel to the referent object Jenks had suggested earlier of a ‘community of international law’ governed by an ‘international public policy’. Legal texts for McDougal played a distinctly secondary role in light of prioritizing the conception of agreement as a process of

\textsuperscript{239} On the latter, see Henkin (1968). For analysis of the differences between Falk’s and McDougal’s jurisprudence, see Higgins (1969); and Chimni (1993).
\textsuperscript{240} Falk (1967), at 299.
\textsuperscript{241} McDougal, Laswell, and Miller (1967).
\textsuperscript{242} Ibid, at 10.
communication which viewed all “signs and acts of collaboration between as an effort on
their part to mediate all relevant subjectivities of commitment.” Lawyers and judges such
as Sir Gerald Fitzmaurice were criticized for relying on beliefs that the intention of the
parties to a treaty could *prima facie* be ascertained and that the text itself both could and
should be used as a basis of reference. Such a reading by positivists was “destructive of
community and individual values”, and negated that the “fundamental policy” of
interpretation was “to defend the dignity of man”, “to respect his choices and not, save for
overriding common interest, to impose the choices of other upon him” as legal positivism
required.

Speaking at the first session at the Vienna Conference in 1969, McDougal, representing in
his capacity the United States’ government, and explaining its reasons for a particular
amendment to be made to the negotiating text, stated; “[t]he text of a treaty and the common
meanings of words would be made the point of departure of interpretation, but not the end of
inquiry. The text would be treated as one important index among many of the common
intent of the parties. No fixed hierarchy would be established among the elements of
interpretation…” In response, the international legal college attacked this approach as
inherently flawed in entirely circumventing both the role and idea of law. The American
amendment was overwhelmingly rejected at the first session, and the UK representative
reminded the forum that analogous functionalist reasoning, originally put forward by Hersch
Lauterpacht, had similarly been turned aside on the grounds that treaty interpretation was
never meant to be found independently of a treaty text. To the contrary it was argued, a text
was presumed to be an authentic expression of the intentions of the parties, and textual
meaning was to be the point of reference rather than the intentions of the parties, a position
supported by the International Law Commission, the Institute of International Law, and
conference participants at Vienna.

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244 McDougal, Laswell, and Miller (1967) at 8, commenting on Fitzmaurice.
By the close of the Vienna sessions, the scope and content of jurisprudential debates reveal how the status of international law by 1969 was one beset by theoretical pluralism, interpretive contestation, and disciplinary fracture. Not only within American academies did there exist a wide range of visions on international law, as set within the two broad headings of the policy school of Yale and the functional/coordinative focus of Columbia, but there was also an equally profound disagreement among western jurists on the proper methods of legal interpretation, the role of value and justice in law, the basis upon which legal obligation was grounded, and to what degree law ought to be protected and reinforced as an autonomous entity in relation to political ideology and policy-making. The ontology of international law and the jurisprudential frameworks within which it rested was, in other words, decidedly unsettled and marked by advocates who saw its role and purpose in fundamentally and at times radically different ways.

The LOS Regime

The quest for an international ocean regime came with the discovery of the common heritage of mankind. Elisabeth Mann Borgese (1973)

To describe the law of the sea ‘as it is’ is to describe a law some of which is uncertain, much of which is in flux. The general principles, however, have remained, the principle exceptions are agreed, the areas and directions of change are identifiable. Louis Henkin (1968)

I had thought that after Professor Burke and I wrote a thousand-page book on this subject I knew what I thought and what the answers should be. After listening to our colleagues, I am distressed to find that my views have become somewhat tentative. Myers McDougal (1968)

By the end of 1968, not only was the arena of public international law undergoing wide-ranging scrutiny, but the law of the sea was similarly subject to relative contestation and uncertainty in relation to valid law and on what basis future law would be constructed. Given the immense changes that were occurring in the expansive role of technology in uncovering resources and traversing the oceans, the nature of scientific understanding in ocean ecology, chemistry and biology, the demand from new states post-decolonization that they have a demonstrable input in crafting international law to which they were subject, and the growing movement to claim as sovereign territory greater reaches of ocean space, the law of the sea was in most areas open for legal reinterpretation and diplomatic bargaining. This
was the historical process within which the politics of international law structured events given that a codification and law-making event for the oceans regime appeared inevitable. While it would be an overstatement to say that the old law of the sea had become entirely obsolete by 1969, the multiplicity of opinions on the future directions of the use of the seas and the law which would oversee these changes pointed towards the regime’s legal and political crisis as reflected in the debates of international lawyers, state bureaucracies, and the UN General Assembly. In short, the oceans became the subject of deep political, ideological, and moral disagreement as the increasing depth of ecological knowledge became set against the possibilities of vast resource extraction and many of the seas most ancient principles of conduct.

Conflict in law was fundamental to understanding the ocean regime at the time. This involved what the former Assistant Legal Advisor to the US Department of State, Robert Neuman, termed the contested basis “of the essential nature of the international legal process.” Writing in 1968, one of Canada’s preeminent authorities on the law of the sea, Allan Gotlieb, propounded the common belief that “[i]t is truly remarkable that after using the seas for centuries man is still today without any answers to some of the basic problems to which this ever-increasing use gives rise.”

The heightened instability in law of the sea discourses associated with issues of ecology and technological change had the effect of reinforcing the fractured nature of public international law in 1968. Schachter put the point with great clarity in 1967:

That the world of the sixties is radically different from that of the previous generations is a truism to which international lawyers, no less than others, pay deference. They are frequently, almost routinely reminded of the great changes in international society: the scientific and technological revolutions, the end of empires and the burgeoning of new states, ideological challenges to existing power structures and traditional norms, the growth of international institutions and co-operative arrangements. No student of international law can be oblivious of these factors and of their potential relevance to international law. At the same time, in the eyes of the other professions, international lawyers appear traditional and old-fashioned in their intellectual approach, more concerned with precedents and verbal niceties.

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247 Gotlieb (1969), at 260. His comments were made on the heels of William Burke positing that “[t]he problems to be confronted by states in attempting to maintain a viable public order for the oceans, to the extent such problems can now be identified with useful certainty, are compounded both of novel legal conflicts and of recurring controversies that have acquired new connotations or urgency. See Burke (1968), at 16.
As the scientific revolution took hold of ocean affairs and required a response from international ocean law, western policymakers were forced to confront a series of political and legal challenges that had been building momentum for several years.

The initial origins of institutional contestation in the law of the sea can be traced back to the negotiations and outcomes that resulted from the first two major codification conferences in Geneva in 1958 and 1960. There were two major divides that split states participating in the Geneva Conferences: the issue of substantive law and that of formal law-making participation, both of which were intimately tied to the process of distributive bargaining occurring within the conferences. As Robert Friedheim noted in the relationship between, as he put it, “satisfied and dissatisfied” states, those who were critical of the existing substantive law and the legal status quo were ‘have-not’ states located in the southern sphere and who believed that the concepts and institutions of international law worked to their disadvantage. These states, which constituted the majority of participants at both conferences (54 of 86; and 56 of 88, respectively), expressed their belief that such conferences ought to be seen as political processes rather than quasi-legal negotiations. The law of the sea was framed as an international problem for developing/dissatisfied states from which General Assembly resolutions, technical, biological and economic factors had additionally to be compressed into possible legal outcomes. The opposition to existing rules was put crisply by Dr. George Casteneda of Mexico:

Rigid adherence to the traditional rules of international law could prove disastrous to all concerned, for the traditional rules on the regime of the sea had been created by the Great Powers for their own purposes before many major problems had arisen and before the birth of the new states which formed the majority.

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248 Schachter (1967b), at 423. See also Douglas Johnston (1967).
249 Although it is entirely plausible to argue that the real fissure in ocean affairs, upon which legal conflict followed a consistent path, was the unilateral Truman Proclamation of 1945 extending United States jurisdiction over the continental shelf and marine resources.
250 In Friedheim (1965: 24)
This belief was repeated endlessly at the conferences on the grounds that their overarching goal should be political, ethical and legal change. As Freidheim remarked, “change for these states replaced history and tradition as a commander of respect.”251 The existing, historically grounded legal rights in the law of the sea were characterized as a conservative, colonial anachronism requiring alterations according to ‘progressive’ visions which acknowledged the necessity of law to keep pace with technology and ethical imperatives. International law was to be equated with justice for newly developing states, placing them as equal partners in the participation and consultation in the law’s relationship to the acquisition of various new freedoms associated with sovereignty. Against these demands, delegates of the ‘satisfied’ (developed) states remained rigidly attached to existing legal institutions and in particular the cornerstone principle of the law of the sea, the freedom of movement and passage.

Simply put, developed states would not countenance the idea that a legal conference of codification and progressive development should involve a political process whereby substantive questions were negotiated in order to find commonalities of legal interpretation.252 Rather, developed states removed themselves from answering the dissatisfied’s charges that maritime powers were interested in preserving the status quo to preserve their own interests. As Friedheim noted, developed states undertook reflexively to “deplore the attack on the law of the sea”, and adhered to an approach of ‘inflexible legalism’ in light of their belief that the relationship of law to politics and the compromises between these two types of collective authority were not at stake at the conferences.253

Following these efforts, as levels of technology in the mid 1960s rose dramatically in step with the explosion of ecological knowledge of ocean ontology and ocean resources, the problem of finding solutions to ocean ‘entitlements’ became ever more acute when referenced against the fractured law of the sea regime. The world’s demand for raw materials was seen as potentially accommodated through the exploitation of a range of deep-sea mineral resources set to become economically viable by the 1970’s. International

251 Friedheim (1965), at 27.
253 Friedheim (1965), at 35.
society’s perspective of the oceans thus began to change from viewing the use of the oceans as a transportational highway to that of an interconnected system of biological environments within which oceanic minerals held the promise of partially solving the energy and economic requirements of developed and newly independent states. In short, the contents of the oceans became re-conceptualized in political, social and legal debate, concomitant to what was understood to be a “marine revolution”. State’s understandings of the nature of the oceans had become, as Lewis Alexander put it, “three-dimensional…permitting activities to take place simultaneously on the surface and within the water, as well as on and under the seabed.”. It was through these new frames of ocean ontology, scientific and technological advancement, and states’ beliefs in resource abundance, that the numerous legal and moral controversies in the law of the sea became the subject of intense scrutiny and debate. By the end of 1967, two pivotal social processes had become intertwined which changed the nature of the discussion on the right of ocean appropriation by states and the broader international community.

The first of these processes was the overarching and somewhat timeless conflict present since the origins of the law of the sea concerning how the relationship between freedom of the seas and sovereign entitlement to territorial waters could be reasonably balanced. From the time of Grotius, almost four centuries prior, the debate pitted the doctrine of open and free seas (Mare Liberum, 1609), structured around the idea that the seas and ocean resources were available to all states in common to fish and navigate on the grounds that they belonged to nobody by virtue of their inability to be ‘located’ within a specific territorial space; versus Selden’s (1619) idea that the seas were indeed capable of ownership (Mare Clausum) and thus provided the opportune for states to protect their interests by restricting the use of certain areas. For most international lawyers, the principle of freedom of the high seas

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254 The phrase stems from the work of the Center for the Study of Democratic Institutions in 1967 and is outlined in the commentary of its director Elisabeth Mann Borgese (1970-71).
256 D.P.O’Connell (1982: 1) has summarized this political confrontation of governance along the following lines: “The history of the law of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of freedom of the high seas.” While authoritative throughout the oceans literature, this binary distinction of ‘freedom’ versus ‘enclosure’, further
was historically and is currently the basis from which most law of the sea must be adjudicated given that such freedom has led to humanity’s ability to travel, communicate and engage in commerce.\textsuperscript{257} Indeed, it was marine freedom which largely facilitated the West’s move towards modernity via modern capitalism.\textsuperscript{258} However, absolute freedom was significantly compromised following the closing years of WWII. Security became equated with the ability to capture resources from adjacent seas, and most infamously the Truman Proclamation of 1945 claimed by the United States the exclusive right to exploit resources of the continental shelf on the basis that sovereignty was associated with the adjacent ‘land-mass’ through the right of territorial exploitation.\textsuperscript{259} Building upon this precedent, in 1951 the International Court’s judgment in the \textit{Anglo-Norwegian Fisheries Case} brought about a legally sanctioned right for coastal states to fortuitously begin to disregard the old law of the sea.\textsuperscript{260} As the late Robert Jennings noted, the \textit{Fisheries} decision detached the territorial sea from its former position on the coast by creating a fundamental breach in the old tide mark rule.\textsuperscript{261} The acceptance of the straight baseline method of delimitation by the Court further left substantial room for states’ subjective interpretations in demarcating the limits of the territorial sea, while also providing the possibilities for states to make legal claims to potential geographical archipelagos.\textsuperscript{262} On balance, while the \textit{Fisheries} decision was aimed at adjudicating a relatively small number of particular disputes before the Court, it had a

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\textsuperscript{257} See, for example, Bernard Oxman’s defense (2006).

\textsuperscript{258} See Steinberg’s (2001) description at pp. 22-26, 110-188.

\textsuperscript{259} Though the American pronouncement was framed as area of controlled jurisdiction rather than an outright claim to sovereignty. On the Truman Proclamation, see Hollick (1981).

\textsuperscript{260} \textit{Fisheries Case} (United Kingdom v. Norway), [1951] ICJ Rep. 116. The \textit{Fisheries Case} turned on a dispute between the UK and Norway on the right to fish off of the Norwegian coast. Norway had attempted to allocate sovereignty to its territorial coastline by drawing straight baselines around its rugged geography, enclosing the area as internal waters. The Court was influenced by the geographical circumstances of the case and found that Norway’s outer \textit{skaergaard} was an extension of the mainland, placing the line between territory and ocean at the end of this geographic form. The low water mark used in constructing the baseline to demarcate Norway’s internal waters became the outer limit of the \textit{skaergaard}.

\textsuperscript{261} Jennings (1972), pp. 34-35.

\textsuperscript{262} Baselines indicate the line from which the outer limits of the territorial sea and other coastal state zones, such as the contiguous zone and exclusive economic zone, are measured.
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catalytic effect on state practice by relaxing the existing legal principles on the law of the sea and facilitating the ocean claims process.\footnote{263 See Jennings (1972), at 35; and Fitzmaurice (1965), at 39.}

In 1952, Chile, Ecuador and Peru, following from a series of radical claims by Mexico and South American states, proclaimed under the banner of the Declaration of Santiago their sole jurisdiction and sovereign entitlement over an area 200 miles from the coast including that of the sea floor and subsoil.\footnote{264 In similar fashion to the Truman Proclamation of 1945, the Declaration of Santiago did not expressly declare these areas to be subject to the territorial sea but did reserve the right to enforce resource management regimes to areas outlying territorial waters.} This transformation of ocean space led to what over the next three decades was referred to as the ‘ocean enclosure movement’, a process through which the absolute principle of freedom of the high seas, seen by many as the most salient example of a peremptory norm of the law of nations, became incrementally undone in light of new political challenges.\footnote{265 Though an extensive literature, on the history of the principle of freedom of navigation, see in particular Ruth Lapidoth (1974-75). See Lewis Alexander’s historical analysis (1982-83) on the ocean enclosure movement.} Claims to sovereignty in the form of territorial control were by the end of 1960s effectively extended into international ocean space, a move which, in turn, greatly shook the entire legal and moral foundations of the law of the sea. But in response to the ‘creeping’ jurisdictional claims of the newly developing world there also emerged a new political and moral theory to moderate the closed versus open seas struggle.

The second process concerned the complex relationship emerging between the resources of the sea-floor, the limits of national jurisdiction over the oceans, and broader rights the international community might possess over the management and use of the oceans. This debate was significantly crystallized on August 17, 1967 when the Permanent Mission of Malta to the United Nations proposed in the agenda of the twenty second session of the United Nations an item concerning who should control the resources of the sea-bed and ocean floor.\footnote{266 The item was titled “Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, and the Use of their Resources in the Interests of Mankind.” U.N. Doc. A/6695 (Aug. 18, 1967).} Put forth by the international lawyer/diplomat Arvid Pardo on grounds that the momentous progress made in marine technology by developed states would inevitably
give rise to claims of national appropriation over the sea-bed and possible militarization of
the ocean floor, the proposal suggested a radical re-thinking of the rights that could be
claimed under the heading of territorial sovereignty and changed the entire framework of
debate over the law of the sea and the duties owed to newly independent states. Pardo
argued that the sea-bed and ocean floor ought to be declared the ‘common heritage of
mankind’, an area used for peaceful purposes within the UN Charter framework in order to
safeguard the ‘interests of mankind’ and promote the development of poorer states. An
international trustee, or agency, would provide the jurisdictional oversight necessary to
exercise the supervisory and regulatory functions of this new international institution,
devoted broadly in scope to the maintenance of ocean space. According to Pardo, the
existing law of the sea regime was structured so as to “encourage” national appropriation by
developed states and needed to be countered by an internationalized, organizational form
beyond the administrative reach of the United Nations.

The idea of the common heritage principle had a resounding effect over the oceans debate in
two specific ways. It first encouraged a change in the spatial demarcations of the oceans
which had previously existed as a binary divide between the sovereign rights of states in the
territorial sea and the oceans beyond subject to the principle of freedom of the high seas.
There was now to be an ‘intermediary spatial area’ covering the majority of the planet in
which a new regime of international law and international ethics would combine to form a
unique institution between the domestic and international frontiers. Second and most
prominently, apart from the initial overwhelming consensus of states who rejected the
proposal on the grounds that it was too ‘premature’ and ‘risky’, but ostensibly that it removed
from most states the ability to claim under sovereign authority the riches of the sea, Pardo’s
idea touched off what the late Thomas Franck famously described as a new discourse
of fairness. By endorsing the concept of res communis, the idea indirectly strengthened the

267 It should be noted that Pardo’s proposal was not an entirely new form of discourse in the law of the sea given
that in 1966 President Lyndon B. Johnson had opened the debate significantly on the grounds that “[u]nder no
circumstances, we believe, must we ever allow the prospect of rich harvest and mineral wealth to create a new
form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold
the lands under the sea. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of
all human beings.”
268 See Weissberg’s (1969) detailed examination about various countries reactions.
value of fairness and sense of community through its proposal of a community title under the
banner of ‘common heritage’ and the use of an international regime for preserving property
held in common.\textsuperscript{269} Moreover, the idea of a common space administered through trusteeship
was grounded in the notion of distributive justice first in its point that developing states
should benefit the greatest from the regime’s financial holdings, and second as the increased
number of “shareholders” broadened participation in the governance process. As Buzan
noted, while the proposal resembled that of a spirited ideological document rather than
innovative compromise to solve the impending dilemmas in the law of the sea framework, “it
hastened the onset of both the conflict between the developed and developing countries over
the seabed, and the dialogue aimed at creating a new international regime…”\textsuperscript{270} In sum,
from 1967 onwards, the law of the sea became destabilized by perhaps one of the most
critically powerful debates on the rights and obligations between states and their relationship
to the emerging ‘limited’ territory of the international ocean realm. Such ethical debate
occurring over the legitimate appropriation of the international domain only further
compounded tensions building between the rights of states to further territorialize areas of
ocean space adjacent to their coasts.

Numerous specific legal controversies within the wider body of the law of the sea also
contributed to the erosion of the law’s authority to bind states by 1969. The breadth of the
territorial sea, the band of ocean states could legitimately claim under sovereign
appropriation subject only to the right of innocent passage by other state’s vessels, was
perhaps the most controversial issue of the oceans regime.\textsuperscript{271} At the Geneva Law of the Sea


\textsuperscript{270} Buzan (1976: 69). There was further an underlying and fundamental conflict between the competing visions
of law as they applied to the sea-bed and the deep ocean, expressed alarmingly, yet convincingly, by Elizabeth
Mann Borgese in 1969: “The conflict is between the law of the land and the law of the sea. Considering that
ocean space is an ecological whole, it seems logical that we cannot have one kind of regime for the deep seas
(the law of the land, based on ownership, territoriality, sovereignty) and another kind of regime for the high seas
or super adjacent waters (the law of the sea, based on common property, no territoriality, and trans-sovereignty).
If these two systems are conflicting, they are bound to clash and one will prevail. The law-of-the-sea system,
however, is a peace system, a system of mutual cooperation. The law-of-the-land system is a war system, a
system of exclusion, competition and conflict. Hence our option ought to be clear” (p.226).

\textsuperscript{271} As defined in the in Article 14 of the 1958 Geneva Conventions, innocent passage refers to all ships. These
enjoy innocent passage through all territorial seas for the purposes of traversing the seas without entering
internal waters. See infra, pp. 118-119.

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Conference of 1958, the extent to which jurisdictional claims to the territorial sea reached beyond the traditional benchmark of three miles was considerable. Thirty-eight states held firm to the three mile limit, while thirty-four had declared sovereignty over zones measuring four miles or greater. In the latter category, twelve states had claimed six miles, fourteen had claimed twelve miles, and five Latin American states claimed either a territorial sea of 200 miles (El Salvador), or an equivalent jurisdictional claim.272 The controversy of the breadth of the territorial sea became pronounced from 1958 on due to corresponding issues arising in conjunction with delimiting zones of sovereignty. The mark of the territorial sea was aligned with fishing rights due to the geographic scope of fishing zones motivating extended claims of state’s territorial sea limits. For the most part, states possessing advanced technological equipment to trawl open waters sought a narrow territorial sea in order to increase potential yields, while developing states attempted to protect coastal areas from others advancing claims of broader distance. However, this division was not absolute, as coastal states’ interests were also determined by territorial security, and many maritime states were concerned with the impediments to freedom of navigation and commerce caused by increasing ocean boundaries. The outer breadth of the territorial sea demarcation also determined where the inner boundary of the continental shelf would be measured from.

Given that the resources of the continental shelf were potentially vast in terms of both hard minerals and living resources, irrespective of the general consensus that had emerged in law of the territorial sea being set somewhere between three and twelve miles, the possibility existed that states which had placed the mark at two hundred miles would set off a chain reaction of claims of sovereignty or exclusive jurisdiction.273

The 1958 Geneva Conference witnessed numerous proposals for the territorial sea breadth to be fixed to three miles, six, six plus a six-mile fishing zone, twelve, or a twelve-mile plus additional contiguous zone.274 Several states went further and asserted the unlimited right to

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272 The 1950’s marked a busy time in this expansion to twelve mile limits: Panama (1951), Ethiopia (1953), Libya (1954), Venezuela (1956), Cambodia and Indonesia (1957), and the United Arab Republic (1958).
273 See Buzan (1976: 40-42)
274 The contiguous zone is a band of water extending from the outer edge of the territorial sea to up to 24 nautical miles (44 km) from the baseline, within which a state can exert limited control for the purpose of preventing or punishing “infringement of its customs, fiscal, immigration or sanitary laws and regulations.
determine their own boundary. All of these efforts were defeated, however, and the fate of the proposal of a six-plus-six formula put forth by Canada and the United States at the 1960 Conference met a parallel fate. The resulting outcome left the world divided largely along Cold War ideological lines, with the West supporting the idea of a narrow band of territorial sea and most developing states favouring the significant expansion of sovereignty over the coastal sea (though Latin American and Afro-Asian states overlapped these divisions). The consequence to emerge from the Conferences was that no agreement on a fixed territorial sea mark or contiguous fishing zone was concluded, which had the effect of facilitating material consolidations made by developing states under the moral and legal justifications of sovereign territorial exploitation. Unsurprisingly, many states quickly exploited such a political and legal environment rife with uncertainty: in 1964, Guinea increased its width to 130 miles, Cameroon to 18 miles; several Latin American states, Argentina and Ecuador in 1966, and Panama in 1967, moved its territorial sea to 200 miles. By 1969, more than fifty states had promulgated, enacted, and in some cases enforced laws permitting their right to maintain a twelve-mile territorial sea, ‘internationalizing’ the issue and giving legitimacy to existing extensive claims present in the Latin American region. Yet while this new process of territorial acquisition moved forward, a concomitant advancement was also being made by the Soviet Union in oceanic affairs. By the mid 1960s, the Soviet Union’s oceans capabilities put it on par with that of the United States and engendered a form of “ocean race” akin to the space race. As there was much at stake in ocean affairs in terms of resources, security, and claims to the potential appropriation of the ocean floor, the inconsistency in legal claims to the territorial sea thorough the ocean-enclosure movement had a ripple effect of destabilizing the entire legal regime.

By 1969, there was similarly little agreement on the law that applied to the relationship between national jurisdictions and the continental shelf. Wide diversity existed in national legislation as many states either did not define their continental shelf or did so in terms that

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275 Buzan (1976), pp. 47-48. Though many states were conflicted by their need to have the freedom to fish and freedom to move throughout the oceans, such as the UK and the Soviet Union, the latter sought their traditional twelve mile limit but also the right to fish extensively.

276 Buzan (1976), at 56.
were distances of more or less than those set out in the Geneva Convention of 1958. The resulting effect of this discrepancy was that there were no clearly defined international norms identifying the limits of the Continental shelf or lengths of sovereignty exploration or exploitation that could be carried out. As the eminent Shigeru Oda argued in 1968, the problem of limits to Continental shelves and the characterization of land beyond this hypothetical point stemmed directly from the very definition set out in the of the Convention of 1958. And for Friedmann:

The fatal flaw of Article 1 of the Continental Shelf Convention – surely one of the most disastrous clauses ever inserted in a treaty of vital importance to mankind – is, of course, that, by extending sovereign rights of the coastal state over the seabed and subsoil resources “to a depth of 200 meters, or, beyond that limit, to where the depth of the subjacent waters admits of the exploitation of the natural resources of the said areas,” it left the limits of national jurisdiction open.

A parallel predicament was also present in relation to the sea floor. Following from the debates of the common-use principle in 1967 and 1968, states were continuing to issue exploration licenses for areas of the sea-bed not only considered beyond the 200-mile limits of their coasts but also under waters at 6,000 feet of depth. After what was described as a year of intensive work at the United Nations General Assembly on the resources of the seafloor, on Dec. 21, 1968, deliberation from an assemblage of forty-two nations emerged with the intent to “study” what possible legal principles might apply to the area. Making this task extraordinarily problematic was that there had been a dearth of suggestions on what ought to be included under such a heading, ranging from principles that could be integrated within the political and normative frameworks of ‘peaceful purposes’, ‘international cooperation’, and ‘the benefits of mankind as a whole’. While the common heritage principle was being consistently stressed by the developing world as a framework under which new international law ought to emerge, the Soviet bloc was stridently opposed to any formulation of general principles or formulas that would lead toward supranational entities. The Soviet bloc argued “against the law of the jungle on the ocean floor and sea bed”, while the British underscored

277 Pardo (1969), at 205.
278 Oda (1968), pp. 105-106. This problem of definitional ambiguity led to the further dilemma that the concept of exploitability had to be revised to take into account the advanced levels of technology and economy in developed states.
279 Friedmann (1971), at 759.
the need “not to go into too many details at this stage before the full implications may be entirely understood.” Following year-long discussions there was little agreement on where the limit of sovereign appropriation and exploitation was to be set, nor whether a freeze or moratorium on current activity was necessary. Speaking in 1969, Pardo echoed the fragmented outcomes of the General Assembly debates and maintained that not only was there no international consensus on the restriction of jurisdiction and sovereignty over the sea-bed, but no discernable developmental process emerging for constructing future international law. Pardo warned that the path being taken by all parties would lead to “legal anarchy”, and not to the construction of an international regime that could accommodate all states’ interests and values. This point symbolized, in other words, a discouraging moment in the history of ocean relation for all who sought positions of immediate international compromise and collective equality. The preservation of the sea-bed and ocean floor was for Pardo’s supporters an imperative flowing from the principle that these areas had a ‘special status’ and ought to be characterized as unique and deserving of an international legal regime coupled with an administrative mechanism. Such an idea had great weight, it would turn out, in providing legitimacy to future claims such as Canada’s in the Arctic which asserted that certain areas of the world were unique and required advanced legal provisions for their protection and preservation.

Controversy also surrounded the nature and practice of the contiguous zone. The concept, as originally expressed by the International Law Commission, intended to convey that the rights coastal states possessed over custom and sanitary matters were equivalent to states’ rights exercised in the territorial sea. However, at the insistence of countries such as Italy and Poland, the committee in charge of constructing law for Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, drafted the following language: “In the contiguous zone…the coastal State may take the measures necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary relations, and violations

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280 See Weissberg (1969), at 123, ft. 17 and 19.

281 The American attitude was indicative of the general divide and apathetic approach by many developed states in arguing that a “precise boundary” should not be fixed. But neither did the United States address how or when it should be fixed, and nor did it support or oppose a freeze in activity.
of its security.” As Oda would note in 1968, this wording implied that the coastal state was afforded the ability to enact its own legislation for “specific purposes to foreign vessels…and to exercise police powers on its own, including search and seizure of foreign vessels” in accordance with its municipal legislation.282 However, this interpretation was eventually jettisoned as a result of pressure from the United States, due not to the concept of the contiguous zone being discretionary, but on the grounds that the reference to “security” as an application to the criteria for interference was not tenable. Article 24 of the 1958 Convention was therefore worded along the lines of the original text produced by the International Law Commission absent a reference to security. Yet the scope of harm entailed by the concept of the term ‘sanitary’, for example, remained to be reconciled in legal practice, in addition to the relationship of other types of harm originating in the contiguous zone that could be enforced within the rules of the territorial sea.283

By 1969, there further existed the problem of what constituted an international strait under international law, and in particular the legal characterization and bundle of rights associated with several prominent international straits. While the Geneva Convention on Territorial Sea and Contiguous Zone of 1958 set out the approximate criteria for international straits, the problem of a precise definition remained. The definitional issue had been dealt with in 1949 by the International Court of Justice in the Corfu Channel Case,284 but the Court there dealt strictly with the rights of passage for warships between waterways. Generally speaking, an international strait was one that connected two parts of the high seas and thus had a geographical basis in being classified as ‘international’, but the Corfu Channel raised the secondary issue of whether a certain volume of ‘use’ played a corresponding or supportive role in international designation. The Court argued that the geographic criteria were paramount in characterizing a strait, but in the French translation of the judgment the Court expressly mentioned that a strait must be used for international navigation for the status of internationalization to be reached. Under article 16(4) of the Geneva Convention, the issue

283 See also McDougal’s remarks (1968: 25) that the contiguous zone should not be the subject of single, arbitrary limits, but expanded on grounds of future security concerns and ultimately clarified as to its exact contents.
of how much ‘use’, or in other words, what volume of maritime traffic was required to fix the test of internationalization, was not clarified. Writing in 1964, Baxter opined that, while “[i]t is sufficient that the waterway be ‘a useful route for international maritime traffic’ … [i]t is impossible to answer in the abstract how many straits meet this requirement of being ‘useful’ for international navigation…”

Part of the larger controversy in relation to international straits turned on whether a coastal state was allowed to suspend passage of a maritime vessel if a strait was international. Article 16(4) of the Geneva Convention reads: “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high sea and another part of the high seas or the territorial sea of a foreign state.” This rule, however, must be read in conjunction with paragraph three, that “the coastal state may … suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if the suspension is essential for the protection of its security.” Hence, in drawing distinctions between areas of the territorial sea and that of territorial strait – a strait that ran through territorial waters - the right of innocent passage could not be suspended in an international strait even though suspension could been carried out temporarily in a state’s territorial sea. However, the concept of ‘innocence’ in relation to passage, and the scope of ‘security’ to that of a state’s protection, were left purposively ambiguous as to their meaning and application. Under Article 14(4) of the Geneva Convention, ‘innocent’ is defined negatively: “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state”. As noted by K.L. Koh, a vital aspect of innocence within passage turns on the voyage not being prejudicial to the security of the coastal state. This view corresponded with the United States’ position at the 1958 Conferences where ‘security’, while possessing no exact meaning, implied that “there should be no military or other threats to the sovereignty of the coastal state.”

The precision of innocence under the heading of ‘good order’ could imply that innocence was lost if a breach occurred in relation to issues of health, customs or immigration. But the test of innocence was revealed through the purpose of a passage, which turned on states’ motives in

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285 Baxter (1964) at 9.
carrying out the voyage in the first place. Such ambiguity within the innocence clause, and the ability for passage to be suspended on the grounds of security, remained open to contestation in many of the ocean’s critical international waterways and chokepoints by the late 1960’s.

The varying width of states’ territorial seas further exacerbated the problem of whether suspension could be carried out by a coastal state and under what types of circumstances. Because Article 16(4) of the Geneva Convention allowed innocent passage to be undertaken in situations connecting one part of the high seas with the territorial sea of a foreign state, territorial seas of wide breadth had the potential of precluding some areas from being designated as international straits. And this was precisely the case in relation to Strait of Tiran which, in 1958, prior to the Geneva Conference codifications, and as a result of Saudi Arabia’s twelve-mile territorial sea, was proclaimed not to be of international status. The effect on Israel’s ability to ship goods absent any politically motivated suspension of passage through the Strait of Tiran by either Saudi Arabia or Egypt was thus pronounced. At the Geneva negotiations, the addition of Article 16(4) to the territorial seas of foreign states passed by one vote (62 versus 61), and it was clear from the proceedings that the Strait of Tiran had determined how states would vote on the issue. Political understandings and compromises were therefore instrumental in the construction of the law on international straits in 1958, pointing towards the fractious nature of the issue in future adjudication and foreign policy disputes. Indeed, American concerns over reduced access to international straits were paramount by 1967, as the US Navy had calculated that increased lengths of

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287 Ibid, at 41.
288 The Corfu Channel also contributed to extending the scope of innocent passage by arguing that the test must also turn on “whether the manner in which the passage was carried out was consistent with the principle of innocent passage” [emphasis added]. Corfu Channel Case (Merits), ICJ Rep. (1949), pp. 30-31. This suggestion again implicates that the purpose of the passage is salient rather than the characteristics of the ship itself. Another point of contention turned on whether warships could be characterized as travelling innocently at any point on a voyage. While the majority of the justices in the Corfu Channel held that warships could conduct passage that was innocent, there was significant disagreement at the 1958 Conferences on this point with the Soviet Union pressing for a prior authorization from coastal states for warships to pass and the UK rejecting this interpretation. Though the Conventions eventually adopted the opinion of the UK, commentary by legal authorities such as Jessup and Tunkin on interpreting the Conventions cast doubt on the absolute nature of these claims.
territorial seas to a width of twelve miles would have the effect of potentially limiting transit through 116 straits in the world.

As evidence of the unsettled nature of the law of the sea regime by 1967, the Soviet Union suggested to the United States that a conference on the law of the sea be convened in order to codify specifically the limits of the territorial sea and construct solutions to problems of ocean law. There was at this point an impetus, or ‘force’, as Elizabeth Mann Borgese put it, from the oceans “to create a new model for international organization in general.”\textsuperscript{289} But there was also an equally pervasive opposing argument voiced from prominent academics. As William T. Burke held in 1968:

\begin{quote}
We are not in an appropriate stage in ocean development for the elaboration of suitable rules and principles for allocating and regulating a particular use of the ocean. Despite the highly commendable progress in ocean sciences, the shape of the future is rather dimly perceived and the opportunities and possibilities in development are immensely varied and difficult to anticipate in helpful measure.\textsuperscript{290}
\end{quote}

The use of the oceans and the international law that might regulate their use were the subject of a “problem that is difficult to define except in the broadest, rather fuzzy, outline.”\textsuperscript{291}

It is plausible to assert that by 1969 the entire edifice of the law of the sea regime, fragmented and subject to a chorus of competing claims from within widespread divisions, was subject to discord between the poles of order and justice. Due to the rising institutional power of newly developing states and their ability to harness the principles of sovereignty - to make legitimate claims that under-development could be reversed through the exploitation of ocean resources, that sovereign equality ought to guarantee a multilateral forum within which their interests were reflected within international legal rules - the ethical link that concretized these demands was the express insistence of the necessity of justice within law. The inclusivity of political and legal justice were absent from the multilateral codification periods of 1958 and 1960, and as new coastal rights to the continental shelf and sea-bed could only be secured by states with advanced levels of technology and capital, justice

\textsuperscript{289} Borgese (1974), at 376.
\textsuperscript{290} Burke (1968), pp.46-47, ft. omitted.
\textsuperscript{291} Ibid, at 47.
required for the developing world the re-organization of legal relations. This requirement was 
even more pressing for developing states given that new rules of customary international law 
would be built upon forms of state practice determined by material capabilities.

By contrast, the interests of the powerful, including the United States, Soviet Union, Britain, 
France, Japan and at times Canada, were oriented towards securing from existing law a form 
of international order. In the minds of most Western ocean lawyers and government 
officials, the rules on the freedom of the high seas, grounded in the ethical ideal that none 
should retain the right to appropriate a fluid resource incapable of ownership that defied 
actual possession, had led to the material benefits of commercial integration and 
technological advancements. While existing legal rules served as a bulwark of legal order 
that precluded the unfolding of political anarchy in diverse claims towards the resources of 
the seas and sub-soil, the Western understanding of legal order was itself a form of justice 
captured and institutionalized within the rules of the international legal system. As 
mentioned, for most western jurists it was axiomatic that states entering the international 
��统 did so under the acknowledgement that they became instantly affected by the existing 
elements of customary law and international legal obligation. International law was not to be 
picked through subjectively and selectively upon admission to the community of states, but 
binding immediately following a state’s legal recognition. And thus in 1969, these tensions, 
derivative not only of the lack of legitimate authority in world politics, but also the 
incommensurable claims about how ‘progress’ could continue to facilitate global economic 
growth, set the parameters of possible argumentation within which the institutional crisis in 
ocean relations unfolded.

The Regime of Oil Pollution and the Discourse on Ecology

Undergoing a similar evolution in 1960 was the international legal regime of oil pollution. 
The body of international law dealing with the problem of oil pollution had by the late 1960s 
come under intense criticism due to its perceived ineffectiveness in prohibiting and solving 
significant environmental challenges. These criticisms were the result of a changing 
international discourse on ecology in which environmental integrity was framed as
conceptually analogous to global security. An exploration of this changing ecological discourse explains why and how the legal regime dealing with oil pollution came to be contested during this time period. John. B. Yates from the University of Ottawa Law Faculty effectively captured the tone of debate about pollution, man’s role within nature, and the role of international law:

> It seems impossible to read a newspaper, magazine, or even law review without seeing something about ‘pollution’ or even the ‘environmental crisis’ . . . The language, or what might be better described as rhetoric, used by many of those, including some jurists, who are concerned with pollution, has been that which is usually associated with war or crisis.

It was now being recognized that oil pollution was not merely a minor irritant or policy problem but representative of a process of environmental catastrophe. This understanding gave rise to new ideas in the West about environmental awareness, the interconnection of the biosphere and ocean-spheres, and the fragility of the planet in relation to technological advancements. Mankind was seen as offending nature in intricate ways, and had found itself on a ‘collision course’ with nature’s laws as the politics of scarcity increased in lock-step with population growth. These ideas, while generated initially through the discipline of environmental science, quickly found support and application in geography, political science, and international law. Richard Falk emerged as international law’s primary exponent, combining the multiplicity of interconnected problems associated with ecology, technology, and the planetary management into discussions breaching the limits of Westphalian assumptions. Within United States and United Nation’s policy discourses, similar sentiments were voiced. No less than George F. Kennan, writing in 1970 in *Foreign Affairs* under the title of “To Prevent A World Wasteland”, commented that:

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292 The origins of the environmental discourse can perhaps be marked by the release of Rachel Carson's (1962) *Silent Spring*.
293 Yates (1971), at 182, ft. omitted.
294 See, for example, the works of Elrich (1972); and the 1970 MIT Study of Critical Environmental Problems.
295 Speaking to the American Society of International Law in 1970, Falk posited that “[u]ntil very recently, the scale of human life on the planet did not present any dangers to the system as a whole, but, more recently, technological developments, together with rapid population expansion, have removed this margin of safety and have started building up levels of pressure that threaten to disrupt the delicate balance of links in the cycle of life on earth. To moderate this pressure, responses by man will be required to embrace the whole earth; there is a need for central guidance of human activities in relation to natural surroundings. See Falk (1970), at 218. Lawyers such as Douglas Johnston (1967: 459) had also written in similar terms and parlance that “[t]echnological man is likely to become one of the most voracious predators of marine species.” See ft. 34.
[n]ot even the most casual reader of the public prints of recent months and years could be unaware of the growing chorus of warnings from qualified scientists as to what industrial man is now doing - by overpopulation, by plundering of the earth’s resources, and by a precipitate mechanization of many of life’s processes - to the intactness of the natural environment on which his survival depends.296

U.N. Secretary General, U Thant, further expressed this horizon of potential catastrophe:

For the first time in the history of mankind there is arising a crisis of worldwide proportions involving developed and developing countries alike - the crisis of the human environment...It is becoming apparent that if current trends continue, the future of life on earth could be endangered.297

Concomitantly, in Canadian political deliberations in the 1960s, environmental issues became salient and for the first time took the shape of a policy problem requiring response during the 1968 federal election. Responding to pressures within the public domain, the Liberal throne speech promised to introduce legislation to assist provincial and municipal governments in dealing with a range of pollution problems. Environmental concerns became harnessed with oppositional attacks within the House of Commons. Much of the concern related to the issue of water purity, ranging from problems with pollutants in the Great Lakes to the contents of drinking water.298 As a result of Parliament’s new ‘green’ interest, debate emerged focused on the constitutionality of federal control over environmental issues, leading to the creation of the Department of the Environment in 1970. At the international level through the United Nations General Assembly the issue of the human environment and its protection were placed squarely on the docket for future deliberation.299

The issue of oil pollution was one aspect of the growing trend in ecological knowledge that infused international public discourse by 1969. Given the marked increase in oil production and transportation in the 1960s, studies were assembled to ascertain how much oil was lost in the oceans. Though varied in their conclusions, analysts began to cite astounding numbers of upwards of 6.7 million metric tons per year.300 This knowledge came into public

296 Kennan (1970), at 401.
297 Cited in ibid.
300 M’Gonigle and Zacher (1977), at 15.
consciousness alongside the fact that the US Atomic Energy Commission had been dumping thousands of tons of nuclear waste into the Atlantic Ocean up until 1968. However, the greatest catalytic event to stir public awareness was the image of the supertanker, the *Torrey Canyon*, breaking apart on the rocks off the coast of southern England and northern France in 1967. For the first time, international audiences witnessed an environmental disaster first hand, as nightly newscasts documented the path cut by thirty-five million gallons of oil spilt onto the coasts of Cornwall, Normandy and Brittany and aired footage of British aircraft bombing the already broken hull in order to sink what remained of the ship. The resultant public fear of environmental catastrophe reached an historic high and imbued within public policy debates a greater range of vocabulary for thinking about environmental care and responsibility in light of the limits of international law to provide effect on such problems.

The *Torrey Canyon* acutely highlighted two significant shortcomings in international regulation of oil pollution. Due to the law of the seas being divided principally into zones of the territorial and high seas in 1967, regulation of shipping in the latter fell largely under the legal responsibility of the host state or flag state of ship registration. Accordingly, as rights to ownership effectively superseded the ability of coastal states to interfere with international transit, admiralty laws accommodated vessels’ owners rather than coastal states. Existing law gave owners the opportunity to deal with a wrecked vessel absent sovereign interference, with an affected state only becoming involved in an incident *post hoc* once a vessel owner divested responsibility of the matter. This rule was centered upon the right of salvage, and worked principally to prevent entrepreneurs’ future loss of revenue and materials. Only when the flag state failed to intervene or act promptly did the right of interference shift to the parties immediately affected by the accident.

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301 See Buzan (1976), at 60.
302 On the incident, see E. Cowan (1968).
303 And, to be sure, illustrated to many parties the need to think seriously about the construction of international environmental law. As Ian Brownlie noted (1972), this historical period contained no international rules or standards related to the protection of the environment, apart from the possible application of broader principles contained in the rules of state responsibility when linked to the territorial obligations of states, and the elements of reasonable-user and non-exhaustive enjoyment embodied in the principle of the freedom of the seas.
Further problems turned on the issue of liability. Under maritime law, the principle of ‘limitation of liability’ was central in that obligations owed to the injured party for personal or property damage due to an accident at sea were set at a specific limit. The 1957 Convention on the Limitations of Liability outlined standards pegged at US$ 67 per ton of the ship’s total tonnage. With respect to the Torrey Canyon incident, this would have allowed the British Government to claim upwards of only US$ 4.7 million in compensation, a marginal denomination given that total costs were evaluated at a minimum of US$ 18 million. Nevertheless, the larger problem became being able to hold a particular party liable in any capacity. The Torrey Canyon incident became infamous for uncovering the ephemeral nature of business relationships at sea as the dense web of contractual arrangements between multiple corporate parties made liability difficult to locate. It was determined that because Barracuda (the company that formally owned the vessel) was a corporate creation of a parent company (Union Oil), this contractual relationship afforded the latter the ability to avoid responsibility for damages caused by the ship.\footnote{The lengthy drama of this problem of tracking down parties responsible went on for some time in a cat and mouse game that traversed the world’s oceans. See M’Gonigle and Zacher (1977), pp. 194-196. What was perhaps most revealing about the extent of the damages eventually rewarded to the British Government (US$7 million) was that the law under the 1957 Convention applied to all property damage. These rules severely restricted the amount of pollution damage that could be claimed as other forms of property damage were tied to the pollution total following the calculation afforded the ship-owner to limit his liability. This reduced compensation was also set alongside the legislation of many shipping states, such as Japan, France and the United States in which the calculation for liability was made according to the ship and cargo after the incident had occurred. As M’Gonigle and Zacher note, this would have allowed the British Government to claim approximately US$50 for the Torrey Canyon disaster, about the equivalent of one life boat (p. 153).}

By 1967, the existing international law of oil pollution was based upon several grounds of party liability, but primarily through fault (upon the claimant’s proof that a party was negligent), and fault with a reverse burden of proof (the defendant must prove an accident was not due to his negligence). English common law had produced two cases, Southport Corporation v. Esso Petroleum and the Wagon Mound\footnote{Southport Corporation v Esso Petroleum [1954] 2 QB 182; Overseas Tankship (UK) Ltd v Miller Steamship Co (Wagon Mound No. 2) [1967] 1 AC 617.} in which the fault requirement was upheld, but following the Torrey Canyon incident the British Government called for an
immediate meeting of the International Maritime Consultative Organization (IMCO) in May, 1967, in order to re-constitute the basis for liability in shipping incidents. Though the IMCO Council was somewhat effective in generating legal debate on the issue, their efforts were eventually curtailed by the interests of traditional commercial shippers insisting on regulation through the domain of ‘private’ legal liability. To demonstrate that such an avenue to regulation was preferable, shippers worked on a document of oil pollution liability independent of the IMCO drafts. Major maritime states backed the private liability schemes, and by the end of 1968 the only decision made was that a conference was to be held in late 1969 where the two drafts of public and private submissions would be debated. Nothing was advanced in the private convention demonstrating any crucial deviation from existing international law. From 1967 onwards, therefore, international rules on oil pollution were questioned by those who viewed it as inadequate in view of burgeoning claims concerning the necessity of ecological ocean protection. This concordance produced an argumentative framework in Western policy audiences and pitted the protection of the planet against the rise of industrial civilization and the excesses of a technologically driven model of Western capitalism. Parallel to the contestation occurring within public international law and the law of the sea regime, the debate surrounding the oil pollution legal regime called the law itself into question on ethical grounds. Within this atmosphere, it became possible for many to begin to draw hard distinctions between the legally valid from the morally required.

The Context of US-Canadian Relations: Foreign Policy and the Law of the Sea

US-Canadian relations have been a case of bilateral dealings between sovereign equals on a plane of majestic inequality.

Maxwell Cohen, 1974

In relation to Canada’s Arctic policy, the contexts of 1969 were not only characterized by debates about the status and role of various areas of international and domestic law. The period also witnessed a rising polemic about Canada’s political relationship with the United States. These dialogues emerged in the 1960s following several decades during which Canadian officials undertook foreign policy action on the assumption that a close and integrative relationship with the United States was beneficial to Canada. However, the Trudeau government’s rise cast political uncertainty into this practice. For the first time in
several decades, Canadian officials began to voice concern about the nature of American hegemony and its potential deleterious effects on ‘the’ Canadian nation. From the perspective of policy, the Canadian-American relationship in 1968 was framed by a two-step process through which Canadian policy discourse, policy choice, and public debate undertook a profound shift. Canadian officials began to think and speak about the United States as a source of threat rather than of security and prosperity. This perspective, with particular reference to Canada’s approaches to the Law of the Sea Conventions of 1958 and 1960, took effect and inevitably drove forward a novel form of Canadian diplomatic maneuvering.

The first step existed within domestic politics. The most prevalent Canadian characterization of the United States in numerous socio-economic areas was of a hegemonic threat. By 1966, Canadian political and economic thought was gripped by the twin problems of the extensive degree of American control over industrial manufacturing, and the idea that Canada’s distinctively political culture was being tarnished by American political influence. For many academics and policy commentators, the US-Canada relationship had reached a critical threshold whereby Canada’s survival as a nation was ostensibly at stake.\textsuperscript{306} Canadian political independence was at issue along with the practice of foreign policy through its guidance from External Affairs. Indeed, 1968 marked the designation of the United States as the “New Romans” in popular academic circles, and John Holmes, then Director General of the Canadian Institute of International Affairs, noted that in the context of the “American Problem” for Canada, the view was now widespread that the Americans had reduced their government under President Nixon to a faction of “fearful conservatives.” This discourse, one centered upon the need to assert Canada’s sovereignty, spilled over into NATO where Canada acknowledged the important challenges set out by social and economic inequalities between the United States and Canada as a result of an unevenly realized technological revolution rather than the challenges posed to the North American alliance.\textsuperscript{307}

\textsuperscript{306} Denis Stairs (1970-71), pp. 229-232 chronicles this process incisively, noting the series of publications from the 1960’s onwards which point towards the need for greater control of Canadian autonomy in political, social, defense, and economic matters. See also Grant (1965).

\textsuperscript{307} John W. Holmes (1970).
value to Canada was scrutinized and new critiques of the alliance swept aside old assertions that NATO was a mandatory institutional arrangement derivative of an inevitable relationship. Critics worried that the alliance as it functioned in 1967 positioned Canada as a “satellite” rather than middle power, a move in lock-step with Trudeau’s intentions. And while Trudeau sought to loosen Canada’s links to NATO, the United States saw this move as threatening the institutional stability of the Cold War order. This fracture was further compounded by the schism occurring over the Vietnam War, as anti-war sentiment had taken hold in much of the Canadian electorate and in particular within Trudeau’s foreign policy circles.

Second, by 1968, the deepening of United State’s foreign investment and foreign ownership over Canadian industry was cast as a potential existential challenge requiring the construction of a governmental task force and firm federal response. This trend ran in tandem with a distinct rise in economic nationalism and direct concern that American multinationals exporting large amounts of capital from the United States to their subsidiaries were deepening Canada’s balance of payments problem. Many academics and policy analysts aligned with both states concluded that the US had become a national security threat to Canada in so far as defence integration and economic interdependence brought about greater continental insecurity than would have otherwise materialized. Canada, it was argued, had always suffered from a sense of insecurity on the basis of its colonial heritage, but the latent fear of possible absorption by the United States gave rise to the potential threat of a loss of national identity and inability to cultivate the ‘national interest’. As Swanson noted, the critical question in public discourse was “how much foreign domination can Canada absorb and still retain its essence as a sovereign, independent nation?” The answer increasingly became one which pointed towards the necessity of political and economic autonomy following Canada’s 1967 centennial celebration and the establishment of a distinctive national self-confidence. The external, yet omnipresent threat from pax Americana, placed Canadian foreign policy ‘under siege’ from all fronts, including debates over ocean relations.

308 See for example, Hertzman, Warnock and Hockin (1969); and Granastein (1969).
310 Ibid, at 15.
But while the American threat may have appeared as overdrawn rhetoric reflecting an identity-based insecurity of a nation undergoing political integration, prominent historians noted with caution in relation to Arctic areas the potential for American exploitation. Published in 1966, though written three years earlier, the eminent Canadian historian of the North, Gordon Smith, put the matter succinctly:

The danger is that even with completely satisfactory arrangements to preserve Canada’s rights, and with unqualified agreement and the best of intentions on both sides, a massive and quasi-permanent American presence in the Canadian North such as we have seen during and since World War II could in due course lead, gradually and almost imperceptibly, to such an erosion or disintegration of Canadian sovereignty that the real authority in the region, in fact if not in law, would be American. This is the remaining non-military threat to Canadian sovereignty in her northern territories, if one exists, and it is for this reason that Canada’s concern about the matter, although at times amounting to hypersensitivity, has a measure of justification. It is necessary to add that at this point the issue becomes part and parcel of the entire picture of Canadian-American relations, and Canada’s uneasiness in this matter is only one aspect of her concern over the benevolent but all-embracing American influence upon Canadian affairs generally.311

A sense of uncertainty in the Canadian-American relationship was not only emphasized in public discourse but entered into policy-making circles. The result was a form of Canadian diplomatic maneuvering which stood in sharp contrast to Canada’s established diplomatic practices within Washington. The situation was summarized concisely by Alan Gotlieb in 1974, former legal advisor for Canada on the law of the sea during the Geneva Conference of 1958, and future legal advisor:

The Canadian approach to the law of the sea provides the best example in her diplomatic history of the influence of national self-interest on the shaping of foreign policy. Indeed, it is one of the very few examples, in the 1950s and 1960s, of a conscious and deliberate determination of self-interest becoming the governing factors in Canada’s diplomatic position.312

Throughout much of the Twentieth Century, the law of the sea was a “sleeper” issue in Canada’s diplomatic history. Yet by the beginning of the 1960s it “began to occupy centre stage” as the 1958 and 1960 Geneva Conferences pressed upon Ottawa to define and assert

311 Smith (1966), at 213. For an authoritative historical overview of Canadian-American relations in the North, see Elliot Meisel (1999); (2009).
Canadian interests in fishing and the protection and exploitation of coastal zones.\textsuperscript{313} Indeed, on the basis of two elements, Canada’s foreign policy on the oceans from 1958 onwards can be characterized as that of ‘frustrated confinement’.

Canada became structurally restricted by what international law would allow within a formal reading of law at a particular moment. Yet restraint also mounted from the politics of international law in relation to what impediments Canada’s allies, in particular the United States, would countenance as practices deviating from a conservative reading of the law of the sea. When, at the 1958 Geneva Conference Canada submitted its writ of a six-plus-six formula (on the territorial sea and exclusive fishing zone), it did so at the urging the Canadian High Commissioner in London, George Drew, who saw this new formula as a dramatic improvement, one creating greater scope for coastal state action even though the major maritime powers, including Britain, did not support the initiative. Upon the formula’s failure however, Canada moved from its former Pearson-led policy approach of “internationalism” and broader international consensus to that of a position stressing greater advocacy of ocean policies governed by Canada’s national interest. The national interest was defined with apparent disregard for traditional allies, resulting in a vigorous push to again secure in the 1960 conference the twelve-mile fishing limit. After intensive lobbying, the Canadian proposal looked poised to meet with approval, but ultimately failed by one vote. Ironically, the missing vote was that of the United States, which had promised to support the provision in order to obtain the necessary two-thirds majority required.\textsuperscript{314} Reacting to such bitter defeat, Canadian officials became determined to achieve the twelve-mile formula in a multilateral forum even while the proliferation of unilateral coastal extensions occurred concomitantly throughout the early 1960s. Canadian diplomacy with the United States in reference to the reconsideration of the issue was characterized by Gotlieb as a “perseverance,

\textsuperscript{313} Gotlieb (1974), at 136.

\textsuperscript{314} From the Canadian perspective, the United States had entirely undermined the possibility of compromise by striking fisheries agreements with states such as Mexico and Brazil, and revealed the authoritative power of its most powerful bureaucratic structure in ocean negotiations, the US Navy, due to its insistence that the territorial sea mark be set at a minimum width indefinitely in order to preserve freedom of military movement. See Hollick (1974), at 762.
a sense of total commitment, almost an intransigence …which made the initiative both at the
time and in retrospect appear rather uncharacteristic.”

In light of this failure to secure assistance from the United States, Canada moved unilaterally
on June 4, 1963. Prime Minister Pearson proclaimed that Canada would establish a twelve-
mile fishing zone and implement the straight baseline system as established in the *Fisheries
Case* from which to mark the boundaries of the territorial sea. At the time, Canada’s only
options for resolving the fisheries and demarcations issues were either political postponement
or action, as Paul Martin Sr., Minister for External Affairs argued, and Canada opted for
unilateral action as a solution to the political and legal deadlock gripping international oceans
law. Undoubtedly, Canadian legal opinion driving the policy was born of Canada’s
frustration with multilateralism in general and friction with the United States in particular on
an issue that had domestic political consequences for the government’s success. However, as
Gotlieb notes, this change in legal strategy could not be characterized as heralding a new era
in Canada’s ocean international relations. Rather, the uncertainty with which Canadian
officials pursued the new strategy was demonstrated by the Pearsonian approach of cautious
internationalism. Though requiring a novel approach, but uncertain about the potency of a
United States’ response, Canada appeared to intentionally circumscribe the historical scope
of its policies on fishing zones and straight baselines in a move calculated to withstand
American rebuke.

This same caution applied to Canadian fishing policy in 1964. The agreement reached on
fishing jurisdiction allowed eight states to continue to fish in designated Canadian waters on
two separate legal bases. Britain, Norway, Denmark, Spain, Portugal and Italy all retained
this right through a Canadian Order-in-Council in 1964, pending a final negotiated agreement
on the substance of this right. France and the United States, by contrast, possessed valid
treaty rights to fish and were allowed to continue the practice until all relevant treaties were
renegotiated. However, by the end of 1968, no agreement had been reached on a phase-out

315 Gotlieb (1974), at 143. Indeed, Gotlieb comments that in his post as a desk officer on the law of the sea
during this period there were doubts in many within the foreign service that Canada’s demonstrable approach
would likely create its own demise due to it being an “open, steamrolling” affair (ft. 8, p. 143).
duration due to the insistence by several states that Canada’s terms for conclusion were expansive and being conducted too rapidly. Negotiations became stalled indefinitely, stultifying political momentum toward solving the fishing issue. This was particularly true of the United States where discernable political will to solve its bilateral fishing dispute was by 1968 in steep decline.

On the issue of straight baselines, the Canadian approach was explicitly ambiguous and without force. In 1960, Canada was concerned about making a decision that would allow for sovereignty to be claimed over waters between the Arctic islands. But in light of the belief of American hostility and possible litigation before the International Court, Canada in 1963 notified the United States of its intentions to in future draw straight baselines around the Arctic archipelago. The United States was firmly adverse to this move, and communicated directly with Canadian officials in ocean meetings in 1963 and 1964 the precedential effects that such a straight baseline policy might have in the Philippines and Indonesia. Canada accordingly adopted the Territorial Sea and Fishing Zones Act (1964), which did not fix the exact coordinates and measurements of the baselines, but gave to the Governor in Council the right to proclaim the desired, specific coordinates were baselines to be drawn. As Paul Martin Sr. explained, if Canada had been precise with its coordinates, negotiations with the United States on the issue would have effectively been stalled. A policy that remained intentionally vague while giving legal effect to the idea of the right to proclaim baselines through domestic legislation was a superior solution to advancing Canada’s interests in the immediate and long-term.

To be sure, there was a great deal at stake in this move. The act of promulgating baselines divides the waters inward and outward of the initial mark into different zones in which interior areas become inland waters subject to complete territorial sovereignty, while those beyond the mark become subject to the laws of the territorial sea. Canada understood that under the Fisheries Case any baseline system had to fall within the existing rules of international law on the grounds that “[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law … the validity of the delimitation with regard to other states
depends upon international law.”317 Thus, the delimitation of Canada’s jurisdiction could only be achieved legally through the acquiescence of other states, and most likely in particular those immediately affected, the United States. Without this customary support, Canada’s ability to claim the waters it sought would remain problematic.318 By 1966, the baseline issue became central as Canadian and American legal divisions met to discuss how Canada’s fishing claims under domestic law would be affected by the possibility of baseline demarcation by the Canadian Governor in Council. Canada moved cautiously, outlining its intentions to re-configure as internal waters through baselines both the Gulf of St. Lawrence and parts of Queen Charlotte Sound. Sensing that these plans presaged a series of future expansive jurisdictional claims, US Under-secretary of State Rostow was summoned to protest the Canadian moves, while President Lyndon Johnson contacted Pearson directly to express his disapproval.319 Undeterred, but with the American relationship in mind, in October, 1967, Canada proceeded to announce its first series of baselines along the coasts of Labrador and parts of Newfoundland while simultaneously attempting to placate American concerns about the erosion of the law of the sea in the face of a global trend by coastal states to assert broad jurisdictional rights.320 In Canadian eyes, baseline claims relating to the Labrador and Newfoundland areas were relatively modest and uncontroversial as their effect on ocean access was not remotely close to the delimitation of waters in the Gulf of Saint Lawrence.321 Unsurprisingly, the United States continued to rely on the existing law of the sea as the basis from which to claim that Canada’s legislation and use of baselines had no basis in international law.

317 Fisheries Case, at 132.
318 Gotlieb (1974: 145) notes that Canada was setting out to close the Gulf of St. Lawrence, the Bay of Fundy, Hudson Bay and Strait, Hecate Strait, Dixon Entrance, Queen Charlotte Sound, and smaller bays such as the bays of Newfoundland and Labrador. That the United States remained opposed to Canadian baselines writ large was in keeping with the process occurring in American ocean legal policy by early 1967. It had similarly by unilateral enactment established a fishing zone of nine miles, but maintained its opposition to any use of straight baselines in order to reduce the extent of global territorial seas.
321 Gotlieb (1974) at 146, cites this Canadian approach as distinctly minor in terms of its measurement against other international claims.
And so by 1968, Canadian policy was marginalized, caught on the horns of a legal dilemma and a political posture of bilateral dead-lock. Given that closing areas such as the Gulf of Saint Lawrence would meet rising American anger, this left Canada in a vulnerable position to uphold consistently in many Arctic areas its legal possession of waters on the basis of internal status. Yet Canada’s ability to continue political and legal deliberations with Washington had reached its end. American opposition to Canada’s ocean policies was, as Gotlieb put it, “unyielding”, placing the Pearson government in a policy position on the law of the sea that “had no future”. By the end of 1968, Canada “could move neither backward or forward.” Hence, it was in the broader context of the American “threat” to Canada that the continuing fragmentation of the ocean relationship began to give rise to the possibility that if vital national interests were at stake, requiring the use of further unilateral action by Canada, the North American bilateral relationship would have to suffer consequently as a result.

Canada’s Arctic Law Assumptions

At the time Canada began considering a possible Arctic policy in the late 1960’s, legal analysis of the Arctic region was also undergoing scrutiny and revision. By the end of 1968, existing Canadian knowledge of the legal status of the Arctic, its waters in general, and specifically the area known as the Northwest Passage, was subject to improved clarity as a result of legal commentary over the decade. However, this recent turn did not entirely mitigate the effects of Canadian Arctic law being subject to confusion and contradiction through statements made on behalf of various government officials over the course of the Twentieth Century. Furthermore, partial confusion surrounding Canada’s legal position was compounded by the legal analysis of Ivan Head, a prominent international lawyer and

Ibid, at 146. Canada at this point debated with sincere and serious consideration two options. 1) be brought before the International Court to litigate, likely against Japan, who had threatened New Zealand with such a move for the latter’s twelve mile fishing zone, parallel to controversial elements of Canada’s domestic fishing legislation; 2) or conversely, withdraw its Declaration of 1929 on its compulsory jurisdiction to the former Permanent Court of International Justice, now ICJ, or similarly file a reservation on disputes concerning fisheries and territorial waters. Canadian thinking on this point would be illustrative and serve as a precedent in the debate to surface in 1970 on a parallel withdrawal of jurisdiction. Canada concluded in 1968, however, that a challenge at the ICJ was a losing strategy on the grounds that the Court was in a conservative phase whose members would adopt, as Gotlieb put it, a “rear-view mirror” approach to international law, one only further deepened given that the law of the sea was in flux.
principal advisor on Arctic issues to the Trudeau government in 1969. Canada’s interpretation on the legal status of the Arctic prior to 1969 was never clearly articulated and remained opaque, and hence its contents must be divined piecemeal by legal historians via speeches, writings and political pronouncements made throughout the first part of the Twentieth Century. A cursory historical view begins with an article appearing in *Foreign Affairs* in 1945, in which Canadian Ambassador to the United States, Lester Pearson, began what would be a continuing process of citing the general areas of Canadian Arctic boundaries:

>[A] large part of the world’s total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada’s northern mainland, but the islands and frozen sea north of the mainland between the meridians of its east and west boundaries extended to the North Pole.323

While this statement was not taken as a legally recognized articulation of Canada’s position (given that the Canadian government never formally accepted it as this would have implied a challenge to Danish sovereignty over much of Eastern Greenland),324 the scope of Pearson’s claim would find rhetorical support among future leaders. In 1953, Prime Minister St. Laurent spoke of sovereignty claimed and exercised “in these lands right up to the pole.”325

As Donat Pharand would note in 1968, there was a significant level of misunderstanding in these claims given that each referred to different geographical areas as the Arctic region itself. That is to say, in these early instances of Canadian pronouncements on the status of the Arctic, little of legal substance can be derived as officials had not explicitly thought about or agreed upon which territorial boundary limits were the subject of such pronouncements. Geographical misunderstandings, in other words, gave rise to evident exaggerations in Canadian claims.326 It is unclear whether officials believed that the boundaries of Canada’s outer coasts marked the limits to which territorial lines could be drawn vertically northward, or if there would be a gradual tapering of territory which tracked the narrowing of the Canadian archipelago toward the pole. Regardless, nowhere in the Prime Minister’s 1953

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323 Pearson (1946), at 638.
325 House of Commons Debates (1953-54), at 700.
326 See Pharand (1968), at 53.
statement is there any language of sufficient clarity or inference that would permit of the implication that Canada believed at that time Arctic waters were the subject of Canadian sovereignty. Rather, St. Laurent was merely asserting a bald claim that followed from most Canadian’s ideas of what the geographical entity, Canada, looked like. St. Laurent might well have taken his cue from Canadian cartographers, for it was they who continued the practice in 1952 of publishing maps for the general public showing Canada as following the 141st and 60th meridians North right to the pole. And this was done despite the fact such an extensive claim was not the subject of any serious political debate at the time.327

To the extent that maps of the 1950-60’s can be interpreted to demonstrate Canada’s expansive territorial claims, legal historians may infer that Canadian officials making those claims relied upon a form of legal reasoning known as the sector theory. The sector theory’s origins are distinctly Canadian.328 First espoused by Canadian Senator Pascal Poirier in 1907 to the Senate in a speech that was supportive of his own motion to the upper chamber, Poirier put forth the logic of sector theory in defining Canada’s Arctic boundaries. He propounded, “[t]hat it be resolved that the Senate is of the opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands in the north of the Dominion, and extending to the north pole”.329 The theory of the sector claim rested on two propositions:

A base line or arc described along the Arctic Circle through territory unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic Circle pierced by the state.330

Accordingly, within the geographical bands that extend into Arctic territory from a state’s contiguous relationship to the Arctic Circle in an arc drawn from the outer eastern and western boundaries of the mainland through to the pole, any of the Arctic states (Norway, Russia, the United States, Canada and Denmark) may lay claim to the land, ice and water directly northward to the pole.

327 Ibid, at 52.
328 For extensive treatment of the sector theory, see Pharand (1988).
329 1906-07 Debates, Senate, Canada, 266.
330 Head (1963), at 203.
While the sector theory was useful shorthand for thinking about international law, specifically in its pragmatism and simplicity in offering what appeared to be an equitable solution to a complex territorial problem, Poirier’s claim found backing neither within the Canadian Government at the time nor among many international lawyers in subsequent decades. However, following a period in the late 1930s in which Canadian officials appeared to be endorsing the sector theory, its explicit rejection was advanced in 1956 by the Liberal Minister of Northern Affairs and National Resources for the St. Laurent government, Hon. Jean Lesage:

We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic islands … We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural state, is the sea; and our sovereignty exists over the lands and over our territorial waters.

By 1958, further confusion arose as to the sector theory’s applicability to the Canadian region. Responding to a question from the Liberal opposition on whether the waters of the Arctic were Canadian waters, Francis Hamilton, Conservative Minister of Northern Affairs and National Resources, claimed that as the presence of ice precluded a characterization of the Arctic ocean as open waters, but also fell short of providing for a classification of stable land given that “the ordinary rules of international law may or may not have application.” Speaking later on the topic, Hamilton opined that the North would only be considered Canada’s territory on the basis of the traditional method of territorial holding in international law, effective occupation. Prime Minister Diefenbaker endorsed this view later that same year. Lester Pearson, then Leader of the Opposition, remarked as well that:

[w]e have claimed sovereignty under what we call the sector theory over the prolongation north, right to their meeting at the pole, of the east and west extensions of our boundary. If we are to make that claim stick … we have to do everything that is possible, everything that is

331 As Head noted, Sir Richard J. Cartwright, Canadian Minister of Trade and Commerce, and Government Leader to the Senate, speaking after Poirier’s interjection on the same day, rejected the need for claims to the Arctic based on the sector theory in lieu of the exercises of “effective occupation” that were being carried out by the Canadian government at the time. See Head (1963), at 204.
332 House of Commons Debates (1956), vol. 7, p. 6955.
Canadian officials were, in effect, attempting to secure valid title to the Arctic through any plausible combination of legal means, a move which entailed relegating the sector theory to subordinate status even though the Soviet Union continued to proclaim its validity within domestic policy. Canada understood that Soviet officials had to acquiesce to Canada’s use of the sector theory given their own legal reliance for domestic purposes, and by 1959, with the United States having neither denied nor accepted Canada’s sector claim, the Secretary for External Affairs, Harold Green, reported to the House that “[a] search of departmental records has failed to disclose any dispute since 1900 between Canada and either the Union of Soviet Socialist Republics or the US of America concerning the ownership of any portion of the Canadian Arctic”.

Although the sector theory’s legal validity was never been tested by Canada, it was neither clearly adopted by the Canadian government as the basis upon which to formulate Arctic policy. In fact, by the early 1960s, “few Canadian policies [had] been so inconsistently or unhappily interpreted over the years as that pertaining to the Arctic frontiers.” Canada appeared content to simply make proclamations about territorial sovereignty over Arctic areas without an express legal basis in the hope that criticism would not ensue from major states. The Canadian legal relationship to Arctic waters remained ill-defined in large part because Canada’s interpretation of international law governing the region was in many ways in error. Some of these problems stemmed from the legal analysis of Ivan Head in the 1960s. Published in 1963, while working at the Department of External Affairs, Head’s conclusions became by 1968 the legal core of Canada’s Arctic policy. Indeed, Head drew several conclusions that had a lasting impact on Canadian thought. Perhaps the most critical was

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333 House of Commons Debates (1957-58), vol. 2, p. 1963, vol. 4, p. 3512. The prominent Canadian legal scholar Maxwell Cohen would add to this position in 1958 and again in 1963, arguing that “it is a question whether the sector theory, even if buttressed by theories of contiguity and archipelago, as established by the Norwegian Fisheries Case, would justify and confirm the Canadian position that the waters between the islands are ‘inland’ waters - although it is difficult to know whether Canadian policy has ever gone quite so far”. Canadian Yearbook of International Law (1963), at 24.

334 Cited in Head (1963), at 216.

335 Ibid.
that, given the nature of the ice-covered waters of the Arctic and the widths of many of the
straits and entrances within the archipelago, “[t]he passage of time endures to the benefit of
the Canadian claim …. time and circumstances both favor Canada in the Arctic.”

Head believed that as the law of the sea continued to develop and states understood the Arctic
archipelago as a natural extension of the Canadian land mass, the qualitatively unique
geography of the region would inevitably lead to a positive legal resolution. Canada needed
only to wait for this acquiescence to materialize while asserting its valid claim of effective
occupation in a consistent manner.

To strengthen its legal strategy, Head claimed that Canada both could and should enact and
draw straight baselines around the archipelago in order to transform international waters into
internal waters. He concluded that legally recognized baselines could be drawn on the basis
of Canadian domestic legislation, validated in the provisions of the 1958 Convention on the
Territorial Sea and Contiguous Zone and the *Fisheries* judgment. Because the Arctic waters
gave the appearance of forming part of the territorial land mass, Head argued, and these
geographical criteria, along with the belief that ice-covered waters were physically tangible
and thus susceptible to capture, this permitted Canada unilaterally if required to circumscribe
a domain of internal waters absent any right of innocent passage. Such an argument was a
pivotal endorsement for the Canadian government in 1963, and particularly efficacious at a
time when Canada was locked in diplomatic conflict with the United States over the use of
baselines in all coastal areas.

Unfortunately for Canada, by mid-1968, a significant part of Head’s analysis was revealed as
an inconsistent reasoning of international law. As Canada’s new Arctic legal specialist,
Donat Pharand, would later point out, Head had misunderstood the law relating to the right of
innocent passage by conflating the legal terminology of ‘territorial waters’ and ‘internal
waters’. While it is unknown whether American lawyers would draw in upcoming years on
this legal error, Head’s statements added a revealing piece of inculpatory evidence to the

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336 Head (1963), 219 and 225.
American dossier in 1970 on the problematic nature of Canada’s claims to sovereignty in Arctic waters. Head wrote in 1963 that:

Canada regards the waters between the islands as Canadian territorial waters, and this claim has been recognized by the US … The unitary appearance of the formation and, to a lesser extent, its location suggest support to a claim to these waters as internal waters. Surrounded on all sides by Canadian territory, they possess the character of Canadian waters. It is highly unlikely that uninterrupted surface passage from the Labrador Sea to either the Arctic Ocean or the Beaufort Sea, or vice versa, will ever be a reality. Future demands for the right of innocent passage through the archipelago are speculative to a degree.  

The implications of this passage have in many ways remained profound for both party’s legal evaluations over time. Head admits that Canada and the United States agree upon the waters territorial status, implying a right of innocent passage for all vessels subject only to the caveat that passage be carried out in an ‘innocent’ manner. Under international law, there could be no suspension of passage beyond the scope of this term. The *Corfu Channel Case* outlined that regulating passage under the heading of ‘innocence’ does not mean the complete prohibition of maritime traffic indefinitely, and furthermore there can be no suspension *in toto* if the body of water under consideration constitutes an international strait extending between two parts of the high seas. Yet Head goes on to maintain that the unitary formation of the land mass gives rise to the point that the Arctic waters are ‘internal’, a qualitatively different form of maritime passage where transit can be suspended on grounds pursuant to a coastal state’s interests. Internal waters are effectively sovereign territory extending from the land mass and the subject of the full force of domestic legislation. Stating that the waters possess the “character” of Canadian waters only further rendered the issue opaque, as Head must have been inferring that there are geographic characteristics in support of the Canadian claim which indicate the archipelagic land mass is conjoined to the mainland. To hold that these are “Canadian waters” would indicate internal waters, even though Head admits that the Canadian government has gone on record in stating the contrary.  

In sum, by mid-1968, Head’s analysis was received by Canadian officials as

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337 Head (1963), at 218.
338 To be fair, Head may have been referring with the term “Canadian waters” to the definition set out in the Canada Customs Act, 1906, which held that “all territorial waters of Canada and all waters forming part of the territory of Canada, including the marginal sea within three marine miles of the base lines on the coast of Canada, determined in accordance with international law and practice…” Customs Act, 1906, Canada Rev.
authoritative, largely due to it representing the most concise research conducted to date, but also that it appeared convincingly to grant Canada the right to regulate vessel traffic within territorial seas and draw baselines around the archipelago to ensure the Arctic’s internal status under international law.

The most significant problem for Canada Head revealed for the future legal position and in some sense exacerbated was that, if the waters were internal and Canadian by legal right, why was there any need to draw baselines around the periphery to accomplish the same task and achieve the equivalent legal position? One could argue that drawing baselines would demarcate and thus delimit with clarity the area in question, but this reason would seem peripheral to the larger negative point of carrying out in territorial waters an act that had the potential effect of challenging the validity of Canada’s case. Indeed, a point unmentioned by Head, but surely at the forefront of international and American jurists was that, if waters previously considered part of the territorial seas are enclosed with straight baselines, the right of innocent passage is not annulled.339 Holding, therefore, that Canada could claim the Arctic as internal waters through baselines was for the most part tantamount to the already existing legal status of the waters, cited as territorial by Head, which thereby negated any real transfer of title, sovereignty, or jurisdictional control in the final analysis. Hence, it may be argued that Head’s conclusions, while for most part probative and insightful, did more to confuse policy on Arctic waters in Canada than to clarify it.

In an attempt to address the perplexities surrounding the existing international law of the Arctic by 1968, Donat Pharand emerged as possibly the most skilled lawyer on the issue of Arctic waters. His 1968 article in the Canadian Yearbook of International Law, proved formative in demonstrating the restrictions on the Canadian Arctic claim in relation to the right of free and innocent passage to foreign vessels. Pharand noted the discrepancies in legal reasoning among jurists and Canadian governmental officials over the Twentieth Century, including the 1966 pronouncement by the Legal Advisor of External Affairs, Paul

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339 Article 5, 1958 Convention on Territorial Waters. And this conclusion remains regardless of whether the area was considered an international strait.
Martin Sr., that international law is “silent with respect to waters which are covered by ice all year round thus making the sea a sort of extension of the land”. 340 For Pharand, with respect to the Canadian position, “it is difficult to ascertain Canada’s official policy with respect to the waters of the Arctic archipelago, and it is all the more difficult because Canada’s laws actually say little on the question.” 341 In reference to Canada’s claim over the Northwest Passage, he pointed out that even though the 1958 Geneva Conventions were effectively codification conferences for the law of the sea, Canada had by 1968 neither ratified any of the four Conventions nor made clear how or to what degree it considered itself bound by the principles therein. 342

Pharand concurred with other notable jurists, including McDougal, Burke, and Lauterpacht that, in relation to the legal right of innocent passage in international straits, when straits connected two parts of high seas but were not used for international navigation, these became governed by the general provision guaranteeing the right of innocent passage through the territorial sea. Thus, coastal states could only suspend passage temporarily on grounds of national security. Such an interpretation of the rule stood in contrast to examples where a strait connecting two parts of the high seas was used for international navigation. In these situations, states were not entitled to prohibit or suspend passage on any grounds. 343 For Pharand, international law in 1968 held that innocent passage was a right, not a privilege, to be granted or refused on subjective grounds; passage was deemed innocent by virtue of the nature of passage rather than the type of vessel (thus permitting innocent passage of warships); and innocent passage applied to areas of territorial waters, waters newly enclosed by straight baselines, and straits connecting either two parts of the high sea or one part of the high seas and a section of territorial waters. 344

Pharand also made reference to the possibility proposed by Head of Canada enclosing the Arctic through straight baselines. Though Pharand suggested that it may prove to be the case

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340 Pharand (1968), at 56
341 Ibid.
343 Ibid, at 14
344 Pharand (1968), at 15.
that following thorough study Canada’s 1967 deployment of baselines could follow the specific criteria set out in the *Fisheries Case* and be lawful even though *prima facie* the baselines off the coast of Labrador and Newfoundland exceeded significantly the maximal length required by law, he believed it was far more likely that closing off the Arctic with straight baselines was contrary to international law.\(^{345}\) Pharand’s reasoning on this point was somewhat unclear, but appeared to turn on the idea that the right of innocent passage in treaty law carried greater weight than the right to suspend passage in internal waters following the drawing of straight baselines. He wrote:

> it is submitted that any delimitation that closed off the Northwest Passage would be contrary to international law. It would mean drawing a line of at least 50 miles across the entrance of Lancaster Sound in the east and another closing line of nearly 100 miles across the M’Clure Strait in the west. This series of straits connects the Atlantic and the Pacific Oceans in a direct and clear channel of at least 25 miles wide except in one place where, as we have seen, the presence of the islands reduces it to not less than 15 miles. If these islands are allotted territorial waters to a width of 3 miles, this still leaves a strip of at least 9 miles of high seas throughout the Parry Channel. The only place in the Northwest Passage, as presently considered, where Canada could possibly interfere with the passage of foreign ships is in Prince of Wales Strait, since this is less than 6 miles wide at one point.\(^{346}\)

Pharand then asked whether Canada, given that it had not ratified the 1958 Convention on the Territorial Sea, could circumvent the problem of passage with straight baselines to enclose the Arctic by relying on customary international law in the *Corfu Channel Case* where innocent passage could be barred within territorial waters.\(^{347}\) In other words, could Canada claim that the 1958 Convention was merely treaty law (binding only its signatories), leaving all other states subject to the principles of customary practice established prior to 1958 and confirmed by the International Court’s jurisprudence? Here, Pharand made two specific points. First, the 1958 Convention was a “general treaty of the law-making type” and had been ratified by “the important maritime powers…In these circumstances, the 1958 Convention may properly be considered as evidence of general international law.”\(^{348}\) Second, Canada clearly considered the 1958 Convention to be customary by 1968. As

\(^{345}\) Ibid, 57-58.

\(^{346}\) Ibid, at 58.

\(^{347}\) Pharand also made the point that the *Corfu Channel* provided possible grounds in customary law to argue for the enclosure of the Arctic with straight baselines. Such a claim appeared odd given that this right flowed naturally from the *Fisheries Case* distinctly. See ibid.

\(^{348}\) Pharand (1968), pp. 58-59.
evidence for this acceptance by Ottawa, Pharand cited several statements: from the Canadian Secretary of External Affairs in 1963, Paul Marin Sr., claiming that “it is generally considered that the Convention formulates and develops rules which are applicable to international law generally”; Martin Sr. in 1966, asserting that the Geneva Conventions were “declaratory of existing international law”; statements offered by the Canadian Supreme Court in 1967 in the *Offshore Mineral Rights Case*,349 where in examining relevant law, the starting point was the 1958 Convention on the Territorial Sea and the Contiguous Zone “which may now be regarded as defining the present state of international law on the subject”; and statements made by the Attorney General in *Offshore Mineral Rights* confirming that the Territorial Sea Convention defined “the present state of international law as to sovereignty in the territorial sea” based upon its “ratification by a sufficient number of nations.”350 It followed that Canada could not legally justify its 1967 use of straight baselines with reference to any pre or post 1958 international customary rules surrounding the suspension of vessel traffic in territorial seas, and that the “evidence is sufficient to show that Canada properly considers herself bound by the Territorial Sea Convention, at least in so far as its basic principles are concerned…”351

Contrary to Head’s estimation, Pharand held that under general international law by 1968, Canada could not legally suspend innocent passage indefinitely for any ships within the Northwest Passage. In the Prince of Wales Strait, where Canada’s three mile territorial sea created an overlap of area constituting territorial waters, “[u]nder the geographical criterion of the Corfu Channel decision, it would probably be impossible for Canada to prohibit the innocent passage of any ship in that strait, even if it is not used for international navigation. Under the territorial Sea Convention, Canada could suspend such passage temporarily if it is essential for its security…”352 The geography of the water’s relationship to the land did, however, allow Canada to adopt “protective regulations governing the innocent passage of ships”, even though such regulations could not result in a complete prohibition of even

351 Pharand (1968), at 59.
352 Pharand (1968), at 60.
warships, but could “go quite far in verifying the innocence of such passage, in order to secure the security of the coastal state and guarantee its territorial integrity.”\textsuperscript{353} In short, Canada could not claim the Northwest Passage as internal waters outright under international law. Moreover, although the Passage was not likely to constitute an international strait, Canada could only suspend passage of non-military vessels temporarily on the grounds of national security. Although Pharand’s analysis stood in many ways in direct contradiction to Ivan Head’s interpretation of Arctic law, while it had the capability to greatly refine Canada’s assumptions about the legal status of the Arctic, its effect was to inject uncertainty into the political climate of Arctic affairs. And it was amid this anxiety over the Arctic regime in the early months of 1969 that a forceful legal challenge by the United States precipitated the construction of Canada’s Arctic policy.

\textbf{Defining a Holistic Context}

In keeping with theoretical orientation of constructivism and critical legal theory, institutional contexts play a significant role in shaping the foreign policy decisions of states in both the immediate and long-term. Chapter three suggested that by the end of 1968, and when Canada’s Arctic policy was first articulated in 1969, a high degree of institutional and normative contestation was present within public international law and the law of the sea. Though the practice of international law certainly remained constant throughout the late 1960s, the pluralism of the era added a degree of flexibility for states to maneuver rhetorically within a jurisprudential range of rule-based formalism and value-based teleological interpretations grounded in extant assumptions about the international community’s ‘authoritative’ requirements. The law of the sea continued to endure significant criticism due to a manifest lack of fairness in its application to newly developing states and its relationship to elements of technological exploitation. This normative fissure surrounding international obligations provided a further institutional crisis within ocean issues, pointing towards their settlement on a multilateral basis. Parallel to this process, the discourse of ecology gained significant prominence during this period, becoming authoritative to adherents of all political persuasions. Rising momentum in the spread of the ecological

\textsuperscript{353} Ibid.
dialogue had the effect of further compounding the opportunity for critiques to be leveled against international law from the developing world on the basis of economic right and in relation to dated precedents of ancient international law weighing down upon the imperatives of socio-economic progress.

Such an alteration had roots in emerging understandings occurring within the physical sciences. The intimate relationship between the world’s oceans and the global biosphere became transformative, allowing a critical, epistemic discourse to emerge which spoke of the need to bring into equilibrium the relationship between technological-capitalism and global ecology. The deepening crisis of ocean pollution became part of this episteme as a result of disasters in British and American waters towards the end of the decade, placing into sharp relief the limitations of the existing state of international law as it related to oil pollution. But beyond these specific institutional contexts, however, the bilateral relationship between Canada and the United States had by the end of 1968 become significantly strained given the proliferation of arguments in competing academic and public policy domains pertaining to the existential threat Canada faced in economic and cultural domains vis-à-vis the overwhelming force of American hegemony. For the balance of the Canadian public, by the end of 1968, the newly anointed Liberal Government under the tutelage of Pierre Trudeau began to govern against what was perceived to be Canada’s dark and conservative rival, President Richard Nixon.

[There is an] imperative necessity for abandoning a doctrine which - expressed in the traditional distinction between justifiable and non-justifiable or legal and political disputes - has lost its original usefulness and has become an obstacle in the way of legal progress.

Hersch Lauterpacht, 1933

If you insist on a strict interpretation according to practice, where we have long-term agreements but a rapidly changing environment, law will become a clog on development and ultimately cease to serve the purposes for which it was formed. I don’t think we have to apologize for saying: “Things have changed; we are entitled to another interpretation.”

Michael Reisman, 1988 (on the problem of the use of straight baselines proliferating)

The Arctic Waters Pollution Prevention Act was an attempt to try and get some control over the Arctic…the assertion of anti-pollution measures was an excellent way to get control of that area without being too provocative to the United States. It helped to protect the environment, but I thought it a very clever way of making progress in the field of sovereignty.

Mitchell Sharp, 1983

[T]he genius of the legislation [AWPPA]” was that “it would put you on high ground in the way of argumentation. You wouldn’t be arguing from a possessive, territorial, acquisitive point of view.

Len Legault, 1991 - interview by Christopher Kirkey

Step by step, fibre by fibre we were weaving a fabric of sovereignty in the north through a series of activities and [we considered] this process should continue. If [through the AWPPA] we wove this fibre of environmental concerns and protection into our posture, it would first of all reinforce our sovereignty claims…and equally be consistent with our attitude towards an international legal regime.

Ivan Head, 1983- interview by Clive Sanger

[T]he ultimate objective was to establish and get international recognition for Canadian sovereignty over the waters of the Canadian Arctic archipelago. That was the overall objective…

Gordon Robertson, 1991 - interview by Christopher Kirkey

[Prime minister Trudeau] 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 of sovereignty.

Alan Beesley, 1971

As the above quotations make clear, there was a marked level of inconsistency in Canada’s public statements about how the 1969-70 Arctic policy related to Canada’s sovereignty claims over the archipelago. As Chapter four details, Canada’s process of policy construction involved a sustained engagement with the politics of international law, and in many ways, smacked of deception to international and American audiences. The chapter overviews empirically at length why this occurred, but provisionally it can be noted as resulting largely from what Hannah Arendt called the requirement of turning “pleasing hypothesis into facts”,

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and ever more so when states face the difficulty of salvaging foreign policy predicaments.\textsuperscript{354}

It would be unfair to submit that Canadian officials were in fact lying about their motives and intentions to the United States, but it is undoubtedly accurate to claim that Canada was engaged in a process of concealment while embedding within the legal case jurisprudential precedents and progressive arguments that allowed it to remain opaquely ambivalent about the relationship of Arctic policy to future claims of sovereignty. We may note E.H. Carr’s insights voiced decades ago, even though Canada’s Arctic policy denotes far more sophistication than Carr’s words reveal. For it is common that “[f]ew salesman fail in an emergency to recognize a duty to lie for their country.”\textsuperscript{355}

The aims of this chapter are two-fold. First, to provide an historical interpretation of the events that occurred within and around the Arctic policy making sequence from 1969-1970. Many of the classic works in the literature on the Northwest Passage are drawn upon, synthesized, and ultimately expanded, in order to arrive at a more consistent and thorough reading assembled to date. Second, to set the ground empirically to respond to the question of how it was possible for Canada’s Arctic policy to be constructed. Chapter four details how the policy process became embedded within the politics of international law and gave rise to a range of constraining and enabling effects on officials when they evaluated and argued for specific policy choices.

The 1969-70 Arctic policy was a substantial endeavor for Canada, and in many ways set the Canadian policy on the Northwest Passage on a trajectory of path dependence for years to follow. Indeed, the creative legal argument accompanying the policy was a remarkable feat of legal reasoning and planning. Its components, as they relate to the thresholds and criteria of legal compliance, are intricate and complex. Accordingly, chapter four only briefly touches on how theory can explain the developments of the policy. Instead, chapter five is devoted entirely to theoretical assessment of this period in order to evaluate and bring into sharp relief the correlation between the generic forms of creative legal arguments and Canada’s Arctic example, the variegated role international law played in the policy, including

\textsuperscript{354} Arendt (1972), at 42, as cited in Jacobson’s work on the utility of deceit (2008), at 337.

within several compliance judgments, and why it can be claimed that the institutional conditions developed in chapter three can be argued to give rise to the possibility of the Arctic policy emerging.

**January, 1969: The Distant Thoughts of Arctic Sovereignty**

On January 1, 1969, Canadian foreign policy officials were not greatly concerned with the Arctic and whether Canada possessed legal sovereignty over Northern waters. Canada had been given control by the United States over the DEW airfields, following the reduced threat of Soviet bombers as détente slowly emerged and Canada’s title to Arctic territory appeared consolidated and protected under international law. There was, rather, a growing chorus to see the Trudeau government make good on its promise to enact a novel foreign and defence policy to guide Canada into a new decade. Those enthralled with Trudeau’s foreign policy vision believed strict entanglements within the NATO alliance and reflexive Canadian support of United States’ security priorities in defense of Western Europe were dated practices and the subject of militaristic thought. Trudeau’s adjustment saw Canada not reject directly all commitments of collective security bound to NATO, but focus principally on the national interest with priority to continental affairs. As Trudeau went to great lengths to stress, Canada was not only an Atlantic country, but also a Pacific and Arctic nation. In its function in the latter role, Canada needed to be concerned about a possible scenario in which missiles might enter over its Northern territories. But apart from issues of war, Canada should focus principally on domestic politics and political economy, prioritizing sovereignty and independence above all Cold War aims along with the inequalities and marginalization of the developing world. At the turn of 1968, most perceived Trudeau’s policy reconstruction as visionary, and those who did not were dismissed as anachronistic by the new government who told the House in 1969 that “[t]hose … who say that our defence policy represents a turn toward isolationism are proclaiming only that, in their fixation on old wars

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356 The DEW lines were a series of early warning radar stations built by the United States and Canada in 1954 across the continent between the Arctic Circle and seventy degrees north latitude.

357 For thorough treatment on the orthodox thesis of Trudeau’s new foreign policy being determined by international and structural factors, rather than Trudeau’s subjective contributions to policy change, see Keeble (1997).
and on old problems, they are isolated - isolated from the world of now and the world of the
future.\textsuperscript{358} Far from abandoning the world of international affairs, Canada was turning its
pragmatic gaze toward domestic and global fissures, including the consolidation of Canadian
unity in the face of growing separatism in Quebec and disparity in regional affairs.

What events led Canadian interests to be focused on the Northern domain? Apart from fear
of Soviet missiles and Cold War proximity, the primary issue to pique Canadian attention
was energy resources and American advancement in pursuit of developing reserves. By the
late 1960s, states were able to extract in large volumes resources in the North and
transportation technology facilitating the movement of resources to southern markets had
accelerated. Iron, copper, gold, silver, asbestos, tungsten, and lead-zinc were discovered on
Little Cornwallis Island, and oil had been uncovered by the United States in Prudhoe Bay on
the North Alaska Slope in early 1968.\textsuperscript{359} These discoveries were taken as evidence by the
United States that large reserves of natural gas existed. In a short period, an oil exploration
boom was underway, hosted by a series of American oil corporations transporting cargo
through territory that had heretofore been considered improbable routes of transit. Many
Canadian bureaucrats warmed to this new technological revolution in the Arctic, viewing the
prospects of Northern development as a momentous opportunity to integrate Northern
peoples into the broader domestic political-economy. The findings in the Atlantic Richfields
at Prudhoe Bay held the possibility that Northern development could adopt an independent
economic course, benefiting not only firms including the Mackenzie Delta and PanArctic
Oils Limited, but also the Canadian government, which owned 45\% of each.\textsuperscript{360}

\textsuperscript{359} On 18, July 1968, Robert Anderson, chairman of the Atlantic Richfield Company, announced that "one of
the largest petroleum accumulations known to the world today" was found, estimated to contain between five
and ten billion barrels of oil. The Prudhoe Bay location would soon become the subject of pipeline and
transportation studies evaluating whether maritime transport, pipelines, or a combination would be
economically advantageous. See Kirkey’s (1997) treatment of the bi-lateral interactions between Canada and
the United States (1969-1973) when the pipeline option to run through the Mackenzie Valley was in 1973
rejected by the United States.
\textsuperscript{360} See E. J. Dosman (1976), at 37, noting that the Department of Indian Affairs and Northern Development
were particularly excited by this scenario, all the while however, never perceiving that the United States would
challenge Canadian sovereignty in the North. A secondary problem for the Liberal government was the issue of
whether the United States would continue its plans to create a pipeline running across Alaska, and from the
West coast then ship oil via tankers south to Washington State, passing through the Straits of Juan de Fuca and
these discoveries becoming public, it became apparent that there were impending problems to Canadian Arctic independence in relation to increased American economic activity. In October of 1968, Humble Oil, a subsidiary of Exxon and Standard Oil, announced its intention to refit a large-scale tanker, the SS Manhattan, to test the possibility and feasibility of transporting oil through Arctic waters in order to shorten the supply lines of extraction from Alaska to refineries on eastern United States coasts. Humble was joined by Atlantic Richfield and British Petroleum in sharing the $US 30 million price to reinforce the tanker, and registered requests in Ottawa for scientific information on the ice conditions in the Northwest Passage to facilitate a planned summer voyage. Ottawa, ill-prepared for the deluge of requests, opted to deny the requested reports for undisclosed reasons, but presumably on grounds that it was unsure of the relationship between the private companies and United State’s government involvement.

Several Canadian perceptions were likely to have formed at this point. On the one hand, any voyages through the Northwest Passage would set in motion a potential legal precedent for viewing the water’s status as an international strait, a position which the United States government had stridently declared for years. However, it was also possible that the Manhattan voyage could strengthen Canada’s claim to sovereignty. If the crossing were difficult, or in some way revealed the undesirability of the Northwest Passage as a transportation route, the United States might have been unable to convincingy characterize the route as an international strait. If events unfolded in this manner, the attempted voyage might highlight the need to accord special legal status to the Northwest Passage under international law as an ice-covered area.361 Uncertain of how to proceed and wanting to avoid weighty silence, the Canadian government sought a middle course. Ottawa opted to cooperate with the American companies in a way that would be commensurate with its self-proclaimed role as sovereign over the Arctic waters. Canada announced that foreign vessels could make the sailing but that the Canadian icebreaker, John A. MacDonald, would escort

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361 See Kirton and Munton (1987), at 71.
all US vessels on the transit. The United States government added, however, that a US Coast Guard ice-breaker, the “Westwind”, would accompany the Manhattan, along with US aircraft through support of aerial reconnaissance. It was concluded by Canadian officials that given the range of actors taking part, the voyage could no longer be characterized as a “private project.”

Explanations for this position of Canadian cooperation vary within academic accounts. Dosman argues that the Canadian approach was grounded in “hope” and intended not only to “confuse Washington to shame it back into the special relationship” but in part motivated by fears that greater Alaskan oil exploration would threaten the profitability of oil exports coming from Alberta via pipelines to the United States. By this interpretation, the policy was the result of poor preparation given the general state of “dismay, chaos, and lack of preparation” in External Affairs following its reorganization by the new Liberal government in 1968. Kirton and Munton conclude that the policy of practical coordination by Canada signaled an approach “designed to avoid or delay a major confrontation or even bilateral diplomatic talks with the United States over sovereignty, to reinforce Canadian claims to occupation of the Passage, and to solidify the support of the United States companies for Canada’s regime.” For these authors, Trudeau’s policy provided the Northern Task force with time to continue to assemble knowledge on the legal status of the waters. Based upon documentary evidence, there is considerable truth to the latter interpretations. Canadian officials welcomed the voyage quite consciously in principle due to the “very significant benefits” it would have on Northern economic development, but were also explicitly aware that while the private companies had requested consent and extensive technical assistance from the Canadian government, the US Department of State and the US Coast Guard had not. This complicated matters of legal responsibility and whether a legal challenge would result from an act of governmental silence. Trudeau’s government likely

362 The government at that point set up a new internal body, the Task Force on Northern Development (TFNOD), to provide policy advice on future issues relating to the bilateral relationship. 
363 As Dosman (1976) notes (pp. 40, 41), that this fear was so pervasive explains why the TFNOD was constructed for possible contingency plans were problems to arise in relation to oil exports. 
364 Kirton and Munton (1987), at 73. 
365 HBC Archives, E 346/2/2B, Memorandum for the Cabinet, “Canadian Sovereignty in the Arctic,” March 29, 2969, 10.
believed in early February, 1969, that the issue could be finessed diplomatically or even set aside at least until the *Manhattan* voyage was underway in June.\(^{366}\)

However, the issue of Canadian jurisdiction became thrust into the spotlight immediately and from an unexpected corner. It was cited by General Charles Foulkes, former Canadian Chief of Defense Staff, on February 12, 1969, to the Standing Committee on External Affairs and National Defense that, “the Canadian claim for ownership of the Arctic islands is still not beyond dispute. I was informed recently that even some of the United States maps show the Arctic islands within the Canadian sector as ‘disputed territory’.”\(^{367}\) Such an assertion must have caught the Canadian government off guard, and led it to think that not only was the North subject to increasing pressure from American companies, but that it was also drawing the attention of the United States Navy.\(^{368}\) On February 26, the public became alerted to the potential implications of the dispute with the United States following a letter to the editor appearing in the *Globe and Mail* indicating that the sovereignty question over Arctic waters required immediate attention. The effect of the letter was catalytic. The sovereignty debate officially entered the House of Commons on February 28, and the allegations of United States opposition to Canadian maps were reported in the morning press. The next day, former Prime Minister Diefenbaker weighed in on the matter in the *Ottawa Citizen*, inquiring if the present Liberal government intended to assert a claim of sovereignty in light of belligerent American oil companies attempting to claim Arctic territory on behalf of the

\(^{366}\) Indeed, the relationship between Humble Oil and the Canadian government was extensive. Humble had contacted the Canadian government immediately for assistance in the form of help with ice-breaking, reconnaissance of ice-conditions and forecasting, and the appointment of a Canadian national with expertise in Arctic pilotage and interagency coordination. Due to the uniqueness of the voyage, Humble was proposing that it would sell to the Panartic Oil Consortium and the Canadian government the scientific and technical data obtained during the voyage. The price was US$500,000 down, and $2 million if the information was used in the design of an ice-breaker prior to 1976. While the consortium had already paid in full, the Canadian government was still deliberating the economic merits and legal implications of possessing the data. See Ibid.


\(^{368}\) The US Navy had made known its preferences towards a minimal width for the territorial sea for some time. Admiral Burke’s comments in the late 1950’s were consistent with the Navy’s attitude throughout the 1960’s: “support of our free world allies depends upon the ability of the Navy to move unhampered, to wherever it is needed to support American foreign policy.” See Alexander (1967). So intense was the US Navy’s interest in the matter that it was prepared to sacrifice almost any other ocean interests to ensure the maintenance of freedom of the high seas. For further commentary, see Oda (1968), at 111.
United States. Debate in the House quickly turned into a series of rhetorical inquiries on the new “Manhattan project” soon to be unleashed into the pristine Canadian North.

By this point, a response by Trudeau was becoming urgently necessary, and Ivan Head likely framed his rebuttal.\textsuperscript{369} To Diefenbaker’s charge, Trudeau responded on March 7 with the admission that “the basic question is whether these bodies of water and ice constitute an inland sea or a territorial sea.” Trudeau had effectively acknowledged publicly that there was a territorial dispute, but obfuscated the real issue. The United State’s legal position was unconcerned with whether the Passage constituted an inland or territorial sea. From its perspective, it was an international strait connecting two parts of the high seas, and these waterways were central to the United States’ global posture in the Cold War.\textsuperscript{370} Trudeau’s statement, positing the union of water and ice, and the legal distinction between internal and territorial waters, reveals several points. The government had incorporated into its assessment Pharand’s critique of Head’s 1963 analysis conflating the territorial sea with internal waters, and this distinction was corrected. The statement also reveals the unpreparedness of the Canadian legal case, for if Canada possessed a valid legal response this would have presented an opportune moment. However, if Trudeau was unprepared for responding to a legal question, it is not clear whether his comments ought to be evaluated on the basis of a literal reading of international law, or whether they reflect strategic legal manoeuvring. His use of the term ‘inland sea’ is curious, as the term was not used in international law at the time and had no clear legal meaning. It might be inferred that by ‘inland sea’ Trudeau was referring to ‘internal waters’. This is unlikely however, as, in 1969 Canada still maintained its three-mile territorial sea, thus leaving it unable to claim Arctic waters as ‘internal’ even though it was plausible Canadian officials could make the case for sovereignty on the basis of historic title. Trudeau’s use of ‘inland sea’ might also be

\textsuperscript{369} Ivan Head was now special assistant to Trudeau on foreign affairs working from the Prime Minister’s Office (PMO).

\textsuperscript{370} Cdr. J.W. Roberston, from the Office of the Chief of Naval Operations, US Navy, speaking in 1967 held that “our greatest danger is not in the extensions of the territorial seas per se but the threat of closure to international straits…we should seek the right of aircraft to fly over such straits”. See Second Conference, LOS Institute (1967), at 49.
interpreted as reflecting a legal reading of the issue on the basis of past Canadian opinion, or a possible indication of imprecise knowledge of the legal subject matter. The latter is highly implausible given the caliber of Trudeau’s legal counsel. Hence, in all probability the statement was intended to add confusion to events and delay proceedings further. However, speaking with intentional clarity Trudeau publicly declared on March 10th that the sector theory could not be considered as having a basis in international law. This evaluation had formed following what appears to a sustained engagement by Canadian legal officials on the broad contours of international law to the Arctic region. These conclusions were summarized in a crucial memorandum to Cabinet on March 20, intended to provide legal and policy guidance to the rapidly unfolding Manhattan situation.

**Legal Appraisal: The March Cabinet Memorandum**

Canadian lawyers underscored with extensive evidence and precedent that the islands of the Arctic were protected under international law under the doctrine of effective occupation due to the proper transfer of title, discoveries, and Canadian administrative capacities in the region. Furthermore, the sector theory had been ruled out on the grounds that it had no basis in international law and that “Canada’s record of adherence to the theory had been uncertain and fluctuating.” On the issue of sovereignty over waters of the “Polar Basin”, it was held that Canada had never definitively formulated its position and that international law provided “no clear or firm basis upon which Canada could assert a claim…” If Canada were to claim

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371 In reference to Maxwell Cohen’s analysis (1958: 36) that “the archipelago ought to be treated as ‘Canadian waters’ parallel to how the ICJ in the Fisheries case viewed the Norwegian waters of its archipelago as ‘inland waters’, and ‘if not as wholly ‘inland waters’, certainly as an extension of the idea of ‘territorial waters’ in some form”.

372 One of Trudeau’s advisors was Allan Gotlieb, whose experience in ocean affairs and international oceans law was formidable. During the 1958 UN Law of the Sea Conference in Geneva, he was the sole officer present from Canada’s legal division, remained in External Affairs until 1966 spending some time as the desk officer on the law of the seas, and was assistant undersecretary and legal advisor for Canada from 1967-68.

373 Though it is unknown who specifically participated in the document’s composition, it was signed off by the Chairman, Combined Sub-Committee of the Interdepartmental Committee on Territorial Waters and Advisory Committee on Northern Development. Document on hand with author.

374 Ibid. The Annex III documents the bases of negative responses from the UK, USSR, US, Denmark, and Norway, over several decades. The report went on to note that if Canada abandoned its Arctic waters claim, this would have detrimental precedent for Soviet use and interpretations of the sector principle. Nonetheless, the Canadian government was counseled that the sector theory “not be repudiated as such (in the absence of any pressing need to do so) but be held in reserve for possible use if and when it became advisable to lay claim to sovereignty over any fixed or floating ice in the high seas of the ‘Canadian sector.’”
the waters, and by extension ice through effective occupation, this argument would be seen as internationally suspect given the relative lack of permanence of some “ice-floes and islands” and the consequent infringement on freedom of the high seas doctrine. Such a move would put the relationship with the United States in jeopardy, because a “modus vivendi” had developed over Arctic waters claims, “pursuant to which it has generally been possible to avoid forcing the issue of the status of these waters, whether territorial or internal, and thus compromising either the United States or Canadian position in this respect.” The modus vivendi had to this point “been uneven”, and on some occasions supported Canadian sovereignty, while at others “the results have been more blurred with each country maintaining its position while refraining from asserting it in such a manner as to embarrass the other publicly.”

On Canada’s overall legal position, the lawyers believed that:

The legal foundations for Canada’s claim to the Arctic channels in the final analysis rests on the application of the straight baseline system approved in the Anglo-Norwegian fisheries case and substantially incorporated in the 1958 Geneva Convention on the territorial sea. In summary, it can be said that the Canadian claim is not strictly inconsistent with the Anglo-Norwegian case or the Geneva Convention. However, an unprecedented expansion or extension of these principles would be required to cover their application to the Canadian situation.

In evaluating the possibilities of straight baselines, Canadian officials posited that the Canadian archipelagos geographic form was similar enough to the Norwegian coastal formation and had support in the Fisheries jurisprudence of the required indented coastlines and proximity of islands in relation to the immediate vicinity of the coast. The presence of ice further reinforced this claim in linking with greater consistency the mainland to the islands. Yet on the matter of baseline calculations:

Although the Arctic islands form a coastal archipelago, its configuration is not that of a “fringe” in the terms of the Geneva Convention. Or, what is much the same thing, the massiveness of the formation tells against its qualifying under the Norwegian formula adopted in the Convention. The Canadian claim to the Arctic archipelago exceeds in terms both of area and length of lines the Norwegian precedent by such a magnitude that it becomes difficult to reconcile the two situations. An enclosure involving baselines which total 3000

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375 Supra note 367, at 10.
376 Ibid, at 7.
miles, it can be argued, is very difficult from a baseline system hugging a shore with a trend line about 650 miles in all.377

And crucially:

An important consideration (which would no doubt influence the views of other countries in respect of Canada’s claim to the waters between the Arctic islands) is that Canada presumably would allow foreign vessels the right of innocent passage, pursuant to article 5 of the Geneva Convention, in the event that these channels were closed as internal waters by means of straight baselines.378

There were in Canadian officials minds both advantages and disadvantages in “claiming sovereignty.” Advantages accrued, even if the right of innocent passage were surrendered, in retaining control over all resources, along with commercial and naval vessels in Arctic waters. However, it was also thought that if the Arctic was declared high seas, “security considerations would arise”, and Canada would not have discretion to use the doctrine of innocent passage flexibly in trying to bar the entry of foreign military vessels. If the government were to give up on the sovereignty posture, “in the eyes of the public, if only for reasons of “cartographic chauvinism”, this might be considered inconsistent with the maintenance of these other claims and tantamount to a surrender of territory.”379 The major disadvantage was the negative effect it would have on the relationship with the United States given that Canada’s claims would support archipelagic law that both Indonesia and the Philippines sought. Canadian officials did, however, acutely understand the current maneuvering of the United States government and their silence in requesting official permission for the voyages:

Under the terms of an arrangement recommended by the Permanent Joint Board of Defence, and approved by the US and Canadian Governments, “public vessels” of the USA and Canada can pass through territorial or internal waters of the other country upon “notification” to local naval commanding officers (in the case of “operational” or “informal” visits).380

No notification had been received for a US Coast Guard icebreaker, but the US State Department had offered to provide a written note to Canada to the effect that “…the voyage

377 Supra note 367, Annex IV, p. 2
378 Ibid.
380 Ibid, at 11.
of the ‘Manhattan’ is not intended to stake out any claim to territory or mineral rights in the Canadian Arctic.’” Canadian officials grasped that the note did not address the subject of Arctic waters or whether Canada had any claim to the area, but they were unsure if the American position on the Manhattan affair would be allowed to “develop into a test” of the respective positions of both states. In calculating how to handle American silence for the voyage it was believed that the State Department’s inaction was consistent with its policy of not taking any action which might be interpreted as acceptance of Canada’s claim...However, Canada’s claim could be seriously prejudiced if the project is carried out without either a request for Canadian concurrence or notification on a service to service basis by the US Coast Guard...It is known that in the views of the US Navy the success of the project would lead to increasing military interest in the Arctic and result in a need to assure freedom of the Arctic Sea...the participation of the US Coast Guard icebreaker is not technically essential for the success of the project... 381

While Canada had several policy options to choose from in light of it now standing “on the threshold” of having to make a claim under law, these needed to be referenced against the belief that “[t]here would not appear to be any overriding reasons to revise the view reached in an inter-departmental study of this matter in 1960 when it was concluded that a claim to the Polar Basin would entail few advantages of consequence…” 382 The United States was unlikely to accept an arrangement that would not force the issue of sovereignty to be aired and allow the parties to retain their ambiguous legal positions, and thus Canadian policy at this historical moment would be definitive for some time, according to Canada’s lawyers.

The first option was to make a positive assertion in order to “prevent the erosion of its claim to sovereignty over the waters” and do so with straight baselines. There were costs associated with this course of action, however:

Since the United States has threatened litigation if Canada proceeds unilaterally with the closure of these and other waters, such a course could result in the defeat of the Canadian claim, unless Canada evaded an action before the International Court of Justice by pleading the “Connolly amendment” against the United States or by qualifying or withdrawing its acceptance of the compulsory jurisdiction of the Court. 383

381 Ibid, at 11.
383 Ibid, at 14. The Connally amendment refers to the reservation made by the US Senate in ratifying the optional clause under Article 36, paragraph 2 of the Statute of the International Court of Justice. The reservation
Though it would be difficult to calculate the American position, Canadian officials were genuinely worried about a harsh response given that US Secretary of State in 1966 had sent a letter to Canada indicating that if Canada undertook such a course of action on baselines the United States would protest directly and publicly, avail itself of legal remedies, and instruct ships and aircraft to disregard Canadian claims in the Gulf of St. Lawrence and Arctic channels. It was also possible that the United States would refuse to continue to grant “special status” to Canadian oil imports if the baselines were drawn. The second policy option was Canada’s abandonment of the Arctic claim, either expressly or tacitly. The major disadvantage with this approach was that Canada was left with a three mile territorial sea which allowed free transit through the channels. Relinquishing Arctic territory would furthermore cause great consternation in the Canadian public. Given that an oceans conference with a primary focus on the territorial sea was soon to materialize and the norm to be codified was likely a limit of twelve miles, it followed that as there would be an overlap in the Northwest Passage at one point of territorial waters (the distance between the islands was less than twenty four miles), “the adoption of the twelve mile limit could perhaps make the abandonment of Canada’s claim to sovereignty over the whole of the channels more acceptable.”384 Third, Canada could maintain the status quo with the United States and neither provoke embarrassment nor confrontation. If Canada wished to “assert de facto sovereignty” while postponing the formal assertion of its claim, it needed to “furnish the required aids to navigation” akin to expenditures undertaken for navigation in ice-congested waters such as efforts in the Gulf of St. Lawrence and Hudson Bay in the winter.

Ultimately the memorandum recommended either asserting the Arctic claim or continuing with the status quo. If assertion was chosen through straight baselines, Canada could juggle the innocent passage clause to either permit of an exception to its inclusion, or make an express assertion about the Manhattan’s voyage if innocent passage were permitted. If the status quo, Canada then need not request permission from the US State Department as this

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would be tantamount to seeking American recognition of the Canadian claim, but should obtain a “service notification” from the US Coast Guard which would protect and reinforce Canadian participation in the Manhattan trials. Whether or not an agreement was reached and a public uproar avoided, Canada could “minimize the consequent prejudice to its claim by undertaking a variety of participatory acts with the Manhattan.”

How may this evaluation of Canada’s legal predicament be explained theoretically? This was the first significant attempt to assess how the Manhattan voyage would challenge Canada’s legal status, and in turn, how future policy measured against the thresholds of legal compliance. Canadian officials were concerned with not only what international law said on the matter, but also what domestic audience costs, in addition to problems arising with the United States over the restriction of naval movement, would arise with an extensive legal claim. Here, then, the politics of international law was in direct evidence, from both a constructivist and critical legal standpoint. Legal evaluations were shifting between the legal and political domains as constructivists suggest will occur in legal predicaments. Canadian officials were also using the open-ended interpretive functions of law to their advantage, pointing out the indeterminacy of legal arguments as they related to the possibility of drawing straight baselines. The Canadian archipelago met the coastal requirements of the Fisheries Case, but the outer fringe of Canadian territory would likely not be able to be squared with the 1958 Geneva Convention rules, and thus baselines were not formally in contravention with both sets of law, but could be legally valid following only upon the “unprecedented expansion or extension of these principles.” But by and large, Canada’s legal appraisal in the March Cabinet Memorandum falls directly in line with what legal rationalists and legal and political realists would predict. Canada was weighing out in a cost benefit analysis whether and to what degree to comply with what the law required, and also what would preserve the existing status quo relationship with the United States. This compact had guided interactions in past without any substantive friction and allowed Canada to remove itself from public legal appraisal. Moreover, Canada was worried about the merits of its case, and in addition to the legal problems of the baseline claim arose the attendant problem of handling the right of innocent passage in relation to preserving the American
relationship and Canada’s amicable reputation within it. The right of innocent passage was considered as binding law by Canadian lawyer that to a high degree foreclosed policy options on a broader scale. If Canada were to repeal this right to extended international audiences it would have to handle American transits on a bilateral basis, and more specifically, the Manhattan voyage with discrete and specific care. Either way, the innocent passage problem and the challenge of baselines having precedential effects on other issues of law relating to archipelagos played an instrumental role in Canada by March 1969 concluding that the existing legal and political status quo ought to be preserved in order to allow the politics of international law, and exchanges of what types of consent were being required or offered by either party, to play out further in the upcoming months.

Spring, 1969: Navigating Domestic Politics

By mid-March, as Canada’s ‘new foreign policy’ was being prepared, Trudeau planned his first trip to Washington from the 24 to the 25th to meet President Nixon and discuss a range of foreign policy issues, including the Arctic. Trudeau was prepared by both Head and Gordon Robertson, clerk of the Privy Council, Secretary to Cabinet, and Canada’s most senior civil servant. Head counselled Trudeau on the existing international law including the history of Canada’s contradictory statements made about its complete control over the North. In his account, Head recalls that he “cautioned [Trudeau] against further offhand ministerial statements about the extent of Canadian claims or about the juridical character of the water, ice and superadjacent airspace”386, and suggested he bring up the Arctic issue only in passing in order to convey to Nixon the sharpness of Canadian public opinion. On March 27, Trudeau announced an Arctic tour by Governor General Michener, and on April 3, greater surveillance of Canadian territory and coastlines. These moves followed from a report from the TFNOD to Cabinet advocating a legal strategy based on ‘effective occupation’ rather

385 By this point Washington’s position on the sovereignty issue was “muted’, write Kirton and Munton (1987:74), as evidenced by United States officials in February at a Calgary oil meeting alluding to the fact that a Canadian extension of territorial waters from three to twelve miles was not likely to be challenged. Whether Washington was bluffing, given the context of the interrelationship of Albertan oil for export to the United States, remains unclear. But the creation in February of the US Task Force on Oil Policy to review American oil imports, appeared to have the effect of staying a possible confrontational outcome.

than an outright declaration of sovereignty. Following United States insistence in late April that an extension of Canadian maritime jurisdiction, including extensions of straight baselines to the east and west coasts, would be seen as provocative, the remainder of the month was replete with public discussions. Anti-Americanism became a dominant domestic narrative, with special reference to the American public’s unflinching position that the US Navy should not give way to Canadian interests that reduced freedom of movement in special maritime areas. Both the press and much of Parliament were outraged at the timidity of the Canadian government’s position, forcing, as Head recalls, Trudeau to be preoccupied with the task of unifying Cabinet as a precursor to adopting a more publicly popular stance.387 Trudeau closed policy ranks at this point, and brought Head and Gotlieb exclusively alongside for legal and political consultation. It was their collective belief that “the United States government would oppose vigorously any endeavour by Canada to hinder or regulate the Passage of the Manhattan on any basis whatsoever.”388

By mid-spring legal opinion was being aired on the subject of freedom of the seas as it related to the Arctic Ocean. Donat Pharand was asking the primary question of whether the Arctic Ocean, not expressly mentioned in the 1958 Geneva Conventions or the International Law Commission’s pre-conference deliberations, was subject to the foundational principle of the law of the sea. Pharand concluded that, “[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.”389 Evaluating the issue legally involved a two-part test: whether it was possible to exercise freedom of navigation within such waters; and the attitude of Arctic states whose territories constituted a continental belt around the area. Part of the key problem in this evaluation lay in determining what legal status could be used to characterize the ice and ice-pack and whether these forms could be the subject of sovereignty. In 1958, Canadian jurist Maxwell Cohen had argued that the ice cap represented a type of “quasi-land” for all purposes of peaceful or

387 The nature of the fragmentation within government departments is difficult to ascertain however. There was a range of disparate opinion according to Head, while Kirton and Munton (1987: 75) hold that there was relative consensus among the departments. By this they apparently infer that all, including External Affairs, had agreed that acts of state forming the basis of legality in demonstrating effective occupation needed to be further put into practice prior to an outright declaration of sovereignty.


military use and that this geographic reality allowed Canada to claim jurisdiction over the ice-cap and the waters beneath.\textsuperscript{390} The majority of subsequent writings, including Heads, concluded the opposite: freedom of the high seas prevailed in the Arctic despite the presence of ice. Given the nature of the Arctic Ocean and how different ice formations related to the legal characterization of the waters, Pharand argued that no agreed position on the status of ocean ice in international law could be identified by evaluating customary international law or the practices of the United States and Soviet Union. The United States had maintained a consistent policy denying territorial claims over Arctic ice, while the Soviet stance on the nature of the waters lying outside its own sphere of legal title was ambiguous. Complicating interpretation of the applicable customary law, both superpowers had made repetitive deep water submarine voyages in the Arctic since the late 1950s without any formal protest. For Pharand, it followed that, in light of the Canadian government’s virtual “silence in regards to the activities in the Arctic Ocean north of her Coast … [i]t would hardly be possible for Canada to explain why she has permitted all the seaborne and airborne expeditions on the part of the United States and the Soviet Union, within her indicated sector, if she really did claim sovereignty or jurisdiction right up to the pole.”\textsuperscript{391} Arctic states “generally regard the Arctic Ocean as being free”, confirming that the physical nature of the Arctic Ocean as ice-covered precludes it from being legally assimilated either to land or constituted as land. In conclusion, Pharand held that “it is possible for states to exercise all of the freedoms of the seas in the Arctic Ocean.”\textsuperscript{392}

Within political circles by May, 1969, Arctic sovereignty had become, as Kirton and Munton put it, “the parliamentary cause célèbre.”\textsuperscript{393} The integrity and authority of the newly minted Prime Minister were at stake, forcing a rapid response to an issue that was fast becoming a political embarrassment. That Trudeau moved to defend his and Canada’s integrity through

\textsuperscript{390} Cohen (1958), at 36.
\textsuperscript{391} Pharand (1969a), at 230.
\textsuperscript{392} Ibid, at 232, 233.
\textsuperscript{393} Kirton and Munton (1987), at 74. And while the issue of sovereignty was the institutional and conceptual framework through which the public demanded a response, contained within this rallying cry was the widespread knowledge that the potential from oil extraction in the Canadian Arctic islands was approximately 150 billion barrels, greater than the sum of all United States’ extraction to date in its history. See Oilweek, 14, 16-17 (25, Nov. 1968).
public statements did not detract from the fact that he was caught, as Robert Reid crisply put it, “between the Scylla of public demands and the Charybdis of international law.”

Navigating between a vociferous form of public nationalism which Trudeau abhorred and the requirements of making a case for Arctic waters that fell within the boundaries of international legal opinion, Trudeau resorted to ‘double-edged diplomacy’ in trying to play the demands of domestic politics against appropriate international norms. A statement to Canadian audiences was required, even though as McConchie and Reid put it, the inner circle of advisors remained “stalling for time.”

Hemmed in by the structural effects of international law but fast becoming subject to their political underpinnings, Trudeau opted for a strategy of rhetorical concealment. On May 15, he put forth a policy statement to placate public opinion and ostensibly clarify Canada’s position to international audiences. Having presumably considered the matter closely with his associates, he argued that:

Canada’s sovereign rights over the Continental Shelf in the Arctic follow from Canada’s sovereignty over the adjacent islands, and again there is no dispute over this matter. No country has asserted a competing claim to the resources in question; no country has challenged Canada’s claim on any other basis and none can do so under international law … the waters between the islands … are looked upon as our own … It is also well known that not all countries would accept the view that the waters between the islands of the archipelago are internal waters over which Canada has full sovereignty. The contrary view is indeed that Canada’s sovereignty extends only to the territorial sea around each island…The legal status of the waters of Canada’s Arctic archipelago is not at issue in the proposed transit of the Northwest Passage by the ships involved in the Manhattan project…The oil companies concerned and the United States Coast Guard have consulted with appropriate Canadian authorities in the planning of the operation. The government will support the trials with the Canadian Coast Guard ice-breaker John A. Macdonald…and will also provide aerial ice reconnaissance and assume responsibility for the coordination of such reconnaissance. The government has also selected and appointed an official Canadian government representative on board the SS Manhattan who will act as a technical advisor and as a coordinator of Canadian support for the operation.

Several positions immediately arose. The political opposition expressed a tone of bewilderment and dismay. Robert Stanfield, Conservative leader, was resolute that Trudeau

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395 On the idea of double edged-diplomacy in international relations, see Putnam (1988).
396 McConchie and Reid (1977), at 168.
had “abandoned the position taken by previous governments with respect to our sovereignty”, and T.C Douglas of the New Democratic Party projected that “we are almost inviting someone else to suggest that we do not have jurisdiction … the Canadian government ought to make its position clear beyond a shadow of a doubt.” Following these interjections public opinion remained hostile, and as Head recounts, “the statement was attacked as inadequate and cowardly” forcing more questions to the floor of the House in the coming days. Trudeau’s speech also seemed to suggest that the waters of the Arctic were internal, contrary to what the unnamed third-party in the speech, the United States, believed, but Trudeau did not explain how the waters had come to be characterized as such. The pronouncement confirmed that Trudeau and External Affairs remained committed to resolving to a degree possible the issue on the basis of international law, though the bases of legality remained to be expounded.

Following this pronouncement, and based upon the attendant pressure to explain the government’s position with greater precision, Trudeau made one of his most serious errors on Arctic policy matters, the origins of which are unknowable. Pressured further by House members on May 20 on the sovereignty question, Trudeau responded resolutely that the waters of the Arctic were not internal, (though they were proclaimed as internal, “as our own”, only five days prior), and Canada’s territorial seas remained at three miles, it had no legal grounds to assert that these waters were in any way ‘Canadian’ as originally presented. It is difficult to understand how

398 House of Commons Debates, May 15, 1969, p. 8720-1, 8721, respectively.
399 Head and Trudeau (1995), at 33.
Trudeau could make a contradictory claim given the lengthy preparation for the May 15 speech. Whatever the reason, damage was done to the legal case, and with the contradiction on record opposition parties and and Liberal caucus members continued to call into June for prompt action on the “sovereignty question.”

As the Trudeau government continued to search for legal solutions a separate political process intervened within the Arctic debate. Following the Torrey Canyon shipping disaster off of the UK coast in 1967, and a smaller vessel, the Schiedyk of off Canada’s Nootka Sound in early 1968 also becoming wrecked, the Department of Transport had taken the initiative to amend in late 1968 the Canada Shipping Act along a range of broad revisions. By June, the Canada Shipping Act amendments were being debated in the House, and as M’Gonigle and Zacher put it, “the issue of pollution damage was very much alive” resulting in a question from a Liberal MP, Paul St. Pierre about the environmental implications should the Manhattan’s hull become caved from the pack-ice. He asked:

> What would happen if a supertanker the size of one recently built for Gulf Oil were caught in the Arctic ice, crushed, and lost 300,000 tons of oil? It would mean that 75 million gallons of crude oil would be spilt out in waters with temperatures from 33 degrees to 34 degrees. I ask you to consider the size of the problem that would face us, the terrible expense and the almost incredible damage that would be done to the ecology of the Arctic. This is the reason we should have control of these waters and the power to determine what ships come into them. We should be able to determine that these ships are safely built and that disasters of this sort do not happen. We cannot have control unless we have sovereignty.

401 The TFNOD had detailed systematically a legal review for Trudeau’s May 15th statement. 
402 These included among others, a new system of pilot licensing, load line standards, and extensions to the Minister’s power to intervene in maritime pollution disasters, in addition to new rules on the absolute and unlimited liability for oil pollution damage. Predictably, maritime insurers were forthrightly opposed to the liability provisions, railing that these would bring a halt to maritime traffic. Consequently, the amendments to liability were removed within the Senate debate in December 1968. At this point the upcoming IMCO conference on ocean pollution in late 1969 was on the horizon, and the need to enact new and stringent standards prior to this multilateral setting in the face of such opposition explains why the deletion of the provision likely occurred. Canada would do little in the summer months of 1969 to submit any significant changes to the pollution regime being constructed for the IMCO conference, and behaved rather timidly in the face of stark opposition to strict liability schemes from maritime states in conference provision proposals. Canada ultimately remained committed to the process of change in pollution legislation through multilateral agreement regardless of its slow but gradual pace. See M’Gonigle and Zacher’s (1977), pp. 106-108.
The effect of M. St. Pierre’s question was both fortuitous and causally significant for at last “the connection was made.”403 Canadian officials envisaged a strategy through which the sovereignty issue could be embedded in the mounting discourse on ecological protection. The broader norm on environmental prevention and pollution control was in a position to be harnessed strategically as a legal defense if arguments in international law were found limiting. Sovereignty could be secured within the legal reconfigurations forthcoming in international forums on oil pollution law. However, a challenge remained over how to achieve this objective within the boundaries of law and maintain Canada’s identity as ‘guardian’ of the international legal system. In light of its recent verbal inconsistencies, the Trudeau government decided to switch to a secretive, multifaceted strategy, involving policy consolidation, political flexibility, and the careful survey of international legal opinion.

The turn towards policy consolidation was evidenced in August by External Affair’s attempt to force all diplomats and embassy staff to maintain a common foreign policy position on Arctic affairs.404 A memo comprised of a series of questions and answers outlined several points for Canadian officials to cleave to: the Manhattan voyage raised no legal issues for Canada; Canada’s position should not be seen as defensive but cooperative and positive; Canadian officials had been consulted and concurred with the voyage;405 foreign vessels should not view Arctic passage by the Manhattan as sufficient precedent for their own; answers to the sovereignty question were not to be offered off-handedly but with great care; Canada steadfastly maintained its 1958 position on sovereignty over the waters and that historic and geographic factors contributed to Canada’s great interest in Arctic waters; Trudeau’s contradictory testimony was to be played down or muted; direct reference to American opposition to Canada’s jurisdiction in the Arctic was to be avoided; and generally, international law supported Canada’s position with respect to questions of jurisdiction. These strict promulgations were however only evidence of a proto-policy rather than a fully

403 M’Gonigle and Zacher’s (1977), at 110. And while it is difficult to imagine that Mr. St Pierre was not prompted by other Liberal officials to put this question to the House, the possibility remains that his question was simply one generated subjectively or on the basis of nationalist considerations or political opportunism.  
404 See Dosman (1976), pp. 48-50.  
405 Later in the memo it admits that the United States government had not formally requested transit for the Manhattan. One can presume that this information was for consumption by Canadian officials only and not to be made public.
defined position, as by mid-August External Affairs was still reviewing possible legal solutions and a tenor of antagonism had emerged, reflecting a low level of conflict within Cabinet on the Arctic issue.\textsuperscript{406} It was in this policy environment that, on August 25, the \textit{Manhattan} set sail for the Northwest Passage.

\textbf{September, 1969: Cabinet Deliberations with External Affairs}

September 11, 1969 was a critical day in shaping the direction of Arctic policy. That morning, Trudeau addressed concerns about the \textit{Manhattan} by promising only to deliver a full statement on Arctic sovereignty during the opening of the parliamentary session on October 22. The promise fell short of responding to a barrage of press editorials demanding a full claim to sovereignty. Trudeau stipulated that his October 22 statement would articulate a position avoiding prolonged confrontation with the United States. He concluded by promising in reference to Canada’s primary legal assumption at the time, taken from the advice of Head that, “the evolution of international law is moving in a direction that will be favorable to Canada.”\textsuperscript{407}

On the evening of September 11 a crucial meeting of Cabinet and External Affairs officials occurred for three hours. External had for some time held that the legal problem could be obviated by extending Canada’s territorial sea from three miles to twelve given that several key sections between Young and Lowther Islands in the Barrow Strait to the east, and the Prince of Wales Strait to the west, were less than twenty-four miles in length. Through this extension, Canada could enclose the most important sections of the Northwest Passage within a “Canadian corridor” and allow its domestic law to regulate maritime transit. According to Head, External believed that the traditional rules of innocent passage would not be applicable to the corridor because the Northwest Passage was not an international strait owing to the fact that it had never been used for international navigation. External viewed

\textsuperscript{406} Head and Trudeau (1995), at 37. There was also a further conflict of interest between government Departments as Transport and Indian Affairs saw the voyage as of benefit to economic development, while the Department of Energy was concerned about the flow of Albertan oil to the US market.

\textsuperscript{407} “Arctic Bid this fall, PM says”, \textit{The Globe and Mail}, Sept. 12, 1969.
this move as “the first step towards an eventual closure of the entire archipelago by extended baselines.” 408

On the Cabinet side, Head, Gotlieb and Gordon Robertson rejected this ‘corridor’ approach on a variety of grounds. External had evaluated all states to legislate beyond the three-mile territorial sea limit, which totaled fifty-four, while twenty-seven had not, including Britain and the United States and all major shipping states. While External was convinced that the new customary legal norm was now a twelve-mile territorial sea, Head disagreed vehemently, noting that “while not likely offending international law, twelve miles nevertheless could not [at the time] demand formal recognition by the international community as a whole.” 409 In relation to the possible policy option by External of enclosure by straight baselines, Head’s account of his Cabinet testimony is worth quoting at length.

Head, Gordon Robertson, and Allan Gotlieb were all firmly opposed to these proposals, and not simply in anticipation of the United States’ reaction. Robertson worried that External’s presentation to cabinet contained no hard analysis of what Canada’s real objectives were, and was perhaps motivated by chauvinism. Gotlieb observed that our three-mile zone already effectively blocked the passage at the western end (at the narrow Prince of Wales Strait), and that all a twelve mile claim would accomplish would be to rile the United States and perhaps prompt the assertion to be challenged in the International Court of Justice. Head argued that baselines had two effects: they claimed what lay within them, but explicitly relinquished interest in what lay beyond. Because international law had evolved mightily in the past, encompassing the concept of the Continental Shelf, for example, he conjectured that this process might continue in the future and to Canada’s benefit; assertions of boundaries now could possibly jeopardize claims to future benefits. The three men were troubled, as was Trudeau, by the simplicity of the proposals that were seemingly devoid of content apart from the assertion of sovereignty. 410

Several points are worth noting before turning to the further sections of Head’s statement to Cabinet. Individuals around Trudeau believed a blunt statement was not appropriate on the grounds that, apart from lacking legal validity, the United States would oppose such measures owing to international law favouring its interpretation. Though unsure of the

408 Head and Trudeau (1995), at 38. External Affairs was led by Mitchell Sharp, but J.A. Beesley, who worked in close concert with Len Legault, had significant impact upon ocean issues in the department. External must have believed that there was some merit to Head’s original straight baseline arguments and that legal processes were pointing in future in Canada’s favor, even though Head was coming round to formally reject his thesis as a policy option.

409 Head and Trudeau (1995), at 37.

legality of baselines, Head believed that their enactment would engender a reflexive American rebuttal. To rush into a dispute was without merit when Canada’s claim was assisted by both time and the probable institutionalization of the ocean enclosure movement.

Most critically, Head had identified the doctrine of legal functionalism as a solution to Canada’s problem. Indeed, the application of functionalism, Head’s self proclaimed “novel idea” for Arctic policy, originated in the confluence of three overlapping practices: Canadian foreign policy strategy, the cooperative doctrine in international affairs of inter-state functionalism, and the functional approach of the various policy-schools in international law.411 Functionalism as a strategic policy tool allowed Canada to advance a claim which was “neither dogma nor cliché” but had the ability to place policy beyond debate and above reproach.”412 Though it is unknown how much of the idea had already crystallized in Head’s mind by September 11, it was in Cabinet where the idea of Arctic pollution control zones grounded in functionalist logic had its first wide hearing. Noting that Cabinet’s reception towards the positions by External had become unenthusiastic, Gordon Robertson suggested Head expand upon for the group an idea alluded to in private conversation. In Head’s recollection, Arctic control zones:

would permit Canada to promulgate regulations restricting shipping as needs arose, and compared in quality to those declared from time to time by the United States and the USSR, warning shipping away from the vast tracks of open ocean space in advance of test-missile firings. The Canadian zones, in contrast, would be entirely benevolent and permanent … providing to Canada an opportunity, on behalf of the community of nations, to perfect and advance a new legal concept, one addressed to functional jurisdiction. The proposal was to extend international standards into the hitherto un frequented area of environmental protection.413

411 Canada’s use of the ‘functional principle’ in foreign policy had deep historical origins going back sixty years and represented perhaps its first independent position in international politics. See A.J. Miller (1979-80: 309). The functional approach reflected the “tension between the pursuit of exclusive national interests and the spirit of disinterested internationalism that Canada has so often wished to project abroad.” Due to its political malleability, it allowed Canada to both justify withdrawal from international politics while also participating in events to enlarge the Canadian profile; Ibid, pp. 310, 313. The theory of functionalism was also in vogue in North American academies owing to the extension of Sewell and Haas to David Mitrany’s work, and as Chapter three noted, many in the international legal academy developed doctrinal accounts of legal functionalism.  
412 Miller (1979), at 326. 
According to Head, Canada was to administer the Arctic under the “concept of trusteeship”, assuming responsibility for the ecological protection of Arctic coasts before similar “international mechanisms” were “designed and set in place.” This would be achieved through the use of two simultaneous tools: protective legislation designed to protect against oil spills and deleterious activity, and negotiations to influence the creation of accepted international standards aligned with Canada’s position. “We would emphasize that we were not acting in breach of international law, rather, in the special Arctic circumstances, we were acting on behalf of the international community in the absence of applicable law.” By Head’s account, the policy was generated entirely within Trudeau’s inner Cabinet and in conjunction with Gotlieb, whom he described as “a student of international law and an advocate of an international community that paid heed to assumptions of responsibility along functionalist lines.” Speaking of their similar approaches to law and policy, Head recalled that he and Gotlieb “felt it important to assess realistically Canada’s Arctic interests…These were not visionary impulses; the aim was to protect Canadian interests by utilizing the support of the international community …” Though Head’s strategy would require further advancement in order to elicit claims of legitimacy and legality from international audiences and jurists alike, the die was cast, and strong assertions of sovereignty were removed from the collection of policy options under consideration in favor of environmental logic. By the evening of September 11, the scope of available legal policy options had thus been exhausted by new and creative thinking. However, in the minds of the most pivotal in reconciling the Arctic issue in legal policy, Beesley and Legault in External Affairs saw in this recalcitrance and creative legalese from Head a move which raised the significant problem of finding an international legal basis for the claim. These challenges began to materialize rapidly just the Manhattan was completing its voyage of the Northwest Passage, set for September 14.

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415 Ibid, at 34.
Quite fortuitously, on the afternoon of September 11 Professor Pharand submitted an article directly to the government discussing the permissibility of straight baselines over Arctic waters in light of its policy statement promised in six weeks. Pharand began by noting that the delimitation of all waters within a state’s jurisdiction has to fit the criteria established in the *Fisheries Case*, but the application of these criteria was unclear due to the unspecified nature of the international rules available to archipelagos. Pharand claimed in passing, having re-confirmed Canada’s recognition of the customary nature of the 1958 Geneva Conventions, that although the Conventions were effectively a codification of the principles formulated in the *Fisheries Case*, there existed several differences between the two bodies of law. When compared, law from the *Fisheries Case* was of greater benefit to the Canadian claim of internal waters. 417 In terms of the geography of the Canadian North, the central issue was the relationship of the Northern islands to the mainland, and specifically, whether the islands could be considered to constitute a single unit “justifying a uniform regime for the various bodies of water between them.” 418

According to the *Fisheries Case*:

Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the “skjaergaard” along the western sector of the coast here in question, the base-line becomes independent of the low-water mark and can only be determined by means of a geometrical construction. 419

Pharand argued that, by virtue of geography, Canada could choose among three options to delimit its territorial waters: 1) draw a belt of territorial sea around each island using the

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417 Pharand (1969b), at 416.
418 Ibid, at 420.
traditional coastline method; 2) draw a single belt of territorial waters around the whole archipelago using straight baselines; 3) draw two belts of territorial waters, one around the part of the archipelago north of the Parry Channel known as Queen Elizabeth islands, and the other enclosing the islands south of the channel along with the mainland, using straight baselines. In terms of determining the type of baseline that could be drawn, a complex evaluation under international law, both the Fisheries judgment and the Geneva Convention outlined that the use of straight baselines, as opposed to baseline methods following the sinuosities of the coast, was an exception to the rule and only permissible “where the particular geography of a coast warrants a departure from the normal rule of the low-water mark along the sinuosities of the coast.” Accordingly, for the Canadian Arctic islands to be considered appropriate for the drawing of straight baselines they had to constitute “a fringe of islands along the coast in its immediate vicinity” according to both the Fisheries Case and Article 4 of the 1958 Geneva Conventions. Having established principles of law that applied to baselines in order to apply these to Canadian geography, Pharand concluded that it remained a question whether these were applicable to outlying archipelagos, noting that neither instrument of international law decides the answer to that question. Through the use of legal principles and the existing state of international custom to provide legal guidance, Pharand went on to argue as follows.

In regard to the first option of declaring a belt of territorial waters around each island in the archipelago, a strip of high seas was left throughout the entire mid-section of the archipelago which provided no economic security advantage via the necessity of territorial integrity. Drawing a belt around the entire archipelago would limit international maritime movement. To bound the Northwest Passage would mean drawing a closing line at its eastern end of at least fifty miles and at least one-hundred at the western end. Pharand then warned Canadian policy-makers that there may not be legal foundations for the use of baselines, and in many

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420 Pharand (1969b), at 420. One immediately notices that even before concluding which option would be legal, there is a tacit suggestion by Pharand that the waters of the Arctic could not be classified as internal, but only territorial waters through which innocent passage was considered a legal right.

421 Ibid, at 421.

422 Ibid, at 427.
ways determined in the following statement the fate of Arctic policy for years to follow. He wrote:

It is very doubtful that the geographic requirements which must exist under both the *Fisheries Case* and the Convention are met. Surely it would be stretching the geographical criteria beyond reasonable limits to consider the whole Canadian Arctic Archipelago simply as a “fringe of islands” along the northern coast of Canada, although they might be considered located “in its immediate vicinity”, at least with regards to the islands south of Parry Channel. It is also most difficult to visualize how a series of baselines around the triangular-shaped group of islands north of Parry Channel, known as the Queen Elizabeth Islands, north of Parry Channel [*sic*] could be considered as not departing “to any appreciable extent from the general direction of the coast” which runs in an east-west direction. Furthermore, the sea areas constituting Parry Channel, averaging about fifty miles in width, can hardly be considered as “sufficiently linked to the land domain to be subject to the regime of internal waters.” Those are all compulsory criteria, under both the 1951 *Fisheries Case* and the 1958 Convention.423

Circling the Arctic archipelago by straight baselines was therefore “contrary to established principles of international law”, leaving open the final possibility of breaking the island fringes into two sections north and south of Parry Channel. This was a legal option for Canada, Pharand concluded, one that would leave open a strip of high seas between the groups within which all vessels would enjoy free transit. He then remarked, albeit rather oddly that, “[o]n the legality of drawing straight baselines around an outlying archipelago, it must be emphasized that this is an open question, the matter not being covered by established international law. The issue is not whether such baselines are specifically permitted by international law but it is whether they are contrary to international law.”424

For Trudeau’s inner circle the conclusions of the paper must have been clear: the straight baseline method to assert Canadian sovereignty over the waters was, in all probability, illegal at the time. If they were persuaded by Pharand’s analysis, Trudeau’s advisors were left only with the option of dividing the Arctic in half, allowing the rest of the world the ability to ‘occupy’ an interior portion of high seas unfettered by Canadian control. And as that policy option seemed tantamount to ‘losing the Arctic’, it was ruled out immediately. Pharand’s final point was meant to foreshadow an upcoming problem while also underscore an important legal caveat. He held that, given that the extent of large amount of ice at the west

423 Pharand (1969b), at 430-431.
424 Ibid, at 432.
end of the Passage of the M’Clure Strait would likely force vessels through the Prince of Wales Strait to the south, there remained a small overlap of territorial waters in the middle of the strait due to the presence of Prince Royal Island. Passage by foreign vessels within this small section of territorial waters beside Prince Royal Island would nonetheless be protected by the right of innocent passage due to the Prince of Wales Strait linking two sections of the high seas. Pharand concluded by again pointing out the important caveat that coastal states, when faced with voyages of innocent passage, may take certain protective measures to ensure their territorial integrity and security.

It is unclear, however, if Head or Gotlieb read the paper at the time. Those in External note that it did not have any impact upon the deliberations that immediately followed. However, a critical issue Pharand did not mention, but one that could not have been lost on External Affair’s officials, stemmed from the judgment issued in the North Continental Shelf cases in February of 1969. The Court expressly declared that the 1958 Geneva Conventions were not customary law and thus did not bind non-signatories or change their legal obligations in any way apart from existing customary law on the subject. This ruling thus ran counter to the jurisprudence of the Supreme Court of Canada in the Offshore Mineral Rights (1967) case, and the subsequent 1967 comments by the Attorney General that the 1958 Geneva Conventions had attained customary status. If the Court’s verdict trumped Canadian law, this had the effect of making Canadian legal strategy more complicated and the scope of legal flexibility offered to Canadian policy makers wider as the customary law of innocent passage would apply for Canada from the Fisheries Case. Moreover, following the drawing of baselines, the right of innocent passage would not be retained by other states. However, it is plausible that when Trudeau’s Cabinet and External Affairs became cognizant of this legal position both would have considered it pragmatic to pay regard to Canadian

425 Which was precisely what occurred during the Manhattan’s transit.
426 That Pharand’s reasoning did eventually however impact upon government thought would be revealed one month later. In a response to an “unnamed professor”, Mitchell Sharp, in the House on October 9, thanked the former for his opinion on the legal necessity of treating the archipelago as two separate entities and pointed out that “[a]s you are aware, there are differences of view concerning the bases in international law for the delimitation of the territorial sea in outlying archipelagos.” See Canadian Yearbook of International Law (1969), at 346.
427 North Continental Shelf Cases (Denmark/The Netherlands v. Germany), ICJ Reports, 1969, Rep. 3.
jurisprudence. To not do so would reveal further confusion in Canadian legal thought, and would not obviate the challenge Canada faced in drawing baselines that conformed to the geographic criteria set out in the Fisheries Case. For the principle problem that Canada was seized with in attempting to validly draw baselines was not just the application of Article 5 of the Territorial Sea Convention, but also, as Pharand had concisely outlined, meeting the requirements of the Fisheries Case as well.

By mid September, then, two policy positions were clear. First, government officials sought through some means a policy or combination that strengthened Canada’s claim to sovereignty. Both Head and Beesley in particular were in agreement about the absolute necessity of this aim, but differed on the method and strategy through which it should be carried out. Second, the central problem associated with moving the policy forward turned on External being entirely skeptical that Head’s functionalist approach would be considered with legal foundation to international jurists. Beyond this confrontation there was far from complete unanimity within government on an appropriate legal strategy. It is therefore plausible that for the remainder of the month of September, as Reid put it, the Prime Minister and his advisors were “playing for time while testing various alternatives on the Canadian public and the international community.”

Evidence of this tactic and the division of opinion were reflected in public statements. Commenting in the Globe and Mail on September 18, Mitchell Sharp remarked that “Canada’s sovereignty over Arctic waters is being steadily strengthened by developing concepts of international law and by our own activities…general principle of international law may have to be applied in a special way in the case of frozen waters.” Canada was in a premier position to ensure that this “special application” of international law could occur and contribute “to [the law’s] progressive development.” However, he also made a comment that directly reflected his own views and Paul Martin Sr., rather than those of the inner Cabinet. In a strong signal intended for

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428 Reid (1974), at 119.
430 Paul Martin Sr., former Secretary of State for External Affairs, was then Leader of the Government in the Senate.
Trudeau, Sharp held that “[a]ction taken internally must therefore be either compatible with
the current state of international law or at least be defensible in a court of law.”431

Sensing that a defence of the Arctic was to be framed by the issue of ecology and pollution,
the United States let it be known categorically in late September that the voyage of the
Manhattan through the Northwest Passage had confirmed the waters status as an
international strait. Pointedly, the United States also expressed its intent to take Canada
before the International Court if international status was not recognized. Yet if Trudeau was
playing for time it is also accurate that he was attempting to confuse the United States on the
exact nature of the forthcoming legal claim in October. In a speech in late September, 432
Trudeau commented that Canada would attempt to convince other nations of an “ice-as-land
theory” for the purposes of securing the sovereignty claim. While this theory had a minority
of contemporary adherents, even within the United States, Trudeau’s political gamesmanship
was likely being deployed behind the scenes as Head cobbled together the specifics of the
environmental approach to be announced in the Speech from the Throne on October 23.

**October-December, 1969**

With the Throne speech crafted, Trudeau began to set in motion a series of complex
processes associated with the politics of international law. Rather than respond to the dated
issues of legality that had sustained the bilateral conflict over the past nine months, Trudeau
asked Canada and the world to consider the following:

The Arctic Ocean and its regions may soon enter a period of rapid economic development.
Much of this development will undoubtedly occur on the islands of the Canadian archipelago,
or in the adjoining continental shelf whose resources, under international law, we have the
exclusive right to explore and exploit. 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 fulfill our responsibility to preserve these areas, as yet unspoiled and essentially in a
state of nature. The Government will introduce legislation setting out the measures necessary
to prevent pollution in the Arctic Seas. It is also considering other methods of protecting
Canada’s ocean coasts. Through the United Nations and its agencies, Canada is seeking to

\[431\text{ Supra note 422.}\]
\[432\text{ In Northern Ontario, as cited in The Globe and Mail Sept, 27, 1969, “Northwest Passage Area to be termed
as land in Canada’s bid for sovereignty.”}\]
Thus, pollution control would be the centerpiece of the Arctic defence, though Trudeau maintained adamantly that Canada was not asserting sovereignty over Arctic waters. Canada was accepting a new type of international accountability as trustee of the North, casting “herself as responsible to all mankind for the peculiar ecological balance that now exists so precariously in the water, ice and land areas of the Arctic archipelago.” The stakes of this new type of responsibility were apparently high. He continued:

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 either in the name of freedom of the high seas, or in the interests of economic development. We have viewed with dismay the abuse elsewhere of both these laudable principles and are determined not to bow in the Arctic to the pressures of any state … Part of the heritage of this country, a part that is of increasing importance and value to us, is the purity of our water, the freshness of our air, and the extent of our living resources. For ourselves and for the world we must jealously guard these benefits. To do so is not an act of chauvinism, it is an act of sanity in an increasingly irresponsible world. Canada will propose a policy of use of the Arctic waters which will be designed for environmental preservation. This will not be an intolerable interference with the activities of others; it will not be a restriction upon progress. This legislation we regard, and invite the world to regard, as a contribution to the long-term sustainable development of resources for economic and social progress.

The international community was therefore invited to join the Canadian initiative and support a new concept, “an international legal regime designed to ensure human beings the right to live in a wholesome natural environment.” The first audience to hear of these plans in significant depth was to be the leader of the United Nations. Partially boasting, but also selling the strategy to his wider audience, Trudeau concluded that “I shall be holding discussions shortly about this and other matters with the Secretary General of the United Nations.”

Trudeau’s attempt to couch Canada’s role as Arctic ‘trustee’ in an internationalist context was deepened by acknowledgement of the primacy of international society’s primary norms. Whether genuinely or not, Trudeau recognized:

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434 Ibid, [emphasis added].
Membership in a community … imposes … certain limitations of all members. For this reason … Canada must not appear to live by double standards. We cannot, at the same time that we are urging other countries to adhere to regimes designed for the orderly conduct of international activities, pursue policies inconsistent with that order simply because to do so in a given instance appears to be to our brief advantage … Neither states nor individuals should feel free to pick and choose, to accept or reject, the law that may be attractive to them.435

The contradiction could not have been more evident in the government’s positional strategy. Not only would Canada proceed to move upon the problem unilaterally with little regard for those to whom the policy had legally effects, but would do so for the good of the international community in the spirit of a benign governor operating within a progressive regime of cooperative political governance. Canada was now not acting on the basis of a legal right, but attempting to change the frame of the argument on the basis of a state carrying out action as a result of it possessing a duty or obligation. Either the policy was an affront to those who sought a clear legal answer to the Arctic waters issue and thus a political masquerade forced upon a desperate government devoid of a sound legal case, or a masterstroke which changed the dynamics of the problem from one of legal sovereignty in an era of industrial ocean relations to one centered on the fragility of nature and man’s role within it. For many audiences, Canada was acting both defensively and responsibly against encroaching industrialization in the North, preempting criticism that it was merely ensuring its claim to exploit energy riches in a remote, relatively uninhabited territory. Canada had taken an enlightened position, relying on a prudential argument that merged the complexities and authority of modern science with a set of precautionary principles based upon an ethics of prevention. In short, Trudeau’s position relied on the hope that respect for one of the last natural wonders of the world would trump man’s thirst for industrial exploitation and resource possession. Dr. Paul Erlich’s thinking in his bestseller Eco-Catastrophe, from 1969, could not have been better represented politically: “It is the top of the ninth inning. Man, always a threat at the plate, has been hitting Nature hard. It is important to remember, however, that NATURE BATS LAST.”436 By late 1969, the stage was set for the Canadian

435 Supra note 427, at 38-39.
government to garner international legitimacy for the pollution policy through the endorsement of the United Nations.\footnote{437}

November 11, 1969, saw Trudeau arrive in New York for a meeting with Secretary General U-Thant in order to disclose the Arctic proposal. This, their third meeting, was well publicized, and U-Thant as Head recalls was well briefed by UN staff “on the international state of play” of ocean law and politics. By Head’s account, Canada’s lofty reputation within UN circles was only reinforced by Trudeau attempt to bring Canadian policy “within the spirit of the Charter.”\footnote{438} U-Thant confirmed candidly that not only was there was no UN plan to launch a follow-on conference to the 1958 Geneva Conventions, but that no state (to their knowledge) was opposed to the pollution control measures.\footnote{439} This admission, however, would likely not have affected Canadian strategy. Head maintained that Canada intended to keep the issue from being lost at a distant UN conference while simultaneously trying to impress upon the world its desire to work within the UN field of norms to achieve international legitimacy for the Arctic policy. Trudeau stated, rather craftily, the pressing need for a coordinated international effort to develop control over non-Canadian portions of the Arctic. Such a move had the effect of complementing Canada’s new role as custodian with the forthcoming international regime mirroring its Canadian counterpart. And so began the acceleration of the politics of international law, for not only was it understood that Canada had resorted expressly to political and duty-based ethical arguments but was tacitly relying on international officials and jurists to underwrite its new international legal regime. Canada was making a claim that ran up against the limit of what the rules on sovereignty could support, creating a case emphasizing the progressive, civilized credentials associated with a modern reading of what constituted a ‘natural steward.’ Acquiescence, general acceptance, and overall agreement from the world’s leading international actor, the Secretary General, was but the first step in legitimizing and furthermore, politicizing, the Arctic waters claim.

\footnote{437} Tension was further developing with the United States on an adjacent but linked maritime issue concerning the boundary of the Gulf of Maine. On November 5, 1969, the United States asserted that the Northeast boundary was faulty and challenged Canadian exploration permits. See Rhee (1981).
\footnote{438} Head and Trudeau (1995), pp. 41-42.
\footnote{439} Kirton and Munton (1987), at 80.
While Canada did not want to wait for a multilateral forum to solidify acceptance for the policy, the United States was pushing in exactly that direction. To the Americans, Canada’s alignment with the UN undoubtedly smacked of political opportunism and international populism. As a counterpoint, US Vice-President, Spiro Agnew, announced a major new program dedicated to Arctic environmental research, and the State Department proposed Canada work with it toward the negotiation of an international agreement for the protection of the environment. Though the United States likely believed in the strength of its legal argument, it also clearly felt threatened by Canada’s initiative and accordingly sought deliberations in a bilateral forum. It later reiterated intentions to negotiate an agreement on environmental protection at an international venue should Canada refuse to meet in bilateral talks.\footnote{The United States pushed further in late November, requesting that these talks be broadened to include the future of Arctic resources and transportation policy and perhaps even other interested states. A continental energy policy was floated that included free transit throughout all Arctic waters. The United States’ apparently believed that it was losing support for its position on the international status of Arctic waters despite the fact that it had a strong legal case.}

Washington thus had to acknowledge that the international law protecting the international character of straits was weakening in the face of new claims to legitimacy. And this shift gave rise to the grave possibility that other critical international choke-points might become the subject of similar arguments as a result of their ‘special characteristics.’\footnote{Rather shrewdly, the United States also suggested a similar arrangement to that governing the Antarctic region through the Antarctic Treaty which placed a moratorium on national territorial claims and stipulated a range of environmental protections.}

Simultaneous to Canada’s discussions in New York, a continuing debate was occurring in Brussels at the International Legal Conference on Marine Pollution opening November 10. The Canadian delegation was staffed with officials of high legal and political authority,\footnote{Two veterans from the Legal Division of External Affairs, Max Wershof and J.S. Stanfield, accompanied Donald Jamieson, then Minister of Transportation, the only cabinet member to represent a state at the conference. See M’Gonigle and Zacher (1977), at 113.} and its approach, both candid and aggressive, was under consideration from the opening plenary session. Jamieson promulgated the view that Canada faced a pressing threat of oil pollution made all the more dire by the weakness of existing legal protections. In light of this potential peril, he argued that the international legal regime dealing with oil pollution was in 1969 “unjust”, “unreasonable” and replete with “so many omissions and protective clauses which
acted to the advantage of the carrier…that in many cases the victim could scarcely hope to receive any compensation at all…”⁴⁴³ To bring these claims into sharp relief, Jamieson pressed the case that as companies bore responsibility for their transportation liabilities, so they ought to bear the full cost of any accidents at sea. Demanding less of shipping companies “would amount to subsidizing the oil industry on a world scale”, forcing the victims of oil pollution, whether local residents, or other marine or coastal industries (including fishing interests), to bear the cost of pollution in their place.⁴⁴⁴ Jamieson threatened that Canada would move unilaterally to address this gap in the oil pollution regime if required.

Canada emerged at the conference as the new leader of an ‘environmental’ group aligned with several developing and developed states, including the United States. However, the hypocrisy of the Canadian position did not go unnoticed. Canada’s rather paltry, status quo position advanced only months prior in the lead-up meetings to Brussels was shot through with inconsistency and now exposed. Numerous conference delegates felt Canada had “destroyed its credibility with such obvious political motivations”, even though it found distinct support from New Zealand. For its part, New Zealand saw the consistency in holding that most coastal states, largely developing states with no significant shipping constituencies, deserved to have their circumstances noted in any forthcoming legal changes. Through its “fiercely uncompromising position” Canada was however able to create new alliances in the developing world.⁴⁴⁵ Eventually at Brussels, Canada and its new ocean alliance were granted concessions from shipping states in that the basis of liability in future was to be that of strict liability on the ship-owner rather than the reduced charge of ‘fault’. But perhaps of even greater importance, the maximum liability limit was raised to US$14 million, and as a further concession, a conference would be convened in 1971 where the arrangements for a fund would be set up allowing the total to be raised to a maximum of US$30 million.

⁴⁴⁴ Ibid.
⁴⁴⁵ Ibid.
And yet even with these remarkable gains made in such a short period of time, following on the memories of the Torrey Canyon disaster and the new alignment of states in ocean affairs, Canada let it be known that it would reject the final document on the grounds that the liability scheme was inadequate for accidents occurring within the territorial sea. Canada’s position was promptly characterized as “utterly negative”, resulting from it being the only state to cast a negative vote on one of the two final sets of provisions. While there were several plausible explanations for Canada’s position against the final document, the most likely was that opposition to an enhanced liability scheme would provide further justification for the impending Arctic legislation. The absence of meaningful international legislation on the issue of liability and international oil pollution law was therefore an important justification for unilateral law-making. The only option in the face of such an unenlightened, international position, Jamieson would conclude weeks later, was that of the progressive use of unilateralism for the benefit of international society. Whether Canada had approached the Brussel’s proceedings in a genuine manner of good faith remains unknowable, but rather unlikely. As Head would recall, following directly after the October Throne Speech “a representative committee of very senior public servants was struck and given responsibility of preparing the content of the promised legislation, a complicated and controversial task. But it was on November 20, 1969, several days prior to the conclusion of the Brussel’s proceedings, that the inner Cabinet met and concluded that Canada would proceed unilaterally with the Arctic legislation. The central question remaining was who would hold authority and veto power to determine the law’s contours.

446 The statement was that of the Swiss delegate, and Canada ended up abstaining on the vote of the second provision.
447 M’Gonigle and Zacher (1977), at 116-117.
448 Head and Trudeau (1995), at 43. In fact, a division of labor was created in which three tasks were divided among different departments. The Department of Indian Affairs and Northern Development, led by Jean Chrétien, was responsible for the area of application and detailed drafting; the Privy Council Office for preparing a memo to Cabinet that introduced the idea of the legislation; and External Affairs was to construct a proposal that would fit the legislation to the international context as a means of selling its legitimacy to the wider world.
449 Head articulates the growing diversity of opinions within the government and bureaucratic infighting which carried through to Jan. 1970, but recounts that at an official level it again fell to him, Robertson, and Gotlieb to maintain the original position set out in the throne speech. Further consolidation of oceans issues was also occurring through the Interdepartmental Committee on the Law of the Sea to prepare Canada’s position for the
By January of 1970, two processes became set to collide. That of a growing Canadian confidence in the legitimacy of its international position, and that of American anger stemming from its repeatedly denied requests for an international forum to deal with Arctic issues. Mitchell Sharp revealed that Canada would avoid an express pronouncement of sovereignty and instead prioritize pollution prevention through a measure “regulating” maritime traffic in the Arctic, while behind this veneer the Canadian public and Parliamentarians were deafening in their protestations of a sovereignty declaration.450 Numerous Liberals were rebelling against Trudeau and the draft legislation on grounds that drawing baselines was the only sufficient option to maintain Canadian sovereignty in future. Deftly, Trudeau and advisors were able to placate the MPs. In a secret meeting held at midnight in mid January in Trudeau’s office, the recalcitrant MPs and Trudeau met with Legault and Beesley, who had brought along John Cooper, himself tasked with continuing to draw the route of the baselines for future use. Cooper was told by External to bring a map detailing what the Arctic archipelago looked like with a twelve mile territorial sea enveloping each Arctic island. Because the effect of this policy was to draw territorial gateways at the ends of Barrow Strait and the Prince of Wales Strait, the MPs left satisfied that sovereignty could be claimed on this legal basis alone. External Affairs was therefore convinced that the baseline claim had not caught up with the extent to which the law of the sea had evolved by 1970.

By the end of January, the first outlines of the legislation were completed for consideration by Cabinet. The government was now addressing three major elements to be included: the prohibition of certain types of conduct likely to cause pollution; preventative measures establishing minimum standards of conduct; and provisions for financial responsibility and liability in the event of injury.451 Of particular importance given potential international

upcoming LOS conference. Every major department was represented on the committee, chaired by J.A. Beesley, from External Affairs.

450 Over fifty percent of Canadian polled in 1970 believed that Canada actually owned the North Pole. See Kirton and Munton (1987), at 86.

451 There were at this point five different legislative alternatives under consideration to address these points (Kirton and Munton, 1987: 87). Among them were two versions of amendments to the Territorial Sea and
disagreement over the legislation was the potential domain of the zone within which Canada
would claim the ability to regulate maritime traffic. Specifically, international opposition
would be concerned with the distance of the outer boundary of the zone from the coast and to
what extent these boundaries enclosed Arctic waters. Trudeau had made known to Cabinet
his preference to have the legislation prepared for the opening of Parliament and tasked
Sharp with evaluating how particular states would react to legislation containing either a
twelve-mile or one-hundred-mile jurisdictional limit. On January 20, Sharp concluded that a
twelve-mile territorial sea or contiguous zone would likely not meet a legal challenge, while
any distance that enveloped large portions of the archipelago would. His advice was likely
procured through the analysis of Beesley and Legault, the latter of whom had consulted
Pharand for the first time on matters of ocean law and who, in turn, endorsed the proposition.
Two positions had emerged within Trudeau’s government: a wide Arctic pollution control
zone with a reservation before the International Court, as supported by Trudeau, and a
parallel twelve mile zone, advanced by Sharp.452 By the end of the month, the House was
also debating a report from the Standing Committee on Indian Affairs and Northern
Development intended to reflect all views of parties in Parliament. The language was
reminiscent of previous stark proposals for the government to declare full sovereignty over
the region immediately. Head ignored the report and continued to press on with the pollution
legislation and the strategy previewing its release.453

Fishing Act, the first of which authorized the creation of wider fishing zones in the Arctic, and a second which
extended the territorial sea from three to twelve miles. The third was the basis of the new Arctic pollution
prevention zone with a twelve mile territorial limit. The last two were combinations of both. While the first and
second were thought likely to dampen the prospects of retaliation from the international community, Head
writes that this move was “a concept fatally flawed in the view of the Prime Minister’s Office” (p. 44). There
was as of late January significant disagreement across the departments as to the correct provisions and
substance that the pollution legislation should take. See Kirton and Munton’s research at 87-88, and Head’s
(1995) recollections at 44.

452 Kirton and Munton (1987), at 88. The Cabinet Committee on House Planning and Legislation argued that
Trudeau’s recommendation went beyond what international law would allow and thus held that a reservation to
the Court was, even if temporary, prudent.

453 Yet the benefits of the report for Cabinet’s developing strategy were significant. As Kirton and Munton
(1987), at 86 argue, because of the consistent criticism of the government in Parliament by all parties, taking on
the form of a “daily ritual”, the debate stimulated a range of ideas which strengthened the government’s position
in several ways. It was apparent that the Canadian military presence in the North was continuing thereby
revealing the government to be ‘doing something’; Liberal backbenchers were provided political space to voice
On February 4, during a Cabinet meeting, the views within the government became the subject of both coordination and polarization. It was decided Canada would introduce legislation with the one-hundred mile pollution protection jurisdiction but there was to be no extension of the territorial sea to twelve miles. Underscoring the fault lines of policy dispute, and with providential fortune, that same day the Liberian oil Tanker Arrow ran aground on Cerberus Rock in Chedabucto Bay, Nova Scotia, sharply illustrating how reasonable Canadian fears were about the pollution threat. A full eight days later, as numerous portions of the hull continued to break apart, the final contents of the ship spilt into the freezing sea waters setting loose one-million gallons of oil and highlighting to the world the complex procedures of disaster responses associated with frigid environments and transit risks of Arctic milieu. That afternoon, the government expounded in Cabinet that the pollution legislation would extend to one-hundred miles, rather than twelve. Anticipating international opposition, Cabinet also decided that the Committee on External Policy and Defense had to evaluate not only the potential of litigation before the International Court, but how procedurally and substantively a reservation before the Court could be carried out and how its timing would be influenced by international developments. Upon their return meeting of February 10, divisions within Cabinet appeared immediately over the issue of how Canada was going to be perceived as an international legal subject if it were to proceed unilaterally with a one-hundred-mile claim, whether or not it did so under the altruistic defence of the “common heritage of mankind.” Canada’s international legal reputation, and further its legal identity as a contributor to the principled order of the international legal system was at stake, as reflected in the dissent and strident views of Paul Martin Sr. and Mitchell Sharp. In returning the discussion to the merits of the twelve-mile extension, a move that for all purposes had been settled, Sharp argued that as the Committee could not decide how to handle the reservation to the Court, Cabinet should reopen the entire subject for evaluation. Both Sharp and Martin Sr. again advocated that the legislation return to the twelve mile territorial sea proposal as it required no reservation. At this point, it was only their own and their constituencies frustrations on the issue; and most importantly, the “anti-pollution passions” of the Canadian people were propounded to wider audiences internationally.

454 Kirton and Munton (1987), at 89.
455 Ibid.
Gotlieb who advocated moving ahead without also attaching a reservation to any portion of the legislation. His argument was revealing: given the contested status of the law of the sea resulting from the failure of the 1960 conference to organize ocean law in the interests of all states, “the United States might be under no obligation to recognize a decision on Canada’s part to enact a 12-mile territorial sea limit, and could, therefore, possibly be in a position to take Canada to court over any enforcement action against its vessels.”

Several implications can be drawn in relation to Canadian strategy and thought at this point. First, the law of the sea was contested even among Western allies. American representatives had only months prior claimed that they would not acquiesce to Canadian jurisdictional claims made on the basis of a twelve-mile jurisdiction. But, in fact, only one week later the US State Department revealed that it generally accepted the twelve-mile limit to the territorial sea as customary international law. Either therefore, Gotlieb was unaware of the climate of legal opinion in the United States and the thoughts of its legal advisor John. R. Stevenson, and was working on past assumptions that the United States would insist on a three-mile limit regardless of circumstances, or he was providing a counter position to the view of Sharp and Martin Sr., pulling the policy framework back towards the centre. It was certainly plausible that the United States would go to the Court over a twelve-mile extension if vessels that were referred to in the legislation included warships. But the fact that the legislation was centered on the issue of pollution would appear to remove that consideration from United States’ strategy to engage Canada either politically or legally. If Gotlieb believed that the United States’ position was either unknowable or that a Court case would follow regardless of Canada’s legislative content, he may have felt that Canada should truly extend itself on the issue: refuse to tacitly acknowledge the illegality of the legislation through a reservation, but hold to the extreme position and risk the unlikely possibility of litigation armed with the strength of Canada’s case in the court of world opinion. Indeed, Gotlieb may well have believed that moral legitimacy and partial legality would be enough to guarantee Canada’s position in the fractured context of ocean law.

456 Kirton and Munton (1987), at 89.
After the initial Committee debate on February 10, the issue resurfaced days later for its final deliberation. Only days prior, however, Sharp was notified that the Manhattan would attempt a second voyage in April against the stronger spring ice-pack. Welcoming the voyage, he added that Canada would provide ice-breaking assistance once again, but before the vessel could make a return visit carrying oil the voyage would have to be approved officially by the government in concert with the forthcoming pollution standards. In reaction to Canada’s attempt to force pollution standards on the vessel, President Nixon made a statement on February 18, noting the United States’ concern regarding Canada’s claim to sovereignty over Arctic waters. Nixon’s pronouncement, coupled with the requests made by legal advisor John. R. Stevenson calling for another international conference on the law of the sea, confirmed that the United States’ patience with Canada’s emerging Arctic policy was waning. In turn, on February 19 and 20, the Canadian position on the status of the Arctic was put forth in its “strongest statement yet”.457 On February 19, Mitchell Sharp announced that “these waters are our waters”, and invoked a legal argument legitimate in the eyes of Cabinet: because of the “lack of use” of the Northwest Passage, it could not be considered as a part of the high seas or as an international strait, and thus the right of innocent passage through these waters was not absolute. This was the first time Canada propounded such a claim, and its counsel likely stemmed from Jacques-Yvan Morin, an academic from the University of Montreal, whose thinking on ocean issues changed the legal understandings within Cabinet on the international law in question. In his publication in the Canadian Yearbook of International Law in 1970, Morin drew on both the Corfu Channel Case and the 1958 Geneva Convention to assert that the Northwest Passage fell short of the standards of use set out by both in defining an international strait.458 Indeed, that the Manhattan had been forced from the M’Clure Strait into the Prince of Wales Strait, thus running through

457 United States’ preferences in dealing with the contested ocean regime were clear, along with the trade-offs they were willing to consider in a bargaining situation. Stevenson declared that “[t]he United States is prepared to lead the way towards a true internalization of the oceans”, and days later outlined in a State Department Press release that “[t]he United States support the twelve-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits.” See Head and Trudeau (1995), pp. 45-46.

458 The Corfu Channel Case holds that the strait must be “a useful route for international maritime traffic” while the 1958 Territorial Sea Convention requires that the strait be “used for international navigation” to be classified as ‘international’. Morin was also to conclude that the Northwest Passage could not have acquired the status of an international strait by custom. See (Morin 1970), at 219.
Canadian territorial waters rather than remaining consistently on the high seas (even by the American definition), supported the position that the Northwest Passage was not an ordinary international strait which might in future be subject to consistent vessel traffic.

Morin’s analysis also made other claims that would greatly assist the flexibility of the Canadian legal case. This included the belief that encircling the archipelago with straight baselines was permissible under international law, and furthermore that Canada might be able to claim the region under the heading of historical title. Nevertheless, Morin acknowledged that, as Canada had treated the waters as territorial rather than internal for such an extended period, a claim to historical title (which applies to internal waters only) might be open to challenge. Hence, when Sharp made the orthodox claim that the waters were “our waters” on February 19, not only was he relying on past government statements, but also likely spoke with confidence that the criteria for historic title might be met, rendering moot American arguments about whether the Northwest Passage constituted an international strait. Sharp may have reasoned that the baseline argument could form a last line of defence, available for deployment if the pollution case was received poorly or if historical title could not be established.

That same afternoon on February 19, Cabinet reconvened. It was understood by all seized of the matter that there was a very high probability that the issue would be brought before the International Court by the United States, and that this was no longer a bluff on the part of the Nixon administration. At the meeting, a report introduced to Cabinet on February 10, which held that Canada would require a reservation if proceeding with the pollution legislation, was taken up. These conclusions had been written by a group of Canada’s eminent legal experts, including Ronald St. John Macdonald, Dean of the Faculty at the University of Toronto Law School and international law scholar, and Donald Macdonald, a Toronto lawyer and

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459 Morin was slightly unclear on this point as to whether Canada could accomplish this task now, needed to wait slightly, or would be best served by advancing the sector theory along with a more developed claim to historic title that Canada was in the process of building.

460 Yet even if this were the case, the legal advice Morin had given was still somewhat hesitant in holding that it would be preferable to wait until historic title had been consolidated in order to draw the baselines. Under what legal terms this advice was offered was unclear, unless Morin considered that given the uncertainty of the case, Canada should utilize as many arguments as possible in its defence.
government House leader. In the meeting, Paul Martin Sr. and Mitchell Sharp were adamant in their opposition to the reservation removing the International Court’s compulsory jurisdiction on litigation challenging Canada’s pollution or fishing zones. Indeed, Martin Sr. and Sharp were acutely aware of the series of legal contradictions and vagaries of Canadian policy pronouncements over the years, and of the ways in which inconsistency might impair Canada’s legal case. Neither wanted to give the impression Canada believed that its new pollution legislation was not lawful. But that they argued in a different direction was also indicative of what was at stake. As Head recalls, Martin Sr. believed that depositing a reservation at the Court would without doubt substantially weaken Canada’s international legal reputation as a promoter and developer of the international legal system and principles associated with UN Charter. Martin Sr. further held that Head’s belief that pollution legislation was not in breach of international law but at the ‘forefront’ of it, a “bold step to create” international law, as Head put it, was an entirely mistaken evaluation of the current law and international legal climate. Further complicating matters, Martin Sr. was also engaged in an antagonistic battle with Donald MacDonald at the meeting in the midst of two positions being raised. Those in favour of attaching a reservation to the pollution legislation maintained that although respect for the Court’s jurisdiction was central to maintaining the integrity of the legal system, Canada’s interests outweighed its responsibility to it in this instance. Others held that Canada was undercutting its international legal obligations and “ashening” its legal identity. Martin Sr., an international lawyer educated at Cambridge in British positivism by Arnold McNair – in the 1950’s sitting President of the International Court - was observed as passionately exclaiming that Canadian officials “should not do not play games with the law” to meet self interested ends, for the “law is what counts.”

Martin Sr. apparently felt that the weight of academic legal opinion supported his position, but this interpretation of his beliefs turned on what was meant by such a comment. As the intent by Head was to produce a policy that would have to remain beyond the grasp of

462 One of Martin Sr.’s most self proclaimed tasks in life was to assist the growth of the Court and the international legal system whenever possible. He believed that Canada could persuade the Japanese not to initiate proceedings before the Court against Canada even if Washington were to treat the Japanese as a “surrogate” in the matter. Ibid, at 90.
international legal architecture, there was agreement on all sides. If Martin Sr. implied, however, that legal opinion ought to recognize that Canada was repudiating the international legal system, this position was up for grabs. Head believed that he was making novel and civilized law for the betterment of the world, while tacitly preserving within Canadian power the administrative ability to regulate the Arctic. By contrast, Martin Sr. saw the legislation as an unnecessary assault against a nascent developing legal system tasked with preserving world order and improving the conditions of international justice. Foundationally, their debate turned on one of ethics and a calculation of risk. Martin Sr. believed Canada might be able to achieve what it wanted without sacrificing its own integrity and damaging international law. Head saw the stakes as grave, and likely realized that the integrity of the Court was already in disrepute following not only the implacably conservative South West Africa judgment in 1966, but also its reliance in the North Continental Shelf Case on the principles of equity to decide delimitation cases.463

Martin Sr. was willing to gamble with Canada’s Arctic for the sake of the principle that the law must be maintained. Head, as policy advisor, would not yield the promise to relinquish Arctic sovereignty in order to uphold a legal principle if an alternate, legally permissible method to stake a claim could be procured. If Canada’s reputation was to suffer on pain of the Court’s rejection, then so be it. Head and Trudeau had a legacy to maintain on an issue passionate to their consciousness and subjectivities, and the balance between strict legality and progressive ethical consequences dramatically favoured Canada breaking rank with its established international relations and legal traditions. Head furthermore likely understood that with proper strategic guidance Canada could achieve its political ends. Indeed, Canada’s

463 It could not have been lost on the lawyers who sought the reservation the words of the International Court in the Fisheries Case of 1951, which Pharand had brought to their attention on several occasions: “The delimitation of the sea areas has always an international aspect: it cannot be dependent upon the will of the coastal State as expressed in its municipal law...the validity of the delimitation with regard to other states depends upon international law.” ICJ, 116, 132. Nor could have Judge Fitzmaurice’s remarks (1965: 39) on the Fisheries Case: “[The judgment] has also been much misunderstood, for although its repercussions have been immense, the actual issue involved related (in the direct sense) only to a particular, and by no means the most important, aspect of the law of the sea. It is more as a catalyst that the decision has influenced the law in general, by facilitating a process that may not have reached its conclusion.” Fitzmaurice would also have been well known for insisting upon a rigid legal distinction between res nullius (nobody’s thing) and res communis (the commons), thereby further threatening Canada’s position.
predicament had strong parallels to Iceland’s engagement with Britain decades earlier. In the 1950s, Iceland had been engaged in a conflict with the UK over the drawing of straight baselines to protect its exclusive fisheries jurisdiction. The ‘cod wars’ which set up the conflict over law of the sea, set in motion a sequence of events whereby Iceland, having drawn baselines in 1948, proceeded in 1958 to extend its fisheries jurisdiction to twelve miles. The UK’s response to what was perceived of as a unilateral act was hostile, and proposed a reference be made to the International Court. Iceland refused, and instead embarked upon a strategic policy of attempting to strive in international conferences to achieve recognition for a new general rule vindicating its position.464

Trudeau apparently watched like a true judge as the interchange in Cabinet unfolded between Martin Sr. and Head. While whispering in Martin Sr.’s ear that he supported his position, it was also clear that Trudeau worried about the possibility of his resignation if the reservation were carried forward.465 In a final vote, only Mitchell Sharp and Paul Martin Sr. voted against the reservation being enacted concomitantly to the introduction of the pollution legislation. Most Ministers simply did not want Canada to lose in front of the Court and thus treated the issue pragmatically. Ivan Head, and by extension, Prime Minister Trudeau, had prevailed.

Following on Sharp’s comments to the press on February 19 of maintaining a policy of control over the Arctic waters for Canada, the United States response on March 10, from Nixon, was meant to emphasize the risks that Canada was about to become seized of. The United States would cut back on Canadian oil exports by 20% as of July 1, and maintain the reduction until negotiations were carried out.466 As Head recalls, the situation was “now ripe” to respond to the United States invitation for consultation. Humble Oil had already

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464 Indeed, the strategic parallels between the cases are uncanny.
465 Kirton and Munton, p. 90, ft. 25. The authors hold that several factors led Trudeau to support the reservation: that the majority of Cabinet were behind it; his belief that the Arctic was Canada’s, pollution was a threat, the reservation could be withdrawn at a later date and thus repair any damage to the international legal system; and finally and perhaps most importantly, that Trudeau wanted to settle the issue politically having thought about its solution and witnessed Head develop the policy deftly throughout his tenure as Prime Minister.
466 In somewhat typical fashion, Trudeau responded by traveling to a location in the Arctic and via a live link with NBC’s Today Show proceeded to tell American audiences that Canada claimed the Arctic waters on the basis of the sector principle and continental shelf.
acquiesced to Canadian demands regarding Manhattan’s second planned voyage through the Northwest Passage, requesting Canadian escort and posting a bond in acceptance. With this understanding secured, Head and Beesley traveled to Washington on March 11 to brief Ambassador Marcel Cadieux, former legal advisor in Ottawa and trusted confidant of Head, on the Arctic situation. During their visit, the group met with U. A. Johnson, US Undersecretary of State, and legal advisor John Stevenson. As Head recalls, Cadieux presented the case effectively, stressing the stridency of Canadian public opinion, Canada’s historic claims to sovereignty, and specifically the overarching need to protect the Arctic from large-scale pollution. There then followed a series of “intense discussions” on the fine points of the law of the sea as it related to baselines, territorial seas, and pollution zones. Head maintained that he emphasized to his American hosts that the idea of the pollution control zone was meant only to fill a gap in international law and facilitate responsible stewardship of an environmentally fragile region. Canada’s position was intended to “bolster - not flout - sound legal principles”, to “lead the international community, and to protect the environment” through an “interim injunction.” The discussion was friendly and very candid, Head recounts, though the United States left no doubt of their opposition to the legislation expected now by Easter.

American accounts of the meeting indicate a far from different atmosphere. As McDorman has recently uncovered, Johnson’s report back to Kissinger on the meeting maintained that Canada spoke of three courses of imminent action owing to it not being unable to take a position inconsistent with sovereignty. The three options were: 1) straight baselines, though Canada claimed that innocent passage would be recognized subject to Canadian regulations; 2) establishment of a one-hundred mile pollution protection zone and twelve mile territorial sea; 3) establishment of fisheries closing lines around the bulk of Canadian territory. The choice was to be fixed within the next two weeks given that an internationalized Arctic legal regime was too far distant for Canada’s interests to be met. Contrary to Head’s insistence of a cordial and professional meeting, Johnson described that

467 Head and Trudeau (1995), at 47.
468 McDorman (2009), at 69.
“During the discussion it became clear that the Canadians were not interested in having our comments, suggestions, modifications, or alternatives... the Canadian presentation was in fact only a notification... any multilateral convention would have to “confirm” the Canadian legislation rather than reduce its effectiveness...” And while all of the Canadian actions were deemed as having no legal basis for Johnson, the impending Manhattan voyage set for April 1, 1970, posed distinct legal and political problems for the United States. For,

If the Canadians impose their legislation prior to the next Manhattan voyage and if the Manhattan goes through, Canada may well assert that the Manhattan complied with Canadian law in recognition of Canadian jurisdiction over the Northwest Passage. On the other hand, if the Manhattan does not make the voyage, the strong inference is that it held back because it either could not or would not comply with Canada’s requirements, thus implying recognition of Canada’s right to regulate. The third alternative is also damaging; if the Manhattan should make the trip in violation of Canadian regulations, the Canadians may well take enforcement measures against the vessel... We have learned informally that the Humble Oil Company will try to avoid any correspondence with Canadian officials…

The precedent set from a country “physically, politically, and economically - as close to the United States as Canada” was beyond political and legal agreement, and all the more so on the basis of its unilateral nature.

On March 17, Nixon contacted Trudeau to tell him that while sympathetic to the political challenge of placating public opinion, the Canadian response was equally problematic for the United States. On March 20, the American negotiating team arrived in Ottawa led by Johnson to argue that any act of unilateralism would be seen as a precedent by other states regardless of how special the Canadian circumstances were; that restrictions on United States naval movements would hinder the security of both states; and perhaps most revealingly, that a further proliferation of pollution, fisheries or other functional zones made it unlikely that a future law of the sea treaty could be concluded. Canadian actions were perceived as threatening, according to Head’s recollections, and not unreasonably by the United States in

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470 Nixon had been briefed by Kissinger on the matter, and was to convey to Trudeau that he was “gravely disturbed” by any unilateral action being proposed. Also shelved for the moment were Secretary of Defence Rogers more threatening elements, as Kissinger described them, to be voiced to Canada following its unilateral action: “[t]he United States thus would be required to take lawful and appropriate steps to protect the integrity of its position in these matters.” See Ibid, Document 368.
relation to the negative precedent being set. Given the uncertain status of many of the world’s maritime chokepoints (many of which could easily be designated as ‘special’), namely Malacca, or deserving of closure to hostile states (Israel in Aquaba), Canadian actions could have dramatic security implications. Yet, in a twist of fate for Canada, the United States was ultimately concerned about the issue of international legal reputation associated with the Arctic legislation. The irony of the matter was borne of Canada’s image in international affairs and legal circles. One of the primary reasons the United States was so concerned with the pollution legislation and attempted to head it off at the Presidential level was that the United State’s image of Canada was that of the world’s law abider, a nation respected in the world for its belief in the necessity of solving disputes on the basis of a fidelity to law. The United States was concerned about how Canada’s unilateral action would have compounding effects on public international law in the rest of the world and in particular, damaging effects on the codification conference for the law of the sea. As one of the world’s leading legal architects, Canada’s policy cut at the foundation of the legal system, which was surprising to American officials, for if the issue had not been one of ocean policy, Canada should not have been expected to make such an argument. American officials believed that living next to a powerful neighbour would imply that a subordinate state would not adopt policies of unilateralism. This explains why American officials were in many ways caught off guard and acted with trepidation in light of the potential consequences for the international legal system.

Trudeau’s conversation with Secretary of State, William Rogers, on April 7, the day prior to the introduction of the legislation to the House, characterized the magnitude of tensions developing. Trudeau had intended to call Nixon directly to inform him that the final version of the legislation did not undermine any American interests in the Arctic. Nixon was out of touch for undisclosed reasons, and thus Rogers engaged Trudeau in a discussion lasting over forty-five minutes. Trudeau assured Rogers that Canada could enter into formal talks with the United States once the legislation was introduced, and that Canada’s intentions were to

471 Johnson’s reflections on the meeting are revealing in that he believed that they had caused the Canadians to “rethink, and undoubtedly to make some revisions in the proposals they are committed to make to Parliament next week.” Supra note 463, Document 369.
participate in international fora “with the aim of setting acceptable international standards.” Rogers was angered by Canada’s attempt to thwart American interests, and threatened to defy the Canadian measure “with any means necessary, including a submarine, if that were necessary to prove the point.” Trudeau, enraged, responded: “Mr. Rogers, if you send up a tin can with a paper-thin hull filled with oil, we’ll not only stop you, we’ll board you and turn you around. And if we do so, Mr. Rogers, we’ll have the world on our side.” Whether Trudeau was bluffing or not is unknowable, but it was unlikely that events would come to this. However, that Trudeau consciously believed his statement about world support is entirely plausible. Many of his inner group thought the legislation to poses substantive legitimacy, based upon ethical content even while its legality was held in doubt. And while the remark could have been the result of a lofty strategy of persuasion, pressured anger, or both, it is undeniable that Trudeau knew that with a creative argument now constructed, Canadian sovereignty was better preserved. Apparently the conversation ended cordially, and Trudeau prepared to present the Bill to the House on April 8.

The Arctic Waters Policy (April 1970): Canada’s Creative Legal Argument

The most interesting points about the legislation were not only its sweeping contents but the series of justifications that followed to support both its legitimacy and legality. The two Bills, the Arctic Waters Pollution Prevention Act (AWPPA), and the Bill to amend the Territorial Sea and Fishing Zones Act of 1964, charted a new course for both Canada and international society in the relationship between environmental norms, national security, and ocean affairs. The AWPPA established a one-hundred-mile control zone in the waters of the Arctic above the sixtieth parallel of north latitude, and unilaterally asserted Canadian jurisdiction to regulate shipping around Arctic waters lines. The legislation also expanded

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472 Head and Trudeau (1995), at 55.
473 Ibid, [emphasis added].
475 C-203, ibid, at 553. Both Bills were given Royal Assent on June 26, and the unanimous vote was 198-0
476 The Bill introduced the provision of the absolute prohibition of the deposit of waste into Arctic waters, and set out requirements for ship construction, navigational aids, cargo, pilotage, qualification of the master, and icebreaking services. Violations of the bill were covered by Canadian criminal legislation constituting criminal offences, and created rules of civil liability based upon the Canadian provisions advanced at the earlier Brussels Conference in 1969, not on ‘fault’ but absolute liability requiring no proof of fault.
Canada’s territorial sea from three to twelve miles, increasing the size of Canadian territory by one-eighth.477 As to Canadian motives surrounding the policy, Trudeau made the assertion that the legislation was not an assertion of “sovereignty, [but] an exercise in our desire to keep the Arctic free of pollution and by defining 100 miles as the zone within which we are determined to act, we are indicating that our assertion is not one aimed towards sovereignty but aimed towards one of the important aspects of our action in the Arctic.”478 But when questioned by the press following the statement on what would occur if a challenge were brought before the International Court, and whether a Canadian legal defense would be tantamount to an exercise in sovereignty, Trudeau replied: “They [sic] would be an exercise of authority given by Parliament to the Executive Branch to apply a certain status. Now this does not necessarily mean that you’re asserting sovereignty over those seas any more than the Continental Shelf Doctrine for instance entails sovereignty with it.” As Canadian lawyer L.C. Green would argue months later, “[i]t is submitted that Mr. Trudeau is here propounding an entirely new conception of sovereignty, and one that runs completely contrary to current trends of functional interpretation of legal concepts.”479

In terms of how Canada was able to justify the legislation in relation to the extant law of the sea and nascent international law of pollution control, Trudeau replied:

Where no law exists, or where law is clearly insufficient, there is no international common law applying to the Arctic seas, we’re saying somebody has to preserve this area for mankind until the international law develops. And we are prepared to help it develop by taking steps

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477 The move to also insert within the legislative package an extension of the territorial sea had a lengthy and turbulent history by this point. Head and Gotlieb in particular had always championed the pollution legislation but been cautious of extending the territorial sea. It was on pains from Beesley and External Affairs, over a series of weeks, insisting that for the Arctic policy to have any international legal validity it at a minimum had to include the extension of the territorial sea to twelve miles. Their persuasiveness would have had effect in the early days of March.

478 House of Commons Debates, April 8, 1970.

479 Green (1970), at 764. Reid (1974: 125) quoting Green’s commentary, would argue that Trudeau’s remarks reflected that he was “playing with words by insisting that there is a distinction between exercising powers and control of a sovereign without also being at least the de facto sovereign. It is contended that this in fact was the true purpose of the pollution legislation.” That such contradiction, or perhaps “stretching” of legal concepts has not been forgotten by American legal officials, and has tainted the entire United States’ perspective on the subject of the Northwest Passage ever since, is undeniable. One prominent United States’ lawyer then seized of the matter described Trudeau’s intentions as not based upon pollution concerns, but an attempt to harmonize a fractured political community by providing a focal point of nationalism through which the government could contribute to greater political integration.
on our own...[T]he way international law exists now, it is definitely biased in favour of shipping in the high seas and in various parts of the globe ... This was fine in the past ... [Canada is willing] to participate in every aspect of the development of international regimes which would prevent pollutions of coastal states. But until this international regime has developed we are stuck with the law as it has developed in the past centuries, and the centuries before when ... there was no danger of pollution, and it was important for commercial and other reasons that the nations could communicate on the high seas ... In one case, [the twelve-mile territorial sea] if there is a problem we will be taken to the courts, and we'll fight it there ... we have the trend of international law in our direction - the twelve miles. In the other case [the hundred-mile pollution zone] there is no law so we can’t be taken to the courts. 480

Trudeau would argue that Canada had been forced to legislate given the impending threat that the Torrey Canyon and Arrow incidents revealed and the existing gap in international law preventing a reasonable response. The voice of Hersch Lauterpacht, four decades prior, was undeniable: “[There is an] imperative necessity for abandoning a doctrine which - expressed in the traditional distinction between justifiable and non-justifiable or legal and political disputes - has lost its original usefulness and has become an obstacle in the way of legal progress.” 481 As Mitchell Sharp clarified to the House on April 16, the Bill was to be regarded as a step towards

the elaboration of an international legal order which will protect and preserve this planet earth for the better use and enjoyment of mankind. A single ecological system governs the lives of all men, and the Arctic regions ...determine the livability of the whole of the Northern hemisphere. 482

Consultation with other nations was promised when setting final standards, as the Bill was merely the “beginning” of a process towards environmental protection. Canada was embarking on a “pioneering venture” and constructing “victim-orientated law” given the “failure of law to keep pace with technology, to adapt itself to special situation.” The era of narrow scope for the right of innocent passage had passed, it was argued, and from herein, any passage threatening the environment would not be cast as non-innocent on the basis that it represented a threat to coastal state security. Somewhat unbelievably, when asked in the House about of the status of the waters beyond the new twelve-mile limit, Sharp responded by declaring them “internal” waters, only to correct himself the next day and revert back to

481 Lauterpacht (1933), at 34.
482 H.C. Deb. (Can.), 1970, April 17, 6014-6015
the ambiguous characterization of “our waters.” As to why Canada was forced to enact the reservation to the Court, Sharp promulgated that:

[w]here 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 … It is of 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 form basis for decision”. Canada’s policy “does not in any way reflect lack of confidence in the court but takes into account the limitations within which the court must operate… 483

Canada had removed itself from compulsory jurisdiction of the original Permanent Court of International Justice, now the International Court of Justice, on the matter of the Court being able to be seized automatically of international disputes arising from legislation on the matter of pollution prevention in the Arctic and the living resources (fishing in particular) in the sea. However, the reservation did not have any effect over matters concerned with broadening the territorial sea to twelve miles. 484 Yet it could not have escaped American judgment that if there existed only fragments of international law on the controversial matter of pollution, then there ought to have been no reason to attach the reservation to the compulsory jurisdiction of the Court. While international lawyers would have then understood it virtually impossible to create instant international customary law on any matter, requiring a breach of international law through a unilateral act to upset the equilibrium of legal stasis in generating a process of reform, the fact that Canada believed that it was legislating for broader “community values in a area of special significance” was moot in American eyes. A letter from the State Department to Ottawa, received April 15, couched in plain legal argument revealed this point distinctly. The letter likely revealed nothing that Canada had not expected to hear. 485

Washington’s note began by underscoring its orthodox complaints. In particular, the legislation curtailed the right of freedom on the high seas, and complicated directly any

483 Ibid. See Canadian Yearbook of International Law (1971), at 284.
484 External Affairs had suggested to Head and Trudeau that Canada remove from the reservation the territorial sea extension in order to “dare” the United States to take Canada to Court. Either by accident or design, the reservation gave rise to far more reaching and complex legal effects. See the extended analysis of R. St. J. MacDonald (1970).
485 See Dept. of State Press Release, April 15, 1970; (1970), 9 Int Legal materials, p. 605
attempt to reach future agreement on the law of the sea. International law, it maintained, contained no basis for the 100-mile extension of jurisdiction over the prescription standards of vessel construction, navigation or operation, nor any basis for exclusive Canadian fishing zones beyond twelve miles from the coastline. The “potential for serious international dispute and conflict is obvious”, the note submitted, not specifically in reference to the Canadian position, but in its precedential effects on other straits and consequent potential restrictions upon naval mobility and merchant shipping. The United States sought international solutions within a UN framework for the Arctic and looked forward to completing a new treaty in which ocean pollution issues would be resolved without prejudice to transit rights in international straits. Given that Canada appeared unwilling to wait for an international forum to make new law on the matter, the United States invited Canada to join it in submitting the matter to the International Court or relevant chamber of the Court.

Canada’s reply was brought to the United States Embassy the next day, April 16. Given the stakes of the matter and predictability of the American response, it is likely that the Canadian letter was crafted carefully over an extended period to include Canada’s most credible points of law and politics. Indeed, the positions, perspectives and arguments in the letter provide the framework and much of the substance of Canada’s creative legal argument. The document in many ways had the thoughts of Head and Gotlieb written directly into it. In short, Canada’s legal position as expressed in the note made three broad points. American opposition to Canada’s unilateral approach was hypocritical in light of past American practice; Canadian action to prevent oil pollution in the Arctic was required as an act of ‘self-defence’; and the geography of the Arctic was such that the principle of the freedom of the high seas was inapplicable.

Canada began with the following point justifying unilateralism: Canada could not accept the view that “international law provides no basis for the proposed measures [ie. pollution legislation]” on the basis that for many years “large numbers of states have [unilaterally] asserted various forms of limited jurisdiction beyond their territorial sea.” The United States

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was being hypocritical in its assertion that, beyond the three-mile limit, the sea is not subject to a coastal state’s jurisdiction on either resource or pollution issues. United States practice reflected this claim: in 1935, United State’s customs enforcement on the water was extended out to 62 miles in contradiction of international law; in 1966, the United States passed legislation granting it exclusive fishing rights out to twelve miles; and shortly thereafter, United State’s legislation had extended jurisdiction over the same area with respect to pollution control. Portions of the Canadian note asserted that unilateral action is sometimes the only way to effect changes in international law, especially when multilateral fora have failed. Here, Canada cited the Truman proclamation claiming jurisdiction over the continental shelf in 1945 (enacted in a similar situation which subsequently become new international law), and the unilateral extension of the territorial sea to twelve miles by numerous states. In relation to the Arctic, Canada attempted extensively at the 1958 and 1960 Geneva conferences to bring about change, “but these efforts failed because the United States ultimately declined to participate in them.” Canada had tried to persuade the United States for the past ten years to engage on matters of coastal state jurisdiction, but had been met with no reply. The Canadian message was clear: American refusal to address Canadian concerns in the Arctic meant that unilateral action was unavoidable. Furthermore, given past American practice, it would have done the equivalent if in Canada’s place.

The note also addressed the need for Canada to pursue ‘self-defence’ in respect of its national interest, even if this ran against the grain of the principle of the freedom of the high seas. For over one-hundred years, waters had become an extension of the land, and thus as D.P. O’Connell (1970) had noted, water was a part of territory and thus subject to the protective allocations constituted within a claim to sovereignty. Accordingly, when thinking about the protection and preservation of territory, states need to consider this entire domain as subject to measures of defense, and thus self defense if required in light of threatening activities, omissions, or most critically possible attacks. Preventative action, congruent with Article 51 of the UN Charter, was the supplemental guide for thinking about this new problem. While the note was not explicit on this point, Canada was not arguing expressly in terms of black letter, positivist law as it related to self-defence. Rather, the self-defence claim was recourse
to thinking about the general principles of international law and legal reasoning, residual of the overall jurisprudential tone taken by Canada in softening the exactitude of legal rules toward functionalist rationales. In other words, Canada reserved the right to declare for itself what was or was not a national security threat in light of new global epistemic ideas, and in its estimation danger to the Arctic environment unavoidably fell under this heading. As a result, and until and unless effective international legislation were enacted to take its place, Canada felt compelled to extend limited jurisdiction to protect against uncertain threats. Furthermore, the note intimated, American officials had also in past recognized that the principle of the freedom of navigation be set aside on matters of national security. Entirely in keeping with Trudeau’s new foreign policy, Canada’s interference with the principle was of a “different order from unilateral interferences with the freedom of the high seas”, such as the atomic tests carried out by the United States in open oceans, which it had mandated all shipping be removed within a fifty-mile radius. The inference was plain that, if American national security could justify the detonation of man’s most dangerous weapons over areas meant to be free for shipping, then Canadian national security could justify the curtailing of shipping without the threat of radioactive exposure. Finally, the note asserted that the idea of freedom of the high seas was conceptually inapplicable in an area covered with ice most of the year, and specifically where local inhabitants used the frozen sea as an extension of the land and basis for survival. The Northwest Passage was therefore neither part of the high seas nor an international strait, even though Canada was determined to open it for safe navigation. Canada was now enacting its own legal standards and regulations regarding pollution in the region, and any new international regime proposed by the United States to deal with that issue area would have to be spelled out in greater detail for Ottawa to ensure that it was not designed to encroach upon Canadian territory.487

Beyond Washington, the immediate reception to the Canadian legislation was mixed, even in Canadian public and political circles. It is therefore incorrect to conclude that it was only the

487 This, of course, represented a contradiction in the Canadian argument. If the creation of pollution control zones was meant to be a ‘temporary’ measure to address a gap in international law with respect to oil pollution, then an international forum to determine the contours of an international regime should be welcomed, and certainly not avoided on the basis that it sought to usurp Canadian jurisdiction.
United States that officially was in opposition. Rather, as Erik Wang of External Affairs would later reveal, Canada received a “drawer full of protests” from foreign governments, including most major Western states and the UK, even though Canada elicited overwhelming sympathy from Sweden, Norway and notable members of the US media. The New York Times took a page directly out of the current law of the sea discourse in its editorial on the subject:

The United States has rejected with unseemly sharpness Canada’s bid to extend her control over the Northwest Passage…while failing to advance the cause of more enlightened international regulation of the sea…Canada has undertaken the initiative in trying to protect a heritage that is precious to all mankind.488

But, despite some encouraging endorsement, May 1970 began a period in which there was tremendous pressure on Canadian officials, and particularly the head of External Affairs, to convince the international community of the legal and moral merits of the Canadian claim. If a critical mass of states could not be persuaded of the legitimacy of Canada’s position, if not its legality, the Arctic policy writ large or the AWPPA in particular in its quasi-international legal form would never crystallize into new international customary law, nor even considered in the upcoming law of the sea conference.

Conclusion

Canada’s initial policy formation over the Arctic waters was a tenuous affair within government. Having been caught off guard in the early phases of its return to power in Ottawa, the Liberal Party of Trudeau faced a challenge in the Arctic not perhaps of absolute high politics, but one very close to it. The North, and the possible American ‘theft’ of its resources, was a subject of collective passion and unprecedented anxiety in the birth of a new nation with a novel form of leadership. Canadian lawyers in attempting to mitigate the legal problem were faced with a variety of challenges in handling the politics of international law. Short of abandoning the Northwest Passage claim to the international community, and reneging or abrogating the ‘modus vivendi’ with the United States, the preferred option

488 N.Y. Times, April 20, 1970. The Washington Post held the same day that “There will be much sympathy with Canada’s move to protect the Arctic from pollution without waiting for the niceties of international law to be spelt out.”
became to stall for time and behave in a way that did not convey Canada’s fear about having its legal case placed in a clearer light and thus in jeopardy. Here the politics of international law were witnessed in full light as Canada deliberated whether to play with the legal rules on innocent passage to assuage American interests to transit Arctic waters, and/or create the conditions for consent to be acknowledged and expressly asked for by the United States prior to the *Manhattan* transiting. Ultimately, Canada was forced to construct an argument on the grounds of environmental logics, pitting the dangers of unfettered access to the world’s vulnerable areas against the right for all nations to traverse the high seas. Canada made the straightforward claim in international law that innocent passage required a dimension of security as the rules of the 1958 Geneva Convention conveyed, and this legal clause provided an opportunity to advance the debate on what self defense and self protection required in international law given the emergence of new understandings about the relationship of the oceans to territory, and beyond this horizon, to the quality of life itself.

In reserving its position before the ICJ Canada divided itself. What was an argument for being progressively focused in its international legal deliberations became a sign-post for many audiences that political expediency could trump international obligations even for states with consistently firm reputations for legal compliance. Whether forced into an awkward position or not Canada had found itself placing the emerging authority of the Court in some jeopardy and casting doubt on its own legal position and positive veneer of international legal identity. In many ways, the Canadian creative legal argument and the politics of law-construction that underpinned it was a definitive moment in Canadian international law. Gone was the proclivity to reflexively assume the position of British legal positivism. Emerging now were a forceful set of bureaucrats in External Affairs who could command debates in international law by making Canada engage in international legal venues with credibility. And finished were the days of a meek and reduced legal footprint in matters of the law of the sea. The forthcoming years of codification were to be known as the years in which Beesley took control of the various ocean venues to which Canada played a substantive role and External Affairs returned to a position of strength in these affairs.
Chapter Five: Theoretical Evaluation and Counterfactuals

How can interdisciplinary theory account for Canada’s Arctic policy development over 1969-70? There are three primary questions that need to be addressed in relation to the policy process and the politics of international law during this period. What is the relationship between creative legal arguments and the Canadian defense of its legislative response? How was Canada’s policy made possible? And what broader role did international law facilitate and constitute within the policy construction? In other words, how did international law matter, or work, in the Arctic case during this period? This chapter tackles these issues in sequence by outlining how constructivism and critical legal theory explain many elements of Canada’s thinking. In terms of evaluating the compliance decision itself, political realism and legal rationalism in particular have much to contribute in evaluating what elements within the calculation of compliance can be explained on grounds of self-interest and the law’s modest role in matters of marginal high politics. A variety of legal effects and roles of international law were carried out in this period, including in particular, the multiple uses of legal theory as a form of constraint, enablement, and basis from which legal norms could be found and defended as law.

The Ontology of the 1970 Arctic Legislation: Canada’s Creative Legal Argument

It bears noting that there is a distinction between policy, dynamically conceived, and an ‘argument’ advanced by states, creative or otherwise. Policy refers to the approach or direction being taken through politics and/or law to meet specific goals, objectives, and requirements. Arguments refer to the justificatory resources that are promulgated to audiences concerning why a policy is legitimate, legal, just, or necessary. Arguments reflect the discursive boundaries that rationalize various components of a policy, which may have legal instruments, such as legislation, embedded internally. Hence, evaluating how a policy was arrived at is a slightly different analytical task than explicating how or why an argument was put forth. To be sure, there is significant overlap between the two. Policy possibilities are a function of argumentative limits in that there are domains beyond which credible responses cannot be mounted given a certain policy endeavor. And yet the limits of these domains are in many cases wide enough to permit of credible rationalizations depending
upon the policy context and institutional framework states are operating within. The focus for the present purpose is targeted toward explaining the discursive contents of the argument as it relates to policy possibilities.

Creative legal arguments are constituted by their dynamic characteristics, which are grounded in an aura of progressiveness and the ability to push against the frontiers of current international law.\footnote{489} Specifically, their core components rely (inter alia) on elements of the meditative capacity of legitimacy discourses to pronounce upon arguments for legal validity; the unconventional use of separate bodies of international law to complete legal cases; the use of interstitial norms to fill gaps in legal reasoning; and the reliance upon dominant forms of contemporary international jurisprudence considered authoritative and aligned with a state’s international legal identity to structure legal defenses. The theoretical roots in exposing creative legal arguments can be seen to reside largely in the complementarity of constructivism and critical legal theory. Constructivists have stressed how international law functions as a mode of legitimation, communication, and element of reassurance through the modality of argumentation. Creative legal arguments are an instantiation of communication through law, but a particular form that critical legal theory seeks to interrogate. Indeed, one of the central ideas of critical legal theory is to uncover the discourses that lead to hidden ideologies, along with the “attitudes and structures which lie behind the discourse, rather than the subject matter of legal talk.”\footnote{490} Bringing to light the composition of creative legal arguments as an example of communicative discourse, but also as a form of dynamic jurisprudence that Koskenniemi has highlighted, lends itself to demonstrating the range of rhetorical roles international law constitutes within state strategies.

The use of legitimacy by Canadian officials highlights how Canada’s reading of what legality required in the Arctic case was grounded in the particularist ethics and political dialogues of the late 1960’s. To recall, legitimacy as a ‘political space’ serves as a form of political brokerage through which the discursive meanings of morality, legality, and constitutionality

\footnote{489} Of course, it also possible for states to construct creative legal arguments that argue against legal change, but this issue is put aside for the purposes here.

are mediated and ultimately compete for reasonable outcomes acceptable to audiences toward which they are directed. Two interrelated aspects of legitimacy are apparent in the Canadian argument. The first element was grounded in Canada being able to turn on its head what had become the absolute principle of freedom of the high seas and provide political and legal momentum within the rapidly unfolding ocean enclosure movement. Canada’s argument embedded centrally the idea that nature was becoming unduly harmed as the technological processes of mankind to traverse the oceans continued unabated without undue care for humanity’s welfare. This belief became coupled with the assertion that international society expressed a profound ignorance of man’s intimate link to the oceans and the potential damage associated within nature’s delicate webs of life.  

The Arctic was pitched as one of the world’s special areas, a unique domain requiring not only a general ethics of care, but particularist considerations due to its absolute fragility and unknown characteristics. It was a land beyond time, sealed in by the elements of millennium past, and owed exceptional consideration. In requiring from Canada a duty of care on the basis of the subject being shrewdly framed in the language of Canada owing an obligation to the world to bring about Arctic preservation, the claim was placed beyond the general arguments of fairness associated with the necessity of international administrative law-making the United States was proposing as reasonable.

International rules for the Arctic were also framed by Canada as exceptions to the broader ocean principles the United States relied upon. This referred specifically to the point that if the Arctic was extraordinary and required distinctive treatment, it followed that particular claims for all unique ocean areas would flow from self-interested states bent upon the nationalization of the oceans. To this analogy, Canada argued that the frontiers of science indicated the mainstream position about how international spaces ought to be used was irrelevant in an area that could not support, without immense technological struggle, man’s ability to traverse Arctic “waters” without significant industrial assault and, by extension,

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491 Indeed, Canada’s claim was located within the broader discourse on the ontology of pollution and the oceans. For example, writing in 1971, Jacques Cousteau would express this point starkly in that “there is only one pollution because every single thing, every chemical whether in air or on land will end up in the oceans.” See, “Our Oceans are Dying”, *NY Times*, (Nov. 14, 1971).
moral risk. In proving this point, the relationship of oil discharges and composition of the Arctic Ocean became sharply illuminated. Canada could therefore fall back upon the authority of scientific advancements. Due to the volatile combination of biochemical decomposition within frigid waters and the extended temporal nature of this process, it followed that with a reduction in the rate of oil decomposition, the re-colonization and rehabilitation of marine species, flora and fauna, and plant-life, would be significantly delayed.492

Rather deftly, Canada pitched the idea of sovereignty as an ethical claim to protectionism in an area that only it could be trusted to safeguard, even though it was ‘agnostic’ on the point of who might oversee a future legal regime in the area. Claims to sovereignty, either directed expressly to Canadians, or in diluted pronouncements to international audiences, were thus able to be cast as ambivalent and undetermining. Yet Canada also rested the international legal authority of the Arctic case on a precedent of international jurisprudence containing a legal principle of strategic importance: a state need not remove the possibility of complete forms of sovereignty being claimed in future through its current policies based upon functional logic and ethical requirements. The use of precedent was astute. In order to preserve the ambivalent claim to sovereignty oscillating within policy pronouncements, jurisprudence from the 1910 North Atlantic Coast Fisheries Case was drawn upon and put expressly into Cabinet documents for future reference.493 The central holding of the North Atlantic Coast Fisheries Case turned on the idea that a state may, while claiming sovereignty

492 Canada had in recent months drawn upon recent scientific research concluding that “the rate of biochemical decomposition of oil in seawater is temperature dependent…[T]he decomposition rate slows markedly at lower temperatures, and at Zero degrees Centigrade is drastically reduced, some components of the process stopping altogether…Where oil is exposed to lower temperatures, for instance when carried on to shorelines and ice floes, biochemical decay would be virtually nonexistent, and the oil would persist for decades, perhaps centuries.” See Warner (1966), Brief prepared for the Canadian Wildlife Service.

493 North Atlantic Coast Fisheries Case (1910) 11 RIAA 167. The case initially turned on the right granted to the United States by Great Britain for American nationals to fish in Labrador and Newfoundland, areas then within the jurisdiction of Great Britain, later Canada. Following the war of 1812, and the treaty of peace signed thereafter in 1818, the economic activity of fishing rose to prominence, setting off a series of tense interactions between the two states. In their communiqués in the early Twentieth Century, the main issue turned on whether Great Britain had the right to issue fishing regulations without the consent of the United States. The Permanent Court held that Great Britain had the right to regulate fisheries in these areas, but that the scope of this right was limited by the Treaty of 1818. Ultimately, the ruling had the effect of abandoning the doctrine of absolute sovereignty in international law by setting limits to sovereignty based on international legal principles or the terms of treaties.
over the whole of the sea area, exercise only so much of its sovereign powers over all or part of that area as it deems desirable without prejudicing a claim to full sovereignty. In other words, the coordinating principle provided temporal and administrative flexibility to undertake essential and immediate tasks, but preserved the right to formally claim territory when required. Legault brought the case to the attention of the international community and international legal college in 1970, allowing Canada’s sovereignty claim to rest on a modicum of credibility and legal precedent.⁴⁹⁴

Second, legitimacy also brokered the constitutionality of international society’s engagement with the oceans, and in part as a result, provided reasons for Canada to argue that some components of the law of the sea, and in particular international ocean pollution law, had lost its authority and ability to bind states. The assumption was made all the more plausible due to the widespread belief that both general international law and specifically customary law contained neither rules nor standards relating to the protection of the environment in its broadest sense.⁴⁹⁵ Indeed, the freedom of the high seas was now pitched as a body of practice which provided a veneer of credibility for states to continue unabated in polluting the oceans. Under Legault’s leadership and brilliance in framing the problem, it became cast as a “license to pollute”. Such “freedom” for the oceans served as a bulwark against any progress being made in constructing meaningful solutions and by extension, positive law, in the area of ocean pollution control. Hence, the core principle of law central to the issue precluded advancement less in terms of what it was oriented to facilitate, which in this respect was the movement of commerce, people, and the facilitation of communication. Yet it did directly cast a stultifying effect on the primary basis of the oceans’ alternative instrumental effect, the ability for man to enrich himself through nature. As Canada suggested, this latter outcome was both misunderstood in the debate on ocean use and ocean law, but when prioritized gave rise to the claim that international law was not directed

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⁴⁹⁴ See generally, Legault (1974). Mitchell Sharp in the House of Commons extolled the virtues of the principle to domestic and international audiences on several occasions, pointing to the Court’s belief that “[s]uch a construction by this tribunal may not only be intrinsically inequitable, but internationally injurious, in that it would discourage conciliatory diplomatic transactions and encourage the assertion of claims to their fullest extent.” See Canadian Yearbook of International Law (1971), at 283.

⁴⁹⁵ See Brownlie (1972), at 1.
towards the purposes for which it was crafted. Teclaff would pithily summarize the Canadian position accurately: “[i]t would seem that the regulation of pollution must wait until the value of the interest affected substantially outweighs the convenience of a body of water as a dumping place for refuse.”\textsuperscript{496}

In Canada’s framing of the situation, international rules had come to sever the ocean regime from the foundations of its existence, the origins of which lay in justice for the \textit{communis} as the oceans were not something to be captured but shared responsibly. The constitutionality of the ocean regime was only nascently coming to incorporate this element of preservation into its core structure. As a result of the world’s shipping nations constructing existing international ocean law the fairness of the regime was undercut by the voices of a plurality of new states demanding input into international, constitutional interpretations. In many ways, Canada was drawing on the sentiments set out by Casteneda a decade earlier in 1960 in relation to why developing states eschewed the authority of the International Court in particular and international law more broadly. For Casteneda,

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it would seem valid to conclude that the reason for their refusal lies in the fact that such countries are not willing to accept the application, in general, of a great many provisions of present international law...the solution consists not so much in reproaching the new countries for their disinclination to accept judicial settlement as in facilitating their access to the creative process of international law.\textsuperscript{497}
\end{quote}

In these ways, legitimacy mediated for Canada the range of discursive claims associated with Arctic exceptionalism and international ocean law, unsettling orthodox legal interpretations favoring the conditions under which custodianship was reasonable, whether grounded in sovereignty, functional trusteeship, or combinations of ideas associated with both concepts.

Canada also embedded within its creative argument the idea that there were several competing international legal regimes at work which complicated a straightforward, positivist reading of law as it related events to the law of the sea. The first was the direct juxtaposition of current law of the sea with the emerging body of international pollution law. The second move was to insert the idea that the use of force regime, bound up with the

\textsuperscript{496} Teclaff (1974), at pp. 104-105.
\textsuperscript{497} See Casteneda (1961), pp. 41-42.
interrelated concept of territorial protection and preventative action, was a counterweight and interpretive component in evaluating the Arctic case. The genius of Canada’s rhetorical move was to complicate the issue of a ‘definitional problem’. In other words, Canada made it difficult to explicate what exactly the Arctic case was an instance of, and therefore what international rules ought to govern its solution. By deepening the interpretive element of the creative legal argument with several international regimes, and through American insistence that the Arctic case was one of creeping jurisdiction masked by a ‘community-driven ecological trustee’, Canada could spread its characterization of the scenario widely and allow each regime’s principles input and narration into a final verdict. The upshot of this argumentative strategy enabled the Arctic case to become deeply unsettled on the basis of its meaning and ultimately mediated by competing legal vocabularies.498

The primary justification, as Mitchell Sharp postulated, lay in self-defense, the substance of which needed to be interpreted broadly in light of what ‘harm’ now meant given that the oceans were attached conceptually and physically as territory to be governed and cultivated. If the oceans were the basis of life, the implicit premise suggested, and the Arctic was unique in providing a distinctive existence and form of sustenance to ancient peoples, it followed that activities which threatened human welfare fell within the political and moral jurisdictions of states to protect and prevent against such “attacks”. Defense entailed the preservation of a region, and the preventative and protective dilemma associated with removing the risk of harm materializing was the fulcrum upon which the legality of the pollution argument rested. Canada was now not principally “defending” but “protecting” its territorial food supplies and ecosystem.499

To protect ocean territory was controversial, and especially in Canada forcing maritime vessels to be re-constructed into a single type model. Such a move was considered by

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498 See Koskenniemi’s (2005), (2007) explanations for how this technique has unfolded in several international environmental cases.

499 By switching the vocabulary from defense towards protection, Canada was able to bring international legal authority to its side. Perhaps the most powerful work on self-defense to date had been penned by Bowett in 1958, which held self-protection to be based upon customary international law whose “basis is found in the general practice of states rather than the exceptional right of self-defence…[T]he legality and normality of the jurisdiction make an appeal to this exceptional right unnecessary in this age.” See Bowett (1958), at 66.
shipping states as a radical overextension of Canadian authority and an exorbitant cost to absorb for a distant region. But Canada framed its response as dated on the grounds as it failed to reflect the volume of accidents occurring, the deleterious effects that followed, and the minimal basis of liability for shippers. Hence, the world was better served by treating the oceans with identical analogies of how the idea and techniques associated with ‘harm’ were governed on land. Presumably all could agree that there were no circumstances mitigating an intentional act of dumping waste on another state’s shores, or one carried out through negligence. If moves toward protection were reasonable claims, then a modern principle of self-defense required preventative action on behalf of states genuinely concerned with changing behavior in the oceans. Why ought Canada wait to observe a blow when the industrial world’s legal infrastructure was illegitimate and based upon a morally unsustainable practice? And why need concerned states be forced into a defensive posture and forced to wait when there were reasonable grounds to claim that environmental disasters were ‘imminent’ as international law required when defending in a preventative manner? In light of Canada’s attempt to reframe the debate, it was expressly suggested that states needed to take a hard examination of what morally and legally ‘state responsibility’ now meant in relation to scientific knowledge about the webs of life. By extension, the risks of abusing nature needed to be weighed in proportion to the obligation imposed by Canadian pollution law. When Canada reduced both the scope and the nature of the territorial claim by arguing that functional jurisdiction was being assumed for an immediate purpose, this, in turn, shrank the domain of inquiry, or weight the claim would have been forced to bear, and carried with it the implication that a particular body of international law ought to apply rather than the broader rules of the law of the sea.

As the Arctic was an exception to many international legal rules, in allowing international legal regimes to engage in normative conflict, Canada made what would have been an implausible reading of the self-defense doctrine based upon the occurrence of an armed attack reasonable in relation to the catastrophic nature of an accident. This argument was strengthened in Canada having a basis of international law to fall back upon. As Pharand had suggested, there were security provisions built into the existing law of the sea which Canada
could defend, not only to give principled direction to the case, but also in some sense to ‘win it’ conclusively in the following sense. The right of innocent passage through territorial seas was restrictive in that ‘innocent passage’ was only so when consistent with the rules of the Corfu Channel Case and Article 14(4) of the 1958 Geneva Convention that “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.” The inference was clear that passage may be regulated if found dangerous to a state’s security. But because this implied that an event had occurred, there was no element of probability or prevention embedded within the rule, only one of immediacy. Through a progressive reading of self-defense however, prevention could be argued to exist for enlightened ends. Canada was able strategically to take advantage of legal ambiguity, force audiences to grant priority to a secondary legal regime, and perceive the Arctic as an exception to the general rule of the law of the sea.

The use of interstitial norms also supplemented the use of competing regimes and the ability of legitimacy to mediate moral and legal claims. Interstitial norms provide completion to cases which lack a (legal) mechanism for either resolving conflict between bodies of law, or in cases which would inevitably lead to non-decisions based upon the absence of law. The primary interstitial norm adopted by Canada was centered upon the right of states to take precautionary action within situations in which ‘territorial’ harm was probable. In these instances, states possessed an obligation to maintain for the international community the security over unique areas of life. Canada’s framing of the situation as it having a duty rather than a right to act made it extraordinarily difficult to critique its actions as driven by self-interest. The interstitial norm was also located within a discourse on the requirement of states to act in light of the uncertain characteristics of oil within water. While the Canadian argument can be seen as the first real legislative step towards international environmental protection on the basis that Canada’s environmental rhetoric within the Arctic argument originated the link between ocean nationalization and environmentalism, the Canadian rationale also gave rise to thinking about natural domains through the precautionary principle. In Mitchell Sharp’s words, “[a] single ecosystem governs the lives of all men, and

500 See Oxman (2006), at 849.
the Arctic regions are an extremely important part of that system. They determine the livability of the whole of the Northern hemisphere.”

Complementing the norm of precautionary action was the palpable note of fear within the discourses of environmental politics at the time. As George Kennan noted with caution, the era reflected the idea that humanity faced a “dark hour” through which an impending environmental crisis loomed. And if elder American statesmen were indicating how pollution was pushing towards a final hour of calamity, the power and effects of the norm of precaution, it may be assumed, had become pronounced in many Western dialogues within civil society. However, the norm of precaution also cut another way in relation not only to the belief of scientific uncertainty and the nature of the pollutants, but also in Canada’s insistence upon an extensive breadth for the pollution zone. The rationalization for such a radical extension stemmed from the nature of oil itself, its fluidity and ability to spread in an unknowable fashion. Oil could move with the currents of the seas, spreading perhaps thinly across ocean surfaces, or rest within the water-column or the ocean floor. It was calculated at the time that “1000 cubic meters (about 1000 tons) would spread to cover 78.5 million square meters of water surface in 90 minutes and about 235.5 million square meters in 10 hours”.

As the Manhattan carried a capacity of 38,220,000 gallons of crude oil, the one-hundred mile breadth seemed to fit within the limits of a reasonable extension. In Canada’s frame, being precautionary entailed not only acting with humility towards unknowable risks, but strengthened the idea that a functionalist policy took those ends into account.

That the use of functionalism by Canada was an outcome of the decision to harness an interstitial norm for strategic gain is without doubt. External Affairs believed that while the AWPPA was without legal foundation, the benefit of the policy package was the inherent ‘legitimacy’ the AWPPA brought with it. To recall Legault’s comments, “[t]he genius of that legislation [AWPPA]” was that “it would put you on high ground in the way of argumentation. You wouldn’t be arguing from a possessive, territorial, acquisitive point of

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502 See Pharand (1972).
Canada’s use of interstitial norms to complete its legal case indicates a strong element of consequentialist logic was at stake in the policy process, evidenced by the considerable apathy within the Trudeau Government towards environmental issues and oil pollution prior to uncovering the link to the Arctic. Head’s stroke of “genius” in constructing the AWPPA, to gain sovereign control step by step based upon ecological arguments, was largely a masked form of self-interest as Gotlieb would reveal candidly years later. The Arctic incident, due to its overwhelming implication of the national interest, allowed Canadian officials to turn towards an “assessment of how international law could further Canada’s self-interest - what, so to speak, were its [international law’s] strengths and weaknesses. The only impediment to allowing international norms to complete the creative legal argument was to remove the final structural barrier the Canadian case faced, jurisdiction to the International Court.

Finally, Canada’s Arctic argument also required rhetorical elements of progressive international jurisprudence to give it structure. Canada needed a jurisprudential discourse that granted credibility to the idea that law must be, among other things, based upon broader ideals captured in ‘community policy’, reflecting contextual and internationalist claims rather than doctrines of black letter law and literal interpretations of treaty language. To accomplish this objective, Canada’s creative argument was assembled largely from the legal vocabularies of McDougal, Falk, Schachter, and Friedmann. As chapter three demonstrated, for McDougal in particular but also Falk, international law was based upon the expectations of the world community, including specifically those who carried authority in the international legal system and its attendant practices. The rules of law and normative content were thought of as “tied to expectations generally shared among community members” through “the flow of decisions in which community prescriptions are formulated.”

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504 McGonigle and Zacher’s (1977) research is largely conclusive on this point, even though Kirton and Munton go on to argue that the concern with pollution was not a “transitory, fashionable theme…[but] a direct emanation of the commitment of the Prime Minister and his closest associates to the integrity and legitimate interests of dispossessed communities.” The authors rely to a large degree on the commentary of Ivan Head in a 1972 piece written in Foreign Affairs justifying Canada’s foreign policy shifts.
505 Gotlieb (1974), at 148. As a prominent member of External Affairs put it, “we used the law, as bureaucrats, to advance the interest of our country.”
were said to be law not once they were pronounced by states or international legislators, but rather, when corresponding to community expectations which reflected shared agreement over the rightfulness of the norm. Ultimately, rules were only “special directives to contextual factors” to be “modified or rejected if the predictable consequences of their application in a shifting social context proved unsatisfactory.” Consequently, there was a relatively limitless hermeneutic freedom for states when confronting a legal text. Following rules to interpret the law merely reflected the “accumulated trends of past decisions” and stressed the problematic distinction between de lege lata and de lege ferenda (what is and what ought to be law). The aim, for both Falk and McDougal, was to get beyond “the evils inflicted by strict adherence to the precepts of legal positivism”, and with an emphasis on the societal requirements of law, reverse the trends of legal autonomy that created an “artificial distance” between the “is” and the “ought”.507

But which community was to be referenced in finding international expectations, authority, and by extension, international law, other than the broadest possible audience of the world community, and how their expectations were to be ascertained, was never explained in clear terms. International law became an instrumental tool and was law properly so called only if it was relevant. The question of to whom law had to be relevant was not explicated but left intentionally ambiguous. Echoes of such thinking can be heard in the words of Mitchell Sharp:

We have considered these questions [resource development and the preservation of the environment] in the light of the duty and the responsibility Canada owes not only to itself but to the community of nations, that is to say mankind as a whole … we have evolved … a constructive and functional approach … which reconciles national interest and international responsibility.508

For Falk, international law was meant to serve global interests and this extended into the realm of ecological problems of the 1960’s. The planetary crisis of ‘environmental overload’ stemmed from the origins of industrial capitalism. Of great assistance to Canada, Falk’s jurisprudence argued that providing an institutional solution to this challenge involved

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creating a system of ‘functional-agencies’ harnessed with international legal coordination to move the solution of critical issues beyond sovereignty and the state system. Only then could “planet earth” be saved from its rampant materialism and ecological collapse. For Friedmann (1964), modern international law had to be reconceived by North American lawyers upon norms of cooperation rather than coexistence in order to meet the demands of interdependence in a world where economics and technology altered community’s relationships to one another. The new structure of international law required from its adherents and legal subjects the ability to initiate social change in lieu of the diminishing moral and intellectual responsibilities the Cold War era foisted upon states. These jurisprudential vocabularies not only cut against theories of legal formalism, but also many dominant legal discourses within which Canadian policy had been historically crafted. Indeed, dynamic jurisprudence encouraged states to look to the limits of what might be considered the orthodoxies of the international legal system, and Canada took full advantage of this historical window by deploying law with a robust constitution of rhetorical creativity.

**How was the 1970 Arctic Policy Possible?**

The intent of “how possible” questions is to probe and uncover the conditions facilitating the possibility of a situation arising or being caused through a combination of interrelated processes and contexts of action. Such inquiries make no claim to even a minimal form of determinism, but seek only to show that the conditions were present for a series of processes to become embedded within a contingent set of interactions which caused an event to occur. In other words, the conditions of possibility delimit the scope of the possible combination of processes that lead to a point of contingency. Arriving at a credible response to this question involves setting out a series of possible counterfactuals scenarios and alternative explanations to compete with the argument reinforced in the case of the Northwest Passage that it was the high level of contestation occurring within international society’s fundamental institutions which explains how the Arctic policy was made possible.

To reinforce the need for distinction, the aim of this section is to assess primarily how the policy was possible, and secondarily, how the role of the creative legal argument in this
process can be explained. It is undeniable that when the policy process was unfolding and choices made about the particular contents of the pollution legislation, the creative legal argument was seen as part of the policy, the rhetorical component of rationalization. The two then overlap and are deeply interwoven. But assessing the policy and its process in relative isolation also gives greater specificity to the analytical contents associated with the idea of ‘policy’ when stripped, to a degree possible, of its rhetorical baggage. For our purposes here, the policy is first explained, followed by its broader alignment with the creative legal argument. The Arctic policy of 1969-70, in its narrow sense, had four components. The one hundred mile pollution prevention zone; the extension of the territorial sea; the reservation to the International Court, and the continuing assessment behind the scenes of possible alternative ways to strengthen the case within the parameters of existing and future directions of international law. In pulling apart possible explanations and counterfactuals, aspects of the role of international law and in particular the issue of compliance are brought to the surface and assessed on theoretical grounds.

How was the Arctic policy of 1969-70 possible? The first difficulty in answering this involves making a claim about whether Canada complied with international law and also whether Canada likely intended to do so. Such a step is essential in that we cannot say how the various pieces of Canadian legislation were arrived at short of understanding approximately what types of action would have to have been demonstrated to comply or fit with what Canada sought. Indeed, because the basis of Canada’s claims of what it was actually doing and intending to legislate towards achieving were permanently shifting, it is difficult to assess with any degree of objectivity whether compliance was intended at any point in the policy sequence, or whether Canada honestly believed that it had complied with the law when the policy concluded. As noted by many jurists, the problem involves assessing what is within the law that is to be complied with, and this is in some sense theory dependent, by which it can be argued that a particular jurisprudence delimits the zone of what law ought to be applied and by extension how it is interpreted.509

that manifest shifting legal ends points, or the ends that states seek in law, like that of the
Arctic example, are deeply problematic to evaluate. The key point to be determined is
uncovered in evaluating whether, and at what points, Canadian officials thought themselves
to be acting in compliance with international law, or acting within a zone of potential or
possible compliance. Accordingly, the question of “how the policy was possible” infers that
a claim can be made about what Canada believed it was doing in relation to its legal
obligations.

Canada was attempting to both legislate for environmental purposes and also assert a degree
of sovereignty over the Arctic, as reflected in the pollution legislation. In Sharp’s words to
the House, on April 17, 1970, Canada was not relinquishing nor “backing down one inch
from our basic position of sovereignty”, and the comments by Robertson, Legault, and Head
years later reflect that the enhancement of sovereignty was the primary motive behind the
policy initiatives.510 The policy was given legal support and precedential confirmation
through the 1910 North Atlantic Fisheries jurisprudence. But Canadian officials knew that
the waters were not internal under any criteria of international law unless the claim for
historic title could be proven. And in their minds, they believed this to be possible, therefore
removing the need for straight baselines which officials would have hedged, and cited
expressly at points, were ‘largely’ illegal at the time to draw in their entirety. Complying
with the law in not drawing baselines, even if considered possibly legal in Canadian minds,
would have been consistent with a state enacting a valid legal policy on the basis of existing
relationships with those states greatly affected. This type of strategy, as cited in chapter two
by Bilder (2000), explains why Canada would not have carried out the baseline policy in the
face of American anger if there were alternative possibilities to achieve the same end. Still, it
is difficult to imagine that the baselines would not have been deployed if the basis in
international law was strong at that point historically given the pressure Trudeau was under
domestically.511 On the sovereignty issues then, Canada was acting illegally if it believed

510 See quotations, infra, pg. 148.
511 Officials would go on to say that the need to draw baselines was “obviated” due to fact that the policy
combination granted Canada essentially the same jurisdiction (Gotlieb, 1974: 150). Such a claim must be
that the pollution measures would contribute to deepening the sovereignty claim, or that by extending the territorial sea to twelve miles this would have similar effect by creating ‘gateways’ on the east and west sides of the Northwest Passage. Canadian officials likely believed that legislating for pollution control would contribute to an overall position of sovereignty through the incremental development of effective occupation, but would also have understood that the extension of the territorial sea was partial in assisting the overall aim given that the right of innocent passage would always prevail in those waters.

While the extension of the territorial sea would likely have been considered legal in 1970, the pollution measures undoubtedly were not. In its note to the United States, Canada underscored the fact that though the United States had claimed that there was no basis in international law for legislating towards “exclusive pollution or resources jurisdiction” beyond the territorial sea, this claim was mistaken. In fact, the United States had over time extended customs jurisdiction up to twelve miles in 1790, sixty-two miles in 1935, claimed jurisdiction over the continental shelf in 1945, and fishing limits of twelve miles in 1966. However, that international law was largely made and given authority in multilateral settings, and that the Brussels Conference in 1969 had produced legal effects short of what Canada sought in terms of liability provisions, these facts did not mitigate that Canada was acting beyond international law irrespective of the Arctic policy’s legitimate veneer. Given that the reservation to the Court was deployed, and External Affairs believed the AWPPA was not a valid piece of international law are decisive evidential elements in demonstrating the Canadian position on the matter of legal compliance. In relation to the reservation to the ICJ, however, Beesley would go on to say candidly in October, 1972, at the Canadian Council on International Law’s first meeting that,

[n]ow can anyone sit here and tell me that if they were the legal advisor, if they were sitting in my seat, they would have said to the Government, “well, yes, that’s a nice thing you’ve done but you ought to go to court even though you are going to lose.”

somewhat overstated, however, given that the legislative package still allowed innocent passage to prevail once the pollution regulations were met, and thus the real issue of maritime threat would not abate in practical terms.

512 See Canadian Council (1972), at 111.
We may conclude, then, that the majority of Canada’s 1969-70 Arctic policy was illegal, and believed to be so by officials, but that the historical claim to sovereignty voiced politically over time was not necessarily in error given that proof might materialize over time to validate that claim.

Let us first sketch out arguments for the skeptics on the question of how the Canadian policy was made possible. Legal realists, and their counterparts in international relations, would hold that the policy was the natural outgrowth of a state faced with a matter of significant political concern, forced by fiat to enact secondary legislation to either mask what was occurring or with the aim of building a legal claim accumulatively over time. In either case, the policy of pollution prevention functioned as a mirage for sovereignty concerns, and the institutional conditions within international society were irrelevant in Canada’s actions of marginal compliance. Situations of high politics, even those short of violence, but which involve territorial issues, dictate by structural necessity that countries will deceive with legal rhetoric. Accordingly, states are always availed and propelled towards this possibility, regardless of historical time or political context. Critical legal scholars would adhere to these propositions, noting that international institutional conditions are subordinate in explaining cases deeply affected by the politics of international law. The ability of interpretive possibilities offered to lawyers, owing to the indeterminacy of international legal categories, allowed Canada to wrap its claim in legal creativity regardless of circumstance. For political and legal realists, then, the policy was possible for Canada because of either the marginal nature of legal obligation in critical matters of statehood, and/or the indeterminacy of legal argument to be naturally, and inevitably, exploited.

A second possible interpretation turns on the strength and momentum of Trudeau’s new foreign policy ideas generated from 1968. This explanation rests on the idea that the Arctic policy was an extension of the overall wave of policy change Canada was experiencing under Trudeau’s emerging leadership. This tide of novelty and self interest gave rise to the impetus to abandon Pearsonian internationalism, which, in turn, propelled the creative impulse towards unilateral measures seeming appropriate. Such interpretation is largely consistent with Alan Gotlieb’s historical understanding. Writing in 1974, Gotlieb claimed that prior to
1968, Canada’s integrity as a nation under Lester Pearson was shackled to ideas of international justice associated with the ICJ. By contrast, under Trudeau’s political guidance, momentum turned towards “national self-interest, and foreign policy was to be the product of the government’s progressive definition and pursuit of national objectives on the international plane….This led, in turn, to an assessment of how international law could further Canada’s national self-interest.”513 For Gotlieb, gone were the days when “there ran a common thread of concern that Canada’s position and international law should not be too far apart.”514

Writing in October, 1972 with his co-author Charles Dalfen in a paper presented at the First Annual Conference of the Canadian Council on International Law, the authors set out to explain how and why Canadian attitudes towards international law had changed and thus related more broadly to international ocean policy and the Arctic case.515 The paper argued that Trudeau’s new foreign policy was enacted to achieve national goals, and this reconfiguration led to novel interactions over political interests, legal realities, and their accommodation under a variety of instances in international relations. Canada’s changing priorities and awareness of international law’s limits allowed officials to see the law as an “instrument” for “regulating” a range of novel challenges and associated foreign policy dangers. Canada now perceived its role in the construction and dissemination of international law as governed by a belief that when multilateralism failed and national jurisdictional extension became paramount to mitigate harm against state and citizen, these two tendencies could be reconciled in policy even though they raised significant political “perplexities.” Relying on Julius Stone’s arguments from 1960 that the ‘fit’ of law to policy must equilibrate the act of balance towards ‘effectiveness’, Gotlieb and Dalfen offered a tacit response to the problem of reconciliation. States must “learn to live with” such perplexities and continue to distinguish “outrageous breaches” of conduct from those which “manifest

514 Ibid.
515 The paper would later be published in 1973 in the American Journal of International Law as a succinct statement of Canadian thinking. Records of conference proceedings in 1972, where the paper was the centerpiece of legal and political debate on Canadian history, reveal the variegated interpretations surrounding the authors’ thesis.
inchoate legal change”, they argued. In removing itself from the Court’s jurisdiction, Canada “became free resolutely to pursue stringent and more absolute concepts of international responsibility when its national self-interest was affected.” In short, the implication of the Gotlieb and Dalfen thesis was that new beliefs about international law were assumed to flow both within and from the contents of Trudeau’s original foreign policy pronouncements and political vision of 1968. Yet it bears noting that no foreign policy statement by Trudeau or the government prior to the Manhattan incident made any note of a new and instrumental role for international law. Hence, Gotlieb and Cohen had essentially torn a page from Oscar Schacher’s thinking five years prior, that international lawyers at the time were “old-fashioned” and “traditional” in their approach, concerned with “precedents and verbal niceties” rather than the hard realities of technological and environmental changes unfolding.

At the Canadian Conference where the paper was first aired for critique, Maxwell Cohen rose to challenge Gotlieb’s interpretation of Canadian legalism. His argument centered on the idea that Gotlieb’s historical reading of events was narrow, written from the point of view of a bureaucratic official, and may have missed the broader historical sweep of Canadian legal policy unfolding over decades. Cohen agreed with the earlier comments of Beesley, the first in the room to comment on the paper, expounding that one would do better by viewing the evolution of Canadian foreign policy and international law as based upon a process of “continuity.” Cohen supported this interpretation, noting that the 1950-58 period was defined by an activist Canadian Foreign Minister and UN support staff. It was a distortion of perspective to say that we had an activist foreign policy that was internationalist-orientated until about 1968, when we suddenly turned a corner and decided to take our national interests more seriously…I can think of hardly any major event in the 1950’s and 60’s, before the Trudeau regime, in which we did not take a stand on the national interest which we felt was important to protect in the international forum….So I would disagree with [the idea] that one must see these recent activities in outer space and particularly in relation to

517 Ibid, at 235.
518 Schachter (1967), at 423.
In support of the continuity claim, Beesley maintained that Gotlieb’s theory of Canadian legal change was in reality one of rhetoric. As to the use of international law as a new tool in 1969, Beesley’s impressions about Canada’s relationship to international law earlier in the 1960’s were similarly revealing. Following a review by Canada in 1963 on the state of international law as it related to UN activities and subjects of international concern, it was concluded that “Canada ought to adopt a more rigorous and dynamic approach to the development of international law than was being taken by the Western group generally.”

This stemmed from the fact that Western states were adopting a “defensive posture” toward legal accommodation for newly developing states, and motivated to uphold traditional, doctrinal interpretations of customary international law. Canada was moving forward against this trend occurring within the international institutional realm by adopting positive initiatives on issues such as “friendly relations” and an expansive view of “aggression.” In turn, this allowed Canada to position itself as a moderate broker willing to make concessions to new states entering the legal system. For Beesley, in 1963, rather than international law being subordinate to world politics, economic and technological development, “there was instead a vigorous and dynamic approach by states of all political standings directed towards developing and making more effective the legal basis of world order within the UN framework.” In other words, continuity existed within foreign policy construction and international law which was consistent with most states’ approaches toward international affairs. This historical process provides evidence then against the thesis that the Arctic policy was facilitated by Trudeau’s foreign policy. Indeed, by the time the Arctic policy was legislatively enacted, Canada had not yet even released the Trudeau foreign policy statement outlining how the national interest would be achieved.

In accordance with the interpretation of Beesley and Cohen, the activist and creative policy solution to the Arctic in 1969-70 would have followed, in all probability, regardless of

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519 Canadian Council (1972), pp. 120, 122, 123.
520 See the following document in the Beesley archives: http://www.library.ubc.ca/archives/pdfs/beesley/Beesley_2_4_1.pdf
521 See Beesley, ibid.
Trudeau’s presence and political inclinations. However, there were several other explanatory factors at work that the ‘continuity thesis’ does not capture, nuances which point towards conclusions beyond the idea that states are always availed of ambiguous forms of legal arguments when the politics of international law emerges. Rather, the institutional conditions within international society gave rise to the Arctic policy, the creative legal argument, and in particular, the ability for Canada to deploy the reservation before the International Court.

As chapter three outlined, by 1969 there was significant contestation occurring within the law of the sea regime and the institution of multilateralism at it related to public international law, ocean affairs, and the rights associated with development for post-colonial states. Canadian officials well understood this institutional environment given that it was being expressed in numerous diplomatic circles and through many of the world’s leading jurists. The law of the sea was held to be by 1969 as “in flux” by lawyers such as Henkin, the subject of total reconsideration (McDougal), a conflictual legal process (Robert Neuman), without numerous answers (Gotlieb), subject to endless conflict between its orthodoxy and the law of territory (Borgese), structured by legal anarchy and revolution (Pardo), hobbled by the problem of an appropriate legal regime (Young), and existing in a state of ‘plasticity’ (Jennings).

Skeptics might raise the argument that even though many jurists and political officials held the law of the regime to be contested, if it continued to function between states this would indicate a position of regime efficacy and general consistency. And as ocean politics did function between states in 1969, there is accuracy in this critique given that it downplays the effects of communication between actors and accentuates the point that international relations are generally subject to a range of rhetorical exchanges which occlude the realities

522 We may also note William Burke’s opening comments which frame one of the most important texts of 1968, Toward a Better Use of the Oceans: A Study and Prognosis: “Recent activities by the governments of influential nation-states, on the international level as well as within internal policy-making processes, provide convincing evidence of a growing concern over the legal and political problems arising from intensified use of the ocean for many purposes”, at 1. Speaking to the American Society of International Law in 1971, in response to the lead United States lawyer John Steveson’s comments that the law of the sea was in crisis, Leigh Ratiner, one of the lead US negotiators held that our “current policy is essentially a response to this revolution.” See Ratiner (1971), at 133.
of politics. However, the specific role of communication should be seen as providing an equally insightful view into a regime’s institutional position, along with its political and legal effects, at a historical moment. As Ruggie noted,

> [t]he impact of norms within international regimes is not a passive process, which can be ascertained analogously to that of Newtonian laws governing the collision of two bodies. Precisely because state behavior within regimes is interpreted by other states, the rationales and justifications for behavior that are proffered, together with pleas for understanding or admissions of guilt, as well as then responsiveness of such reasoning on the part of other states, all are absolutely critical component parts of any explanation involving the efficacy of norms. Indeed, such communicative dynamics may tell us far more about how robust a regime is than overt behavior alone.\(^{523}\)

In other words, states and jurist’s critiques of the law of the sea reveal a great deal about the relative and objective conditions of the regime. And during the period of the first pivotal Arctic deliberation, this condition was historically positioned as institutionally contested.

Attached to the status of the law of the sea regime was also a belief by many states that the multilateral framework had failed developing countries but also Canada’s interests throughout the 1960’s. For the developing world, the law of sea was properly understood through the prism of hegemony and institutionalized illegitimacy. International law had been forced upon these states in a coercive fashion, forcing many to be law-takers rather than equal-partnered law-makers owing to the rules of customary international law binding states to existing practices upon becoming legal subjects. As Beesley would note in his reflections of 1960’s lawmaking, the process that had unfolded in the international legal system was guided by the Soviets and non-aligned movement calling into question the fairness of all customary international law on hegemonic grounds.

Having witnessed its law of the sea interests become strained in the 1960s, Canada took full advantage of global disharmony in justifying its Arctic case and in further approaches to law of the sea codification efforts. It began to refer to itself as a “developing state” and align with like-minded groups in the Southern world. This was in many ways a strategic decision in Canada handling its international political and legal affairs, one which demonstrated

\(^{523}\) Ruggie (1998b), at 98.
support for legal change and assisted it in drawing favorably from shifting alliances. Canada understood that a series of forthcoming legal codification conferences that would remake oceans law, not with complete novelty, but out of the existing regime’s foundations. If the AWPPA could be interpreted as a legitimate instrument of law-creation when set against the ‘rusty chains’ structuring the existing law of the sea, Canada would maintain a stronger hold over which the Arctic policy could be used as a potential international bargaining position. In Southern states voicing their overwhelming displeasure with the law of the sea as how it related to concerns about the ability to capture sovereignty for economic gains, this group ushered into existence the discourse of fairness as it related to ocean entitlement and the moral purpose of the state to provide resources to peoples as a first priority.

As Franck explained in relation to how a common core of agreement functions in relation within certain boundaries of rule application, when there is marginal overlap of opinion on what can be argued to exist within a legal regime’s discourse, there will be no real agreement on its rule structure. For Franck,

> The rule fabric will be seen to be full of holes. The rule will invite creative evasion. The result will be to undermine not only the legitimacy of that which has been negotiated, but further to undermine the legitimacy of other community norms, and even the communitarian discourse by which some norms are formulated.524

In the law of the sea losing its aura of fairness by being unable to mediate between the necessities of order and justice for all states under international law, the regime of the oceans lost its authority to be followed reflexively owing to its position of moral obligation. The oceans regime lost its legitimacy due to its construction through a series of historical interactions which in no way could be considered ‘right process’ by virtue of it excluding an overwhelming majority of states. As the moral purpose of the state by 1969 countenanced that the possession and exploitation of economic resources was one of the primary bases of sovereignty, given that the law of the sea did not provide distributive benefits to those who both required and were owed assistance, it followed that the law of the sea had its aura of fairness diminished. States fell subject to, and were guided by the idea that, “[f]airness is the

rubric under which this tension [between order and justice] is discursively managed”, leading
the law of the sea to became unhinged from this position of rhetorical equilibrium and further
undercutting its ability to attract voluntary compliance.525 Ultimately, contestation in the law
of the sea regime did not allow Canada to deploy any variety of policy despite the fact that
international legal obligations were seen by some as existing on a continuum of bindingness
at the time.526 However, this structural framework did provide Canada an historic
opportunity to act instrumentally with international law and harness strategically the power
of normative discourses for political ends.

The other primary contributing factor explaining how Canada’s Arctic policy was
constructed was both the type and level of crisis that was being experienced in international
legal jurisprudence by 1969. As Chapter three detailed, the Yale policy school became set
against the dominance of European and British positivism, resulting in an era of pluralism
surrounding claims about the nature of international law, its autonomy to policy, the law’s
obligatory purpose and jurisdictional reach, and the role of treaty centered interpretation. Yet
this schism and its application to legal practices was contingent upon how a state’s legal
identity was constituted. Legal officials were adept enough to construct arguments based
upon competing theories, and whether a state’s lawyers were also policy driven or centered
in policy discussions mattered in how international law was thought about, rationalized, and
deployed. Most states had a somewhat stable and knowable international legal identity.
Prior to 1969, Canada’s was a form of relatively orthodox British positivism which also took
into account the Columbia school’s gravitation towards the role and promise of international
institutions, multilateralism, and cooperative law-making. However, the fracture in authority
within international jurisprudence gave rise to the possibility for Canada’s policy options to
be cast against the limits of law. This also strained Canada’s relatively stable legal identity
on the basis of political necessity if plausible arguments could be constructed.

Ivan Head understood that the pollution legislation would likely be viewed by most
international jurists as illegal and in all probability realized this while the policy process was

526 As Schachter (1967b) had explained.
unfolding. But Head was also quick to point out to people in External Affairs that the legislation was protected by its moral authority. External agreed entirely that Canada’s law was an example of progressive lawmaking grounded in legitimacy, even though the functionalist logic of Head had a marginal basis in international law as interpreted by External’s primary international lawyers. Nevertheless, with all other policy options legally foreclosed, Head insisted that the functional component of Arctic policy was the correct way to proceed and that the reservation to the ICJ could follow if necessary. The question of greatest interest then, is, how was Head able to justify this approach within Canadian positivist circles and make the reservation seem both reasonable and appropriate?

It was not the case that Head had in general admiration for the ICJ as a legal institution competent in solving the world’s legal challenges and attendant problems of international politics. Writing in 1965, his thoughts ring loudly: “the International Court of Justice has failed to command the confidence of States and is now a monument to the near-abandonment of institutional decision-making in the judicial sense.”527 And nor did he have great respect for the tradition of positivism and what were then considered conservative readings of international law. Indeed, Head was, at root, a policy school advocate. His words in 1966 could have been written by McDougal himself:

> Law is not an end unto itself, it is a means of fulfilling the orderly desires of the community...Rigidity results in the law losing its attractiveness as an agent for the settling of disputes.528

The problem for Head was that, in so far as McDougal was considered by many in External Affairs as a leading figure in international law, most Canadian government lawyers would not draw directly upon his jurisprudential reasoning due to the problems associated with McDougal’s use of legal language. Moreover, policy orientated jurisprudence had no historical basis in Canadian legal discourse and practice. With the schism in international jurisprudence resolutely divisive however, the Arctic problem provided an opportunity to deploy McDougal’s legal thought about a ‘reasonable’ reading of the law of the sea once re-

528 Ibid, at 3. Beesley was also described by Douglas Johnston (2007: 66) as a “jurisprudential product of the North American scene: a Yale functionalist without a Yale education.”
constructed under the proper ‘authoritative investigations.’ Canada just would not mention by name the guardian of Yale to its American audience, who would have likely thought this application both amusing and self-serving.

The jurisprudential divide of 1969 facilitated Canada’s reservation to the ICJ on the following basis. Head understood that Canada could walk the tightrope of legality on the AWPPA, echoing McDougal’s legal interpretation on the law of the sea, while also knowing that the schism in international law mitigated creative legal reasoning from being held in disrepute. As the next section details, McDougal’s legal doctrines mattered explicitly to specific components of the Canadian argument. However, in relation to the indirect impact, or conditions of possibility that McDougal’s jurisprudence had on Canada’s foreign policy, Ian Brownlie had this to say in 1972:

Another reservation I would like to make about the use of policy in teaching is this: The kind of policy reference I do not like is the one that brings in special circumstances. This where I am in some danger of misreading Professor McDougal. What is called a contextual approach to my way of thinking encourages unilateralism. It encourages the view that by reason of special policy considerations one breaks away from the rule…. When one gets the Canadians or whoever happens to provide the latest example of, if you like, a form of practical contextual analysis, where they say, “We have special policy reasons including the uncertainty of the law: and so on, in declaring a 100 mile, antipollution-jurisdiction zone in the Arctic, then this sort of development is more easily rationalized by a certain type of policy interpretation which emphasizes the special circumstances…this point of [McDougal’s] contextual analysis as applied in certain situations…is a sophisticated invitation to a certain type of unilateralism.”

It was only by virtue of positivism’s continuing demise in the late 1960’s that such an invitation could be seen as readily at hand for Canadian legal officials, deployable even when cutting against the grain of Canada’s cumulative international legal identity. It was therefore quite understandable why Paul Martin Sr., upon watching the Arctic reservation pass in Cabinet in 1970, was described by his colleagues as “heartbroken.”

How did International Law Matter to the 1970 Arctic Case?

For realists, the law did not play any significant role in 1969-70, as the penultimate legal component of the case was the issue of Canada consolidating a form of sovereignty. By

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529 Brownlie (1972), pp. 101-102 [emphasis added].
extension then, through various techniques, Canada circumvented international law in order to attempt to achieve a more consistent legal position on the sovereignty issue. Canada ostensibly attempted to “shake off the restraining influence” of law on foreign policy, as Morgenthau so candidly put it, and the comments of Canadian authorities reveal this proclivity and direct sense of attempting to mislead audiences in what it was attempting to achieve on the basis of sovereignty. However, international law did foreclose policy options for Canada, which, in turn, led the pollution legislation to become perhaps the only credible position to cleave to. Straight baselines were never enacted at the time, nor was the sector theory, and it was not considered possible to build the Arctic case upon the ice as land doctrine. Many of the explanations behind why these legal rules had restraining effects on policy choices can be understood as a result of legal reasoning from notable international lawyers at the time. International relations realists are however correct in pointing out that Canada’s policy options were subordinated to more convincing and practical legal approaches. On the issue of compliance, then, political and legal realists can explain Canadian action quite convincingly: the issue was of serious concern to the state involving matters of control over ‘territory’, and thus Canadian self-interest dictated largely why legal rhetoric was used to cloak ulterior purposes. The fractured nature of international law was used to blanket a policy of political necessity, and Canada relied upon the only type of power that it could wield to preserve its interests, a form of moral power, or ethical authority.

On the issue of how Canada’s reputation played into its decisions about compliance, rationalists would argue that, in the cost benefit calculation of aggregate utility Canadian officials were engaged in, the payoff from maintaining Canada’s international legal reputation of high standing was insufficiently valuable when set against the necessity of securing a policy of minimal legality, but one that did mollify public opinion and allow Trudeau to adapt its course. Yet as rationalists note, states will suffer reputational sanctions and damages to their international standing if the immediacy of an issue outweighs future negative judgments about a state’s level of trust.530 Canada was attempting to cultivate

530 See Guzman (2008).
several reputations in order to preclude negative repercussions from having lasting effect as a result of acting unilaterally. That Canada was able to secure for itself the characterization of the world’s most concerned environmental leader, one willing to mount moral critique against an institution of unjust law, its success in carving out this niche provided support to push the wider aims of the policy forward were Canada’s broader reputational effects to suffer through the use of the reservation. Because Trudeau was early in his term and the Arctic issue was of central importance in maintaining consistency with his early promulgations on new policy direction, Canada’s legal reputation for international justice and order through law could be subordinated to an emerging reputation associated with progressive, non-hegemonic lawmaking and a plurality of new identities wrapped up with legal fairness, environmental steward, and supporter of developing states. As Bilder commented, it is a state’s “integrity of the foreign policy position as a whole” that is key in compliance tradeoffs, and thus the moral legitimacy attached to Canada’s strengthening of the global turn towards ecological justice was either sufficient to remove the concerns of non-compliance, or served to mitigate political damage that might be incurred. Still, the former seems all the more likely given that when evaluating the domestic and international relations of the Arctic policy, domestic support early in Trudeau’s term was easily granted due to the general malaise towards what was perceived of as economic expansionism dictated by Canada’s southern neighbor.

When looking further at how international law mattered to foreign policy based upon its facilitative element, the structural effects of legal theory in the Arctic case are significant. As legal theory sets the course for questions about the nature of law and justice to be raised in relation to the application of legal rules, it follows that the centrality of theory governing a state’s officials will force responses in somewhat predetermined ways. Indeed, to recall Brierly, states’ officials are often unconscious of their theoretical biases when making legal claims or evaluating conduct. In Head’s case, as noted above, his admiration and dispositional loyalty fell towards the role of law associated with policy jurisprudence unconsciously, but Head’s strategic approach reflected his comprehension of the state of international jurisprudence and Canada’s unique role within this emerging dialogue on the
international legal system. Most revealing, however, was the analytical basis, or origins of legal theory that structured the Arctic policy. The parallels between Canada’s policy, its rhetorical justifications, and the law of the sea commentary written by McDougal and Burke in 1962 are unmistakable. Indeed, that their text was considered as one of the leading volumes in the field by 1969 must have given Canadian officials, and Head in particular, considerable comfort.

In a practical sense, Canada was essentially claiming that the extension of the contiguous zone was insufficient to protect coasts from environmental harm. McDougal and Burke, seven years earlier had held that “rational community policy” must be governed by the idea that the “permissible purposes” for which the contiguous zone is put into practice to regulate must be “sufficiently broad to permit protection of all the manifold unique interests of particular states which may be especially endangered by approach from the sea.”531 As to the permissible geographic breadth of the zone, they wrote that “[u]ntil more effective general community institutions of world public order are created … there appears no reasonable alternative to a recommendation that the contiguous zone be maintained as a highly flexible device, capable of adaptation to secure the reasonable protection of any exclusive interest shared by states.” In relation to how international lawyers were to evaluate specific claims involving the contiguous zone, McDougal and Burke offered a quintessential rationalist method: lawyers must determine “[w]hether the interest sought to be projected does warrant the authority asserted, for the time projected, and in the area specified, again is a function of balancing factors relevant to the assessment of the importance of the exclusive interest against the deprivation of inclusive use.”532

Perhaps most importantly for Canada however, “[t]he question for policy”, or in other words ‘law’ for policy school advocates, “relates not to the number of miles from the coast at which exclusive competence is claimed but to the functional relationship between authority claimed and the exclusive interest requiring protection.”533 This conclusion was deemed reasonable

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531 McDougal and Burke (1962), at 582.
532 Ibid, at 584.
533 Ibid.
on the basis that the “effects of interactions at sea may be projected for very considerable distances.” On the state of current legal practice, it was observed that

a considerable number of important states, including the most powerful, assert authority for security purposes beyond the territorial sea and seldom encounter serious objections … On occasion states claim a limited special authority for protection of well-being, as in the prevention of health, sanitary or pollution regulations.534

As to the legislative history of the concept of the contiguous zone, the authors noted in 1962 that there was “little agreement on the variety of particular purposes the contiguous zone might serve”, but lawyers should be reminded that the International Law Commission in its original debate on the matter in 1956 concluded that the term “security rights” ought not to be included in the list of permissible purposes served by the zones. This was to be excluded from the menu of legitimate purposes because of the ease with which the terminology of ‘security’ can be abused by states.

However dangerous this possibility of manipulation, it followed for McDougal and Burke that, “the single twelve-mile width even for the few permissible purposes, would, thus, appear to be … about as far removed from desirable community policies as from then probable future realities of claim and decision.”535 In other words, the twelve-mile contiguous zone was neither effective, by virtue of its arbitrary nature, nor likely to be seen as legitimate in future ocean delimitation negotiations. The contiguous zone therefore needed to be enlarged to meet the broader community’s needs of individual self-protection. In reference to how Canada could advance mixed claims to sovereignty by attacking the limits of the contiguous zone, McDougal and Burke provided counsel:

In regard to the relevance of the premise of sovereignty, it should require little emphasis that states need not, and surely do not, make claims to sovereignty over adjacent waters when they assert claims only to an occasional competence to prescribe for the protection of certain particular interests in specified contexts.536

Such a legal interpretation could only have strengthened the Canadian case given that McDougal and Burke’s work underpinned in law many contours of the Canadian argument.

534 McDougal and Burke (1962), at 594.
535 Ibid.
536 Ibid, at 610, [emphasis added].
But why then was the substantive core of McDougal and Burke’s thought not mentioned expressly by Canadian officials? Two explanations appear plausible. As noted, although all Canadian officials were either direct adherents to the Yale school, or commented that they held McDougals’ thinking in high regard, to argue from the jurisprudential basis of the policy school would have run counter to Canada’s legal identity forged over time. Canada had never invoked legal language that corresponded to McDougal’s somewhat perplexing and awkward cadence. Indeed, that it would have been awkward for legal officials to invoke McDougal’s approach or deploy his language in its fullest expression was neatly captured by Beesley at the Canadian International Law Conference in 1972. In response to McDougal’s supportive statement at the conference of how Canada had attempted to run through procedurally ‘authoritative investigations’ attached to the ‘policy process’ used in solving the ‘genuine problem’, Beesley quipped,

I don’t see how anyone can be faced with serious decisions on these topics without attempting to go through the kind of process you have just described. When it comes to terminology I’m simply unable to use your rhetoric, especially in the U.N. where I have to be understood by people who speak different languages.

As centrally, to invoke McDougal’s legal view was to invite a clear discussion from the United States of the subject of law, not the functional aims of Arctic policy or its justifications for recourse to a clean environment. Drawing in the international legal college to adjudicate the dispute contained the danger of having the Arctic case placed in the glare of legal hypocrisy.

In sum, the narrative of Canada’s interaction with international law during the early Trudeau years must to some degree be re-cast. Trudeau’s ideas about world politics and how Canadian foreign policy should fit within this frame are explained as driving change towards Canada’s flexibility with international legal doctrines. However, the evidence presented here has attempted to show that when this argument was first constructed and justified by its primary exponents it was received with a degree of skepticism from other Canadian

537 See the “delightful” critiques of McDougal’s language by Fitzmaurice (1970); Allott (2005); and Koskenniemi (2005).
538 Beesley (1972), in Canadian Council (1972), at 145.
authorities who had been seized of legal matters for decades. To be sure, Gotlieb structured his understanding in many ways on Canada’s frustration with law of the sea efforts which had effectively become stalled due to American obstinacy during the 1960’s. Nevertheless, the claim made here is that it was the basis of the creative legal argument, this process of deliberating about the new contours of jurisprudence for a new era, which set the tone for Canada’s approach to international law to be altered. It was not Trudeau’s vision, but the experience of the Northwest Passage policy sequence embedded within the politics of international law, that altered the possibilities for a new Canadian international legal identity to emerge and a new course for international legal affairs to take root.

By extension, we can only understand this political and legal process of change by comprehending the conditions of possibility that led to the Arctic legislation being considered possible in the first instance. Such sequencing, I have argued, was due to a combination of institutional pressures within international society. Canada’s legal engagement with the United States and the broader world, its questionable approach to achieving a measurable level of compliance within a shifting debate on what the terms of law were and what Canada was legislating towards, should not be viewed solely as the result of law being structurally indeterminate. However accurate the argument that international law cannot remove itself from the freedoms of interpretive possibility as critical legal theorists suggest, Canada’s was locked into a relatively fixed identity of positivism prior to the Arctic policy even though many of Canada’s key officials in 1970 were inclined towards dynamic jurisprudence if an opportunity were to arise. The fracture within the law of the sea provided a normative entrance for legitimacy to mediate the concerns of pollution control and globally regarded ‘special areas’. Public international law had split on whether law had a distinct purpose, whether this could be found, and if so, how such a formation contributed to applying legal norms to situations of fact. This window of opportunity allowed Canada to engage in deliberations about the possibility of a creative legal argument, and the specific contours of its substantive contents. In other words, Canada was grappling with understanding the limits to the politics of international law in a matter of high public priority, given that in forging an Arctic policy from tenuous legal foundations “the international law
of the sea was in a great state of flux and thus the establishment of new rules of the law of the sea was largely a political rather than simply a legal matter.”539 Canada therefore had some license to play with the law for its own purposes. But how this flexibility could be squared with the requirements of legal compliance involved breaking down the structural impediments of legal theory and forging a new identity about how politics and international law should be reconstituted in an era of technological advancement, scientific awareness, and global justice.

Conclusion

Canada’s engagement with the politics of international law over its Arctic policy of 1969-70 reveals the myriad forms and roles of international law in foreign policy processes. This chapter has attempted to underscore the range of legal factors in consideration over the course of the policy’s formation. In keeping with the theory developed in chapter two on the primary functions of law, Canada’s Arctic policy revealed elements of legal constraint as the binding effects of straight baseline law and the ability to get around the problem of innocent passage following the baselines being drawn to restrict Canada’s policy choices. But even in doing so, the extent to which the law of the sea was structured by a wide range of interpretive possibilities also allowed the law of the sea regime to be used for the purposes of enablement given that an expanded interpretation of baseline law could, if required, be stretched to accommodate Canada’s unique geography. Canada also used the politics of international law as a strategic weapon to move its Arctic policy onto terrain that could be considered legally valid to some audiences and also legitimate to others. Canadian policy was grounded in creativity, engaging legal rules with elements of normative intersubjectivity and particular collective norms in order to fashion a legal argument to meet its strategic priorities. The domain of legitimacy mediated this interaction between competing legal regimes, progressive forms of jurisprudence, and debates about what the nature of international law at a given moment.

Finally, it has been argued that Canadian policy can be explained as a result of the fractured institutional conditions of international society in 1968. In making this claim, the chapter has outlined counterfactual evidence and engaged with competing theories in order to provide plausible alternative accounts. There is not overwhelming evidence to suggest that the structural effects of international legal discourse gave rise by fiat to the Canadian policy being possible, as critical legalists and political/legal realists would maintain. Rather, Canada’s positivist legal identity to some extent prohibited it from engaging in legal progress. However, the Northwest Passage policy experience provided sufficient opportunity to unleash Canada’s new legal subjectivity as a progressive leader in international legal affairs. Canada could claim allegiance to policy school jurisprudence when required, and use this new legal identity to beneficial ends as the law of the sea deliberations moved towards codification. For Canada, in having the Northwest Passage and Arctic policy frame its law of the sea efforts, the move towards progressive legal interpretation provided greater scope to negotiate not only with the United States, but as importantly, Canada’s newly formed alliance with its new allies in the developing world.
Chapter Six: Canada’s Process of Persuasion through Legal Diplomacy: The International Legal College Weighs In (1970-1972)

By the end of April, 1970, the Trudeau government was situated in a favorable position politically in relation to law of the sea issues. It had quelled high levels of dissent and rancour within Canadian domestic circles based upon the perception of American intransigence towards Canada’s Arctic territory and waters. And Trudeau had, to many audiences, successfully rationalized the Canadian case on the basis of necessity, proportionality, and the prescience of environmental precaution. Adding credibility to his appeals, the scope and severity of the environmental crisis were only given further confirmation in the April edition of *Foreign Affairs* in George Kennan’s comments that the natural environment and man’s survival within it was intimately threatened. However, with domestic audiences placated, Canada faced a far more difficult task of persuading the international community of states and international jurists of the legal validity of the Arctic legislation. Canadian officials decided upon a multifaceted strategy to secure the legal claim, involving an intensive process of persuasion and conceptual framing carried out through a variety of personnel, including government officials and Canadian legal academics. This alignment and division of labour had by 1970 become somewhat natural in Canadian bureaucratic and legal circles. Indeed, there had emerged a distinctive inter-connective relationship between government and the Canadian legal academy on many issues of international law as ideas moved with relative fluidity and candour between both domains. These individuals formed perhaps Canada’s earliest cadre of members in its ‘invisible legal college’, a professional community of international lawyers constituting an “invisible college dedicated to a common intellectual enterprise” of legal thought. As Schachter famously explained, these international lawyers and policy consultants formed in the late 1960s especially a transnational, epistemic community bridging academia and foreign ministries.

Canadian Arctic strategy from 1970 forward was grounded in the following logic, as officials from External Affairs recount. While it would be extraordinarily difficult to persuade

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540 Kennan (1970). Trudeau would go on to reference Kennan’s argument text later that month in public.

political and legal officials in Washington of the merits of Canada’s case given the incommensurable positions that had hardened over the previous months, influence could be built through interactions with American and international legal academics who then, through further discursive exchanges with colleagues and government officials, might become facilitative agents in challenging Washington’s position as either invalid or too stringent. The Canadian aim was to reach as many audiences as possible via a “shotgun approach”, a strategy denoting the pressure brought to bear by Canadian officials in academic exchanges and forthcoming institutional forums through which the Canadian legal case would ‘stick’ and become socialized with various audiences. If the net were cast widely, a range of critical professionals, whether governmental or academic, were likely to fall within it. Deriving support from the international legal college was therefore essential in securing bargaining power for Canadian positions in law of the sea debates. But cultivating a perception of legal authority was also central to Canada’s need to reinforce the idea that an element of justice existed at the core of the Arctic policy, a point which had been lost on many as a result of Canada’s partially tarnished identity as international legal advocate.542

1970 was both a critical year in Canadian law of the sea matters and the Arctic policy in particular. As McDorman has recently noted, 1970 marked a time “that the Canada-US salt water relationship both set off in different directions and moved into the modern era,” informing the attitudes and perceptions of both states for a period of forty years.543 These insights are essential in understanding the development of the Arctic policy in the twenty years to follow. While the United States moved towards ensuring the success of a multilateral treaty to reverse political and legal uncertainty structuring ocean affairs through codification and to some extent legal reform, Canadian policy was similarly bent towards parallel objectives of legal change, but Arctic policy in particular began to move down a relatively consistent policy pathway. The Manhattan voyage was a critical juncture, or event

542 As Louis Henkin (1971: 135) would later remark, “[a] blow at international law by Canada is perhaps the most unkindest of all.” L.C Green would also starkly report to Canadian officials at the Canadian Conference of International Law in 1972 that throughout his tours of the “Eastern world” people were aghast that Canada would remove itself from the jurisdiction of the Court.

of significant magnitude from which Canada’s creative legal argument had the effect of foreclosing future alternative policy choices, not in a fixed deterministic manner, but in relation to policy options located beyond the rhetorical boundaries of the argument’s substance and its future implications for the law of the sea. Arctic policy development thus moved in a path-dependent sequence. This involved Canada’s initial policy choices in the creative legal argument being referenced, or layered, within any future policy decisions made thereafter. In other words, elements of the initial policy position could not be removed from impacting upon policy decisions given that these were ‘embedded’, or locked-in to the policy trajectory and ultimately constituting a core element of it. Though many policy issues are assumed to move in such path-dependent sequences, in the Canadian case, aspects of legitimacy associated with the creative legal argument, along with the demands of the politics of international law as they related to legal validity, played a decisive role in shaping the contours of Canada’s policy choice.

Canada needed to maintain a subtle overlap between legitimacy and legality in order to preserve the Arctic policy’s credibility over time. This required potentially persuading states and international lawyers about the policy’s validity in light of retaining the possibility of Canada institutionalizing its claim in codification efforts to follow over the early years of the 1970’s. However, the argumentative basis of ecological necessity upon which AWPPA and the creative legal argument were founded did not structurally determine the entire range of policy possibilities open to Canada even as the Arctic policy moved down an institutional pathway of dependence. Though the obligations of preserving a unique ecological domain were central to Canadian efforts, officials in various bureaucracies and External affairs would continue to investigate the possibilities of supplemental policy options based upon arguments for historic title and the use of straight baselines. The aim of this approach was straightforward: to provide a composite legal defence if necessary in future, one which drew upon developing legal opinion and combined to the highest degree possible a variegated web of overlapping legal defenses which in the aggregate constituted a position of international legal validity. The challenge for Canada was to learn how to accomplish this task, what the

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544 See, for example, Pierson (2004); and in international relations, Goddard (2006).
The aims of chapter six are two-fold. First, in detailing the historical dynamics associated with the Arctic policy from 1970 through to the IMCO preparatory meeting on maritime pollution in early 1973 prior to UNCLOS\textsuperscript{545}, chapter six shows how the process of cognitive learning by Canadian officials was carried out and eventually gave rise to policy change. Understanding this causal sequence involves demonstrating the range of arguments put forth by the international legal college problematizing the Canadian position, the specific components of legal merit within these arguments, and how, as a result, these claims forced adjustments in Canadian beliefs about the substance of the case and legal strategy. Second, in showing both when and why legal learning was present, it is possible to draw out inferences along the policy process of how international law mattered in policy thought during this historical period. The argumentative domain associated with the Arctic policy, which included along a continuum supportive reasoning and critical assessments, moved historically into a period where a pluralistic range of opinions were being consolidated on the contours of the new law of the sea. Various interpretations of ‘Arctic law’ in relation to the

\textsuperscript{545} The IMO was formerly known as the IMCO, the Intergovernmental Maritime Consultative Organization.
Northwest Passage were forced to become integrated into the beliefs and strategies caught up with the UNCLOS forum, international society’s most extensive law-creating process carried out to date.

The effects of international law in this interim and lead up phase were felt in several other areas beyond that of facilitating information. The process of generating ideas and principles about the form of the new law of the sea carried with it many continuities and disjunctures associated with the existing law. The law of the sea by 1971, and the interactions that it facilitated between states, demonstrated a variety of structural and normative effects on Canada’s conduct and policy thought, both restrictive and facilitative. States were beginning to construct policy papers to be submitted to UN General Assembly on draft proposals for the law of the sea, and the early years of the 1970’s marked a period where seeds could be sown to produce a form of *opinio juris* between and within states on how customary international law was evolving and ought to relate to future ocean pollution measures. For Canada, this movement was of critical importance. If a wide basis of collective agreement could not be established about the legality of Canada’s pollution legislation, the effects of international law would be marginal as Canada would be unable to continue to sustain a policy position consistent with its need to enforce with binding effect the AWPPA.

The period of 1970-71 tracks empirically the manner in which rhetorical persuasion through the “shot gun approach” was attempted by Canadian officials and academics and became, in part, a partially successful strategy leading into UNCLOS. The period thus highlights the power of social and legal rhetoric in communicative exchanges, as many of the best international legal minds within North America became engaged in argumentative warfare with each side bent upon discrediting the opposition through the use of legal persuasion and cognitive framing.

**Spring, 1970: the Canadian Legal Academy goes to Broadway**

On April 24, 1970, Canada’s opening act was set in motion, as the annual conference of the American Society of International Law convened in New York. Attending were two of Canada’s premier international lawyers, R. StJ. MacDonald and Douglas Johnston, who
circulated a document in which they attempted to explain the reasoning behind the pollution legislation and the international problems associated with its enactment. The document, which allowed Johnston to categorize their presence as being “armed with virtue”, was of interest in that it attempted to capture the general contours of legitimacy and law within the debate by articulating the problem Canada faced as one that originated within the institutional structures of the United Nations framework for multilateral codification efforts. In so doing, the article attempted to show how institutional impediments associated with multilateral law-making required states who wished to conceptualize and create law in a dynamic manner to embark upon unilateral action in order for customary law formation to potentially emerge from such practice. The fault stemming from these institutional conditions resided in none other than the “international community”, itself having given up on the task of progressive law-making in environmental matters and having failed “to remedy a critical situation affecting its essential interests.” The IMCO was captured by flag states, it was argued, and could not achieve a proper balance between shipping interests and environmental protection. In turn, the international community had through “passive confirmation” allowed the IMCO to undertake this work because there had been no other agency capable of dealing with “far-reaching legal and technological implications” of the environmental question. The IMCO had no less than “retarded the development of international legal norms” in the field of environmental pollution, and in eschewing preventative action based upon reasonable boundaries of self defence the agenda of the Brussels Convention (1969) relied upon a mistaken logic of armed attack and a defence of negative liberty on the high seas. Lost were the ideas that preventative action was reasonable in environmental matters and that obligations were owed to all peoples to administer for the

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546 Printed as, “The Canadian Initiative to Establish a Maritime Zone for Environmental Protection: Its significance for Multilateral Development of International Law”, University of Toronto Law Journal (1971). In addition to Johnston and MacDonald, Gerald Morris and Richard Arenas contributed to the piece. ‘Circulated’ may be the wrong verb in categorizing their action, however, as they simply left seventy copies of their paper outside an early conference session for participants to take in order to perhaps stir up debate on the matter at the conference, as Douglas Johnston recalls.
public good of the oceans. By contrast, Canada’s actions were progressive in contributing to a “desirable pattern of procedure” for the United Nation.547

On the broader question of whether Canada was undermining an effective international protective regime for the environment, or engaging in an act that would “turn back the clock” in ocean affairs, MacDonald et al proposed that this question be answered against the international community being responsible for two kinds of failures: “to develop first-order principles to govern the marine environment; and the failure of shipping, industrial, and other user states to negotiate agreements for the establishment of institutions, procedures, and administrative rules to deal with the problem of risk-bearing and distribution of losses in the light of greatly magnified pollution hazards.”548 Again, by contrast, Canada was providing these first-order principles while also committing itself to negotiation on the subject of the marine environment. As to the status of the existing international law on marine pollution, the authors rhetorically framed the problem as one that required an initial evaluation of what in the first instance legal rules and legal concepts were in place for. Hence, while the contiguous zone could be explained as a necessary response to problems within a narrow spatial area requiring state authority in limited scenarios, it followed that “a pollution zone is no less acceptable because of a spatially less modest limits if these limits are wholly appropriate to the problems of pollution and the function of environmental control.”549 In sum, the lawyers attending the American Society gathering were encouraged to give consideration to and ultimately promote the following propositions: all states have a responsibility to establish norms and procedures to protect the marine environment; the new law of the sea required that the principle of universal responsibility be built into its framework; and that the UN had to reallocate legal issues of importance to agencies beyond those captured by vested interests in order for these institutions to deliberate objectively on matters of international law and ocean administration.550

547 Supra note 540, at 247.
548 Ibid, at 249.
549 Ibid.
550 Douglas Johnston would go on in the mid 1970’s to further develop the idea of environmental obligations states owed to one another. See his, Behind The Headlines (1971). Johnston saw these duties as already built
The dissemination of the paper also presented the first opportunity to hear explicitly what prominent international jurists thought of Canada’s actions in the Arctic. Speaking first at a panel on Arctic law, professor Wolfgang Friedmann asked the audience to see the Canadian action from within the context of what was happening in the dominant processes of ocean affairs. “We must not delude ourselves”, he argued, “there is presently ‘an ocean bottom grab’ doctrine being put forth”, and while the Canadian action contains a noble element in that it “may have been a genuine move for conservation” it also “contained an element of destruction of the freedom of the high seas.”

Myers McDougal, in formally acknowledging with the audience that an environmental crisis had materialized, held that states should be free to move in both unilateral and multilateral fashion in making law. When cooperation was not attainable, states ought to be able to invoke the doctrine of self-defence and self-help in these instances. Professor Edward McWhinney, a prominent Canadian lawyer, took an alternate approach constructed in consultation with Alan Beesley, stressing that while Canadian actions challenged international law procedurally by excluding adjudication through the ICJ, substantively the law was in accordance with the legal frameworks on pollution set out by the Institute de Droit International in September of 1969.

It is unclear why this defence stemming from the Institute was not brought to light in Canada’s earlier exchanges with the United States, perhaps beyond Canada not having

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552 Douglas Johnston (2007: 72) described McDougal then as a “friend of Canada”, adding that McDougal seized upon “Freidmann’s remarks as an example of misplaced faith in the suzerainty of form at the expense of substantive merit.”
553 Testifying before Canada’s Commission on Indian Affairs and Northern Development on April 30, 1970, Beesley would justify Canada’s unilateral action on the basis of the preamble and Draft Article 1 and IV from the Institute, which read from the preamble that “appropriate measures to prevent such accidents as far as possible may be taken on a joint basis either by a multinational agreement or through the action of a authorized body or, in absence of such procedures, by the individual states concerned…”, p. 10. Beesley was also at pains to stress Article VI: “States have the right to prohibit any ship that does not conform to the standards set up in accordance with the proceeding articles for the design and equipment, for the navigation instruments, and for the qualifications of their officers…” (p. 12). While not formal law, this was for Beesley, “the kind of thinking that a learned group…has been carrying through in the form of a draft convention for states.”
found reference to it until early April, but such an omission would denote further evidence that Canada’s creative arguments were intended to be grounded in a basis of legitimacy and further expose the hypocrisy of the American position in it opposing reflexively and without reference previous historical extensions of the contiguous zone for protective purposes. Nevertheless, by the end of the American Society’s conference, Canada had found support in many quarters, but perhaps unsurprisingly, specifically with scholars associated with the policy school, including McDougal and Rosalyn Higgins.554

Of greater significance in gauging the interests of the United States was President Nixon’s statement to Congress on May 20, 1970, concerning the problem of oil pollution. On the point of how the “evident problem” of pollution ought to be dealt with, Nixon adopted a conciliatory approach to reconciling diverse domestic interests involved: “[t]he development of world commerce and industry and its growing dependence on oil need not result in these added dangers (threats to the marine environment). The growing threat from oil spills can be contained - not by stopping industrial progress - but through a careful combination of international cooperation and national initiatives.”555 In announcing a new policy in which American efforts were to be intensified towards the curtailment of marine pollution, perhaps most astonishing was Nixon’s belief that most of the action required would have to be carried out in unilateral fashion by the United States in the proximity of its coastal waters. So while advancing, on the one hand, an invitation for multilateral solutions, in typically shrewd fashion, Nixon was willing simply to replicate the Canadian approach as a result of having had the issue slip from his grasp in the first bilateral exchange.

The Fifth Annual Conference of the Law of the Sea Institute, at the University of Rhode Island, on June 15-19, 1970, provided further opportunity for Canada to advance its ever

554 Higgins noted, for example, that while the Canadian claim suffered from political and tactical flaws, in that Canada did not “move adroitly in terms of getting support” for its actions, it had first attempted to forge the pollution legislation within the boundaries of collective expectations rather than in a specific, self-interested form (p. 58). In terms of the process of customary international law creation, Higgins, following Quincy Wright’s comments that the world required the development of legal methods to bring the law up to date in order to keep pace with technology and science, held that custom could now be created in “rapid fashion” depending upon the level of acceptance granted to a specific, tacitly illegal act, carried out by a state.

expanding legal defence from two of its most authoritative voices, Len Legault and Douglas Johnston, and also a chance to hear for the first time how the American response would be positioned by government lawyers.\footnote{The LSI annual conferences were described by Johnson (2007: 72) as forums which “would crackle with new ideas about the changes needed in ocean law in order to reflect the new realities of ocean use and to accommodate the new demands for effective ocean management.” See, \textit{Proceedings of the Fifth Annual Conference of the Law of the Sea Institute}, June 15-19, 1970, edited by Lewis M. Alexander, University of Rhode Island (1971).} Legault presented a traditional defence of Canada’s position, focused on the idea that Canada was only exercising jurisdiction within the region due to the special problem of oil decomposition in Arctic waters. In framing the matter as a particular geographical example requiring a special response, Legault was able to make the case that a grave danger to the environment of a state constituted a threat to its security “and indeed perhaps to its continued existence.” Analogously, the right of self-defence in these settings, now painted by Legault with a broad brush to include the survival of the state in relation to an oil spill, found a basis in law in accordance with George Schwarzenberger’s legal ideas of the 1960’s that the right of transit beyond the territorial sea could be restricted if certain conditions leading to an infringement of sovereignty were met. The intricate combination of ice, water and land within the Arctic area required special treatment, Legault demurred, and was an acute example Schwarzenberger’s thesis on how to think about territorial, and thus, sovereign harm. On the nature of Canada’s motives in constructing its Arctic legislation, when questioned from the audience as to whether Canada was masking its claim to sovereignty through its pollution legislation, Legault responded in the negative: “the good faith of the Canadian Government on this question is unchallengeable.”\footnote{See Ibid, Alexander ed. (1971), at 322.}

Douglas Johnston, by contrast, took an entirely different approach, but one in keeping with the broader Canadian preoccupation towards trusteeship and administration, conceptual ideas which straddled the line of law and policy typical of the Yale school. He urged the participants to picture the Arctic as a “managerial concept”, and to in some sense give Canada the benefit of the doubt as to its authenticity and the type of problem it was attempting to solve. Canada ought to be given greater allowance to fully explain the linkage between its Arctic policy, maritime policy, and environmental protection policy, all three of
which were intertwined within the legislation. Johnston’s frame was then taken one step further, grounding how the Canadian act was to be rationalized. The area should be viewed as a “region, an ocean, and as an environment”, and that the type of authority required for a unique area in being “consistent with international principles” gave rise to the conclusion that the Arctic could “be regarded as severable from the rest for the purposes of good management.”558 When viewed geographically, Johnston made the point that 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.”559 It followed that, if states were able to make sovereignty claims to hypothetical islands, “they should be ready to question the mechanical application of the freedom of the high seas to hypothetical waters.”560 In terms of how states ought to evaluate the Canadian claim in light of whether Canada should have negotiated with the United States a bi-lateral or sub regional agreement, this depended upon the interpretation of both state’s national interests in the matter “in the first instance.” The American interest was solely economic and therefore potentially negotiable, whereas Canada’s had a greater social component. The United States could anticipate economic gain, while Canada could foresee social loss. If technological means were available to confine spillage in frigid waters, only then should a regional arrangement be constructed as such a breakthrough would eliminate any social loss Canada would incur.

Also on the panel was Leigh Ratiner, Chairman, Defense Advisory Group on the Law of the Sea, who would represent the United States at UNCLOS and law of the sea matters for the US Navy.561 Ratiner highlighted what would be the dominant perspective within American government and legal circles, namely that the roots of Canadian action stemmed from a wave of nationalism. Trudeau had attempted to harness this movement for the benefit of domestic

558 In Alexander ed. (1971), at 313.
559 Ibid, at 315, [emphasis added].
560 Ibid., [emphasis added].
561 Leigh Ratiner had tremendous authority in American legal circles on law of the sea and security matters, chairman in his capacity as head of the General Council’s Office, the Defence Advisory Group on the Law of the Sea (DAGLOS), which assumed control over all matters affecting the United States having legal implications for jurisdiction in the seas and seabeds, the territorial sea, continental shelf, and regime of the seabed. See Hollick (1981), at 218.
political advantage, and tacitly made a claim to sovereignty in the following comment. When asked about his reluctance to claim sovereignty in a forthright fashion, Trudeau responded that “one starts by doing something reasonable.” Canada, for Ratiner, was therefore moving in lock-step with the Latin American states in making coastal claims in unilateral fashion, even though its attempt to quell scenes of “oozing black oil” from covering snow and ice was noble. But the question was whether these types of environmental disasters could be prevented without damaging world order, and the answer to this was undoubtedly negative given that Canada “could have tried the multilateral approach for six months” but did not, even though it had the time.

Ratiner then attempted to frame the issue from the perspective of ‘reasonableness’ on the part of the United States and world community. In pointed fashion, he asked, “can anyone doubt that the US would have been willing to agree with Canada on sensible pollution regulations knowing the US attitude toward unilateral claims to the high seas? What other nations who are potential users of the Arctic with tanker fleets would have been prepared to refuse to bargain with Canada in the face of Canadian national sentiment on the question of pollution in the arctic?”

In conclusion, Ratiner quoted from a question Trudeau had taken from a student at Carleton University, Ottawa, in February of 1970. Trudeau was attempting to explain why Canada did not simply claim the Arctic waters and be done with it, and asked the student to consider that, “[w]hen you talk about international law, the only basis on which it rests is the acceptance by the nations of the world…You cannot just grab it and say “It’s mine.” You have to make sure that after you have grabbed it, people say “You were right to grab it and that it belongs to you and we approve this and we won’t go to war over it, and we won’t take you to court.” As Canada had removed itself from the Court’s jurisdiction, and war was unthinkable, Ratiner pertinently noted that “[a]n Arctic conference is therefore the only solution if Canada is to have the protection that she needs.”

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562 The quote is by Bernard Oxman (2006), ft. 104, who does not cite this source, but in any event concurred with Ratiner’s position in 1970 that Canada’s true motives lay in building the sovereignty case within the shifting domains of law, politics, and ethics.
564 Ibid, at 309.
565 Ibid, at 310-311.
nations who would use the Arctic Oceans, the future would be that of “perpetual conflict”. For Ratiner, it ought to be the goal of all nations to have a world governed by international law, to remove nations from the “near chaos in the law of the sea” which Canada had moved the world one step closer toward.\footnote{566}{Ratiner, in Alexander ed. (1971), at 311.}

One of the crucial questions that followed this denouncement concerned the extensive length of Canada’s pollution jurisdiction to one hundred miles given that the territorial sea extension now created ‘gateways’ for entrance into the Northwest Passage. Johnston and Legault responded that rather than being an arbitrary number, one-hundred miles reflected the progression of lengths being debated within the IMCO. Furthermore, a twelve mile limit, stemming from the territorial sea or as a proscribed length of pollution jurisdiction, would not cover the entire Arctic archipelago and leave it vulnerable in its most traversed areas. This justification, while appearing largely defensible at first glance given that its principles were largely in concert with the prominent oceans international institution, would ultimately prove to be a major line of legal attack in the coming months.\footnote{567}{Louis Henkin, in one of the most authoritative pieces evaluating Canada’s legality, would make one of his most trenchant criticisms of the legislation specifically on these grounds, but framed in a quantitative manner. Rather than Canada making a pollution claim in the twelve mile zone, Henkin held that Canada’s claim was ultimately flawed as they had claimed almost “ten time that,” , p. 133.}

A second question asked, if authors such as McDougal, Gidel, Brierly, and Lauterpacht, among others, had held that, when faced with technological challenges, unilateral acts which are reasonable should be considered presumptively lawful, why then could not Canada’s? If the United States and France had closed off sections of the Pacific Ocean to military weapons testing, could not Canada’s claim be considered of lesser effect? This line of attack presented Ratiner with an awkward analogy to reason from. Having to argue against the tide of legal history, Ratiner responded by saying that the United States now regretted having made a unilateral assertion in the form of the Truman Proclamation over the Continental Shelf in 1945 which had caused the ripple effect of coastal state claims. The Proclamation had been “highly inefficient and destructive” to international law, and thus by implication, Canada should not be allowed to rely on a legal wrong to justify its own manifestly illegal action.
A final question probed whether the roots of the American response to Canada were not solely anchored in the need of the US Navy to traverse the oceans unimpeded, and that the potential for Canada’s act to have effects in other maritime chokepoints was sufficient to explain the American reaction. This would again prove a delicate area for Ratiner to respond to, for the issues of military transiting were a critical question in the minds of states as they wrestled with the dilemma of reconciling international security concerns with coastal state interests. An affirmative answer by Ratiner had the effect of framing the argument as a clash between the necessity of a nuclear first-strike option and military deterrence versus the right to protect the environment and ‘well-being’ of coastal states. Of course, Canada’s actions need not have led to logic that produced conclusions of this nature, but in the minds of most lawyers and policymakers, the train of reasoning leading to security consequences was unmistakable. Ratiner responded by pleading to the logic of nuclear deterrence, making the point that if Polaris nuclear powered submarines were forced to surface on behest of a coastal state requiring identification of all vessels on the grounds of pollution control or any other technicality, submarines could be at worst attacked and, more minimally, tracked and possibly boarded by inspectors at the ports of coastal states. With 116 potential straits that would be affected, what the US Navy and President Nixon sought in making proposals for the new law of the sea was legal consistency, the basis, as he saw it, for international legality.

One final set of points from the audience strengthened the validity of the Canadian claim, but also cast doubt into many minds as to its practicality. It was argued that three principles were in play in thinking about the Canadian case. First, that “the law, like nature, abhors a vacuum.” Given that courts in general, and the ICJ in particular, must find law in the situation before them lest a non-liquet be raised, and there was no law on the matter in the international realm, the United States was asking judges to legislate from the bench, which was a domestic ‘grave breach’ in all legal cultures. Second, that “the law does not require the doing of a useless act” pointed towards Canada not needing to submit itself to litigation given that Canada had been “stonewalled” at Brussels at the IMCO meeting and forced to assist the United States when the Manhattan voyages were carried out. Thirdly, and most importantly, the idea of freedom of the high seas needed to be re-attached to its purposes on
grounds that “when the reason for the law ceases, the law itself ceases.” It was maintained that the rule on freedom of the high seas was designed to protect shipping against three things: extractions for gain, for example, taxation on the high seas; limitations on fishing; and ‘impressing of seamen’, as evidence in the War of 1812. Though Canada was not infringing on any of these three rationales, it was requiring all vessels to be of the same hull type and shape, which consequently required a complete overall of shipping infrastructure for vessels intending Arctic waters.

A crucial critique was also put forth by American lawyer Richard Bilder which would expose many of the legal fault-lines in Canada’s case. In relation to the one-hundred mile distance of jurisdictional reach, Bilder acknowledged that there had been no other precedents in international law for extending the contiguous zone to this length, and accordingly, any zone created beyond the twelve mile limit was illegal. The previous Canadian argument was also refuted which stated that there was neither existing law in relation to environmental protection in force, nor any attention given to this problem prior to the Canadian legislation. Rather, Bilder argued, the 1958 Convention of the High Seas expressly referred to the existing law contained in the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil, as amended in 1962, and the two Conventions agreed to in Brussels in 1969 also did not purport to regulate pollution measures beyond the twelve mile zone. In relation to the Canadian claim that the legislation was a “current initiative of striking importance and relevance in the context of the dynamic, creative development of international law”568, Bilder found this justification unpersuasive, even though it was based on the idea that international law was made through state practice and unilateral measures, such as the Truman Proclamation of 1945, the joint Canadian and United States extension of exclusive fishing zones, and the gradual extension of the three mile territorial sea. Every state could rely upon this tactic to justify its legal self-interests, Bilder maintained, and given that there were existing international norms at the time, “existing international fora and procedures” in place as he put it, contrary to the absence of substantive and procedural law.

568 A claim made by MacDonald, Morris, and Johnston weeks earlier to the American Society of International Law.
existing in the case of the Truman Proclamation in 1945, the argument for legal dynamism could not circumvent the need for legal order through the maintenance of international mechanisms.

Ultimately, the Canadian legislation was both unlawful and unhelpful in solidifying the orderly development of law through international community processes, and represented another sequence in the process of contraction occurring on the high seas from coastal state interests. With that in mind, however, Canada could fall back upon one firm defence, that of doing in law what others had done. In this respect, Bilder noted the Canadian complaint that the United States should not be critical of Canada placing the reservation before the ICJ given the numerous unilateral acts the United States had carried out, including *inter alia*, the Truman Proclamation, custom enforcement practices, Atomic testing on the High Seas, and the Cuba Missile quarantine. Furthermore, the United States was itself protected by the Connolly Reservation providing discretion to litigate. It followed for Bilder that Canada could invoke the argument that “a state is in no position to complain if other states imitate its actions.”

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**Learning Legal Contours**

By mid 1970, then, Canada had a relatively clear picture on what legal bases American opposition rested, and had itself advanced a set of complex arguments and cognitive frameworks to try and gauge whether these could further deepen Canadian legal policy. Several crucial points from these initial pedagogical exchanges would have become apparent. First, most lawyers saw Canada’s motives as self-interested, stemming from nationalism (Ratiner), or the ability to achieve sovereignty (Friedmann), and as illegal (Bilder). However, despite Bilder’s claim of there being law in existence at the time from which

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569 Bilder (1970-71) would produce an influential follow up piece of greater length later that year registering the same points of critique. He would add to the point about imitation the following: “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”, at 28. Bilder would also register sympathy with the Canadian claim in stating that “after almost fifty years of international discussions of maritime oil pollution…very little has been accomplished…Canada’s view that the development of the law of the sea has been dominated by the ship-owning nations, and has tended to reflect primarily their interests rather than coastal-state interests, also seems historically correct”, at 31.
Canada could have drawn, his charge of illegality was weak in areas that Canada could exploit. Specifically, it relied upon the argument that international law could not be made by unilateral action when in many examples of recent history binding rules were created through this process. Hence, the United States could not fall back upon the principle that unilateralism was universally illegal only in so far as its use did not have positive benefits for the international legal system when higher order values were realized and further institutionalized. In short, the United States could not have it both ways in arguing in its legal history for the justice of its own acts, but also for the imperative maintenance of order in the legal system. By contrast, in striking a balance between these two elements, Canada was framed its actions as deserving scrutiny only if the moral merit of the act fell far beyond what the expectations of the international legal community countenanced. Considering the institutional impediments and historically vested interests which Canada encountered in Brussels, in order to remove bias from the entrenched private interests of state’s domestic constituencies, the Arctic legislation could be seen as legitimate in taking the first step towards changing the law for the greater community’s interests. Canada could still hold that on the basis of utilitarian ethical evaluations in tallying up the positive benefits of its acts, the greater good lay with protecting the oceans in the immediate future rather than the detriment that might follow hypothetically in scenarios where states imitated Canada’s actions. For there was no comparable geography to the Arctic region other states could draw analogies from. Douglas Johnston’s testimony illuminated this point given that the Arctic had to be managed in the interim by its closest trustee until sufficient mechanisms were put in place to reduce any and all immediate risk given the “hypothetical” composition of the Arctic area. Indeed, in de-conceptualizing the region into a series of physical entities that were unique and not comparable to other geographies, Canada continued its tactic of unsettling the evaluations of ‘what this was a case of’, parallel to its use of this move in its creative legal argument. Given the challenges with describing what the Arctic ‘Ocean’ was as a constitutive entity, it followed that rule application towards the area’s regulation was deeply problematic and inherently controversial.
In many ways the initial debate on the legality and legitimacy of Canada’s claim reflected three sets of dichotomies to grapple with: justice versus order, formalism versus dynamism, and procedure versus substance. The greatest legal charges against Canada were that the one-hundred mile zone was not within the scope of international law and that there did in fact exist law on environmental measures which could have been referenced. And yet it was becoming clear to Canada that this argument could be significantly mitigated on the basis that the purpose of the law on environmental protection had in reference to the contiguous zone ceased to be fulfilled if protection from harm was its critical principle. If a congruent ‘fit’ had ceased between legal purpose and expectation, and the rule could not serve as a formal impediment to the principle for which the law was first created, then the law lacked coherence and consistency. Canada was, therefore, quite effectively carving out exceptions to a rule that freedom of the high seas was to trump all other ocean principles. Through the metaphor of “balancing”, which pointed to the value of ocean resources being measured in some equivalent form against freedom of transportation, Canada attempted to deepen its framework of legitimacy by enlarging the scope of what was to count against the principle of freedom. It was not that the Arctic environment \textit{per se} was to be balanced against other priorities, but that all other forms of ocean practices were to be evaluated against rights constitutive of freedom of the high seas. Canada’s framing had the effect of creating a rigid separation between international and domestic law, pitting many of the core norms of sovereignty against rights that were positioned within the realm of the international. Hence, as the frictions within ocean affairs remained grounded in a discourse of fairness,\textsuperscript{57} freedom of the high seas continued to be more consistently characterized as a practice being carried out in the domain of the international with marginal concerns for ‘sovereignty’, coastal state interests, and the right to resource extraction. This dichotomization stemmed from the spatial area being debated. The contiguous zone was, after all, a realm of extended sovereignty where domestic norms were given priority as a bulwark against foreign encroachment.

\textsuperscript{57} Franck (1995), at 17.
In relation to the poles pitting procedure versus substance, the strongest argument against Canada was that it could have preserved the international legal order by demanding, as Friedmann had suggested, a bilateral agreement and the further institutionalization of pollution controls. However, it is likely that many developing states would have been unsympathetic to this point. Demanding such a deal from the United States would have been seen as a pointless endeavour given again that Canada had requested from the world in Brussels greater extensions of liability but found its requests soundly rebuffed. So while Canada was quite explicitly politicizing the law of the sea and dealing its authority a significant blow, for many developing states, the right to act in proactive fashion in deterring pollution at sea would likely have appeared reasonable. Developing states had marginal interests in shipping on the high seas given weak levels of industrial development, but would have seen the benefit of being able to control coastal states areas with greater autonomy. And this aspect of coastal state prevention was always set against a military backdrop and the militarization of the oceans. In Canada framing the debate as a choice between United States interests to retain launch capability for nuclear weapons under absolute security against the need to protect unique geographic areas as the era of détente gave way to greater international integration, the developing world would support Canadian policy. The structure of alignments within the international system began to change as a result of both expediency and a belief about the justice of states’ entitlements. To take advantage of this adjustment, Canada understood the advantage of framing its position as caught temporally between the shifting plates of new and old worlds. To find favor and ‘capture’ the interests of developing states’ grievances surrounding the law of the sea being made for them, Canada understood that an expansive range of arguments grounded in international justice could be tapped. Ultimately, Canada learned through its various exchanges with lawyers and states by mid 1970 that, while the Arctic policy had probably not crossed the threshold of formal legality, the Arctic argument could be given greater legitimacy when nested within these other aspects of international justice. There were substantial mitigating effects within the ever expanding understanding of statehood that could be relied upon, and interactions between experts from all types of states throughout the post AWPPA period reflected this tension.
Diplomatic Globetrotting

In the international diplomatic arena, Canadian officials were also pressing firmly for acquiescence for the AWPPA from various major states in order to galvanize its position at the Arctic conference proposed by the United States. Following Parliamentary approval of the AWPPA on June 26, 1970, with no dissenting votes, Head and Beesley travelled to Moscow for formal discussions with Soviet legal and Arctic experts. Central to the Canadian’s task was to ascertain whether Moscow would be an interested participant in such a gathering and what comments Soviet legal authorities had to say on the matter of the pollution legislation.571 According to Head, at the outset of the meeting the Soviet participants were firmly opposed to any conference in which American interests would structure the contents of any agreement. But by the meeting’s conclusion, Head maintained that the Soviets were not only willing to consider the possibility of a conference, which served Canada’s interests given that any Arctic agreement had to have Soviet involvement to reinforce the credibility of ‘interested states’ in matters of maritime pollution, but both sides had agreed that the contents of any conference “would have to take account of special Arctic circumstances.” This express admission by Soviet jurists was a significant achievement in making the AWPPA appear legitimate. The special circumstances of the Arctic region would have to be acknowledged in any final set of legal rules drawn up to regulate Arctic shipping and coastal state control.572

Following a similarly successful trip by Head and Beesley to Sweden, Canada and the United States re-engaged in matters concerning the Arctic conference. In mid-July, an American working draft presented to Canadian officials was perceived as demonstrating “little sensitivity” to Canadian concerns. A similar negative reaction was also displayed by

571 By this point, the great Soviet jurist, Tunkin, had stepped aside from his formal duties, which would have likely given Canada greater confidence that the Soviets were less inclined to deal with the issue under a strict reading of international law, Soviet or otherwise.
572 Although Head gave a positive gloss in his personal account about the possibility of Soviet participation, this interpretation is rather difficult to square with his comments made to Christopher Kirkey in 1996. Kirkey writes that Head actually admitted to attempting to persuade the Soviets to oppose the conference, and cites him as stating that “Alan Beesley and I went to the Soviet Union…and were simply delighted that we were able to get their agreement that they would oppose any such convention. That is really what sank in finally. The United States could not claim to have a conference addressing itself to issues of polar navigation when the greatest of the Polar presences…was not going to participate.” See Kirkey (1996), at 55.
Moscow following the presentation of the working paper by American legal advisor John Stevenson to Soviet policy-makers.573 And so with the United States becoming increasingly isolated in pursuing the necessity of an Arctic conference, Head and Beesley then made their way to London later in the summer to meet with the foreign office legal advisor, Sir Vincent Evans, along with a group of legal and technical experts. At the meeting, Head immediately began to recount Canada’s most authoritative points. He suggested that there was a meaningful distinction to be made between open waters and oceans covered with ice, thus inferring that the Northwest Passage was a unique area that could not be subject to the rules of the high seas. While this argument had little initial impact upon the British interlocutors, later in the day, and following a presentation by a British scientist, Head recalls that many of the legal advisors came around to seeing what would appear to be the unique features of the region and the necessity of specific pollution law. The ‘unique’ frame of the Arctic had thus become internalized by both the legal and scientific communities in a state that was for the most part sceptical of unilateralism and opposed to freedom of high seas curtailments. To be sure, Britain had suffered through the travails of the Torrey Canyon incident and therefore represented somewhat fertile ground for transplanting new environmental norms, but Britain was a major maritime and shipping power which saw its legacies of empire as inherently supported by the freedom of the high seas doctrine. So while not completely unremarkable, support from British lawyers reinforced to Head that groundwork was being carefully prepared for a formal claim from Canada to be accepted at the law of the sea conference given that two of the world’s most powerful shipping states were showing acquiescence to Canada’s claim.

By late August, Canada had officially prepared a response to the American Arctic proposal, and the Canadian duo again travelled Washington to explain its contents to a range of American officials from the Department of State and Pentagon. The Canadian plan suggested that a two-step phase be carried out in relation to the timetable of an Arctic

conference. The first was focused upon the technical nature of the pollution legislation, followed by the construction of an international regime to enforce agreed upon technical rules. According to Head, the American representatives wished this order to be reversed in order to secure a greater hold on the regime’s rules through which technical matters could be given stricter alignment to the political and legal aims intended in the regime. At this meeting, Head proposed to John Stevenson that a dispute settlement mechanism be included within the negotiating framework. While the Canadian position was at odds with the United States in prioritizing how to proceed, Dr. Robert Uffen, Canada’s leading scientific advisor, remarked to the American legal advisors that there was much support in the American scientific community in following Canada’s two-step program giving priority to the technical details before the construction of a legal regime. Ottawa had left Washington in a stalemate over the conference and its substantial and procedural components.

By this time it was also apparent that the problems associated with the environment and scientific knowledge surrounding the Arctic were becoming deeply intertwined. Secretary General U-Thant had announced on August 23, in Ottawa, the overwhelming need for the creation of a “global authority to deal with the problems of the environment”. Whether or not international momentum was pushing against the marginalized American position is unknowable, but scientific thought appeared to trump the necessities of legal rules in early October as the American draft treaty was resubmitted and its contents now substantially reflected the Canadian sequence. Running parallel to these events, Canada was also actively involved in the preparatory issues surrounding the forthcoming law of the sea conference and made a major step in advancing the point that a wider scope of issues be debated by expanding the mandate of the United Nations Seabed Committee. The effect of this move, generated by Canadian leadership through its chairing of the negotiations, would also carry over into the types of debates that were to be brought into deliberations at the major conference at Stockholm on the environment, now scheduled for June 1972.
Canada’s Legal College Consolidates

In September 1970, Canada’s international legal community met in Vancouver to debate the problem of international law and pollution control. At the outset it was posited that “while it is for the technologists to find practical solutions, international lawyers have an important role to play in the control of this frightening Frankenstein.” There was agreement that lawyers were to be tasked with the specific problem of examining what could be done to prevent pollution, and specifically in light of Richard Nixon’s recent admission that “[t]he United States has neither the technical nor the operational capability to cope satisfactorily with a large-scale petroleum spill in the marine environment. The technology does not exist to prevent virtually all of the oil in a massive spill from being deposited on shore.” Tones of the conversations within which the debates were occurring were approaching dire levels of consequence. The group was asked to accomplish their task in light of “the scientists that forecast the extinction of all life on this globe within the next twenty years.” By 1970, therefore, it had become accurate to claim as John Ruggie would later argue that “[t]he application of science and technology to human concerns has progressively made “nature” an object of public authority and public choice; that is, “nature” has progressively become politicized.”

While the agenda at the meeting was broadly focused, John Yates, a Canadian lawyer now at External Affairs, made a convincing and specific point on the pollution legislation. Noting that the United States had argued in 1970 that Canada should have waited for a multilateral initiative to occur before attempting to make new law, he cited the prominent American lawyer Arthur Dean, US government representative at the Geneva Conferences of 1958 and 1960, who had maintained after the Conferences that,

The debates were printed in the University of Toronto Law Journal (1971), at 175.

Ibid.

Ruggie (1975), at 560.
Dean’s opinion struck at the heart of American hypocrisy rather than Canada’s, given the obvious overlap of interests between the two only years earlier. The immediate question, therefore, was whether the United States was now questioning the Canadian initiative on the basis of Canada’s environmental provisions, or whether the United States was more prominently concerned with Canada’s creeping jurisdictional claims in the Arctic having effects on other states.

Len Legault seized the opportunity to advance a new idea into the debate, one that would have dramatic effects on ocean negotiations throughout the 1970’s. He asked the audience to consider whether it was not unreasonable to characterize the principle of freedom of the high seas as being analogous to a ‘right’ possessed by states to pollute when they saw it expedient. His opening remark framed the comments to follow: “The use of the sea as a dumping ground is among the traditional uses which man has made of the marine environment.”

The debate, as Legault now constructed it, had to begin from the point that the law of the sea was divided into two separate legal concepts, and by extension, ontological spaces, where different laws and ethical principles applied: the sea as highway of communication, and the sea as refuse tip. But there was also another primary distinction to be made in sorting out the

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577 Supra note 35.
578 Later printed as Legault (1971), ‘Freedom of the Seas: A License to Pollute?’, at 211. Legault was at this point in 1970 Head of Canada’s Law of the Sea Section, Legal Operations Division, in External Affairs. Only several weeks earlier in late August, at the Lima Law of the Sea Conference, Legault had propounded similar ideas that “The major maritime powers have insisted for too long on a peculiar conception of the freedom of the seas in which freedom has tended to mean license, in which equality has tended to be translated into hegemony, in which everyone’s business has tended to become nobody’s business and consequently has been left uncared for…”. Cited in Neuman (1970-71) ft. 5. Legault had also stressed emphatically the need to conceive of the Arctic as a region that should be associated with “special circumstances”, and was rewarded with the following provision as set out in the Declaration of Latin States on the Law of the Sea, Lima, Peru, 8 August 1970. For the Latin participants, the assertion of maritime sovereignty or jurisdiction is discretionary to coastal states, so long as that discretion is exercised with regard to the “special circumstances” of each state, according to “reasonable”, though undefined, criteria. Also of interest was Legault’s new thinking about sovereignty and jurisdiction of the Arctic region: “Canada regards maritime sovereignty as a bundle of jurisdictions which is kept whole and complete in relatively narrow territorial sea but which may be broken up for the purposes of exercising specific limited forms of jurisdiction for specific functional purposes beyond the limits of the territorial sea or even in areas where there may be a claim to territorial sovereignty but where functional requirements do not demand the assertion of a claim to full sovereignty.” Cited in Neuman, ft. 39.
contours of new law which pitted flag state and coastal states’ interests. The former sought a narrower scope for law in their favour, while the latter wanted constant expansion and protection over their right to protect national territory. Legault noted that the balance of interests favouring flag states had begun to shift the other way, not the least from Canada’s progressive actions in the Arctic. The crucial problems of concern, however, remained the limits of international pollution law, and in particular, with enforcement issues associated with detection and jurisdiction. Not only was it virtually impossible to cite with certainty which vessels were polluting, but as importantly, whether discharges could be said to exceed the limits permitted under the 1954 Convention for the Prevention of Pollution of the Sea by Oil. In other words, the science of technological expansion had not been curtailed by any corresponding technology of detection.

Compounding this dilemma were three overarching concerns: discretion resided with the flag state to initiate prosecutions; the provisions fixed in the Brussels Agreement (1969) could only be triggered following the event of oil pollution actually occurring off of a state’s coasts; and that a coastal state had to submit to binding international arbitration on issues where preventative measures went beyond what was reasonably necessary. What was required, in Legault’s view, were preventative measures in law that would not allow liable parties to decide whether to submit to legal measures, especially in the event that they resided in a state not party to any international pollution conventions. Was it not anomalous, he asked the audience to consider, that a state was entitled to sink a ship on the high seas when marine action threatened pollution, as the British had in the Torrey Canyon incident of 1967, but could not take preventative measures as minimal as refusing entry by threatening vessels into areas off of a state’s coasts? Citing the jurisprudence of the Trail Smelter Arbitration in 1941 between the United States and Canada,579 Legault maintained that the court’s reasoning that no state had the right to use or permit use of its territory in such a manner so as to cause injury in or to the territory of another state applied correspondingly to cases of ocean law.580

579 See Trail Smelter Arbitral Decision, 33, AJIL, 182 (1939).
580 Legault likely realized through correspondence with L.C. Green the possible application of Trail Smelter to the context of the oceans. Green held that not only could an arbitral tribunal call equivalently to the International Court for the adoption of preventative measures in international law, but that the tribunal’s
These obligations of non-injurious use had to be applied to the principle of the freedom of the high seas given that the principle had never been absolute but subject to various qualification over its history, such as, for example, the reliance on universal jurisdiction in relation to piracy on the high seas. In Legault’s reasoning, the difference between the principle first enunciated by Grotius and the circumstances of the late twentieth Century turned on one primary factor, however. For Grotius, the “vagrant waters of the sea” were “necessarily free” on the basis that even though the right of occupation rests on a subject becoming “exhausted by promiscuous use”, it did not follow that this axiom applied to the oceans - they were by their very nature inexhaustible either through navigation or fishing. At this point in history, Legault argued, the tides had changed - the sea was now subject to exhaustion by ‘promiscuous use’ because “technology had given man the power to destroy his environment.” The time had therefore come once again for further exceptions and accommodation to be made to the bedrock ocean principle in the interests of all the international community.

Towards the end of 1970, two valuable legal opinions were also put forth in the public domain to supplement Canada’s knowledge of the case. The first was by one the more powerful United States ocean lawyers, L.F.E. Goldie, professor at the Naval War College in Rhode Island. Goldie argued that, in the context of assessing the current principles of responsibility for the pollution of the sea, one of the primary categories for distinguishing responsibility was that of the reasonable preventative measures which could be taken in particular cases. In terms of whether Canada had complied with the general international law of “abatement”, or preventative action, and its law of the sea corollary contained in the 1969 Brussels Public Law Convention, Goldie held that like the case of the Torrey Canyon which warranted abatement, Canada’s acts similarly fell within the Webster criteria from the Caroline Case (1829) of being carried out on the basis of necessity given that the threat was
instant and overwhelming, “leaving no choice of means, and no moment for deliberation.” 583
As the Brussels Convention, in Article 1(1) held that necessary measures can be carried out
by states “to prevent, mitigate or eliminate grave and imminent danger to their coastline or
related interests from pollution” or the threat of it by oil “following upon a maritime casualty
or acts related to such a casualty”, it followed that Canada’s reliance on the principle of self-
help would accord with conventional international law.

Moreover, Canada’s motives in creating the pollution zone were honest. Goldie remarked
that the belief that Canada was claiming sovereignty tantamount to South American states
wide territorial sea jurisdictional claims of two-hundred miles (the nine states in the ‘200-
mile club’) was “misunderstood.” 584 Canadian intentions were only to designate in an
“appropriate area” the ability to “exercise a limited authority to vindicate a specific national
purpose”, that of ecological protection. Goldie then went on to attack Richard Bilder’s
earlier analysis of 1970. Noting that Bilder had expressly referred to Canada’s claim as
being a variation on an archipelago theory parallel to that which had been advanced by
Indonesia and the Philippines on the basis of straight baselines, such conflation was
unreasonable given that Canada’s action relied on the right to take action within the
 contiguous zone rather than extend a claim based upon internal waters. In reference to
Bilder’s charge that the pollution legislation had the potential to create precedents of
“widespread abuse” through the conflation of contiguous zone policy being embedded within
sovereignty claims, Goldie rebutted that if the law were truly grounded in the problem that
the Arctic’s primary feature was “the precariousness of the web of life” in the region, it
followed that there were few states who could treat the law as a precedent analogous to the
numerous other examples of “creeping jurisdiction” that had occurred in ocean relations. If
the Canadian case was to be rationalized as a precedent of that movement, those making this
claim would have lost sight of the ‘limited purpose’ which the Arctic legislation truly
represented. Such a charge in future could then only be chalked up to a state’s own
“ineptitude or pusillanimity. States’ exclusive jurisdictions can only creep forward if the

583 The Caroline Case pitted the United States against Britain in deciding the limits to self-defense and the
criteria for imminence. See the internal debates at  http://avalon.law.yale.edu/19th_century/br-1842d.asp
584 Goldie (1970), at 303.
contra posed community interests withdraw before them. A failure of will should not be disguised behind a pseudo-law.”

The second piece of legal material from late 1970 was authored by L.C. Green, the effects of which would have a tremendous impact upon the course of the Canada’s Arctic foreign policy. In meticulous detail, Green explicated the requirements necessary for Canada to meet a claim of historical title, citing the numerous Canadian pronouncements from the late Nineteenth Century through to the administrative acts carried out from 1905-1968, all of which could evidence such a claim, he argued. Green then set out to show why Pharand’s analysis on baselines was without foundation in international law. To recollect, in 1969, Pharand had argued that Canada could not encircle the entire archipelago with straight baselines but could draw them around the two sections of the archipelago thereby creating a body of high seas between the route of the Parry Channel. Green first took aim at Pharand’s point that innocent passage would have to follow from the act of straight baselines being drawn due to the rule that their establishment “has the effect of enclosing as internal waters areas which had been considered as part of the territorial sea or of the high seas.” Green held that, based upon the historical record, it was by no means clear that the Arctic archipelago had been previously considered to be high seas or part of the territorial seas. Furthermore, Pharand had claimed that in order to circumvent the right of innocent passage being applicable in such instance Canada could rely on the reasoning of the Fisheries Case where innocent passage did not follow from the drawing of baselines, in addition to Canada’s non ratification of the Geneva Convention on the High Seas. However, the North Continental Shelf Cases from 1969 had removed this issue from consideration as, the “World Court expressly rejected the view that the Convention, although ratified and in force, had altered the law one iota in so far as a State which had not ratified it was concerned.” On the basis of the following points being aggregated - Canada’s historical consolidation of the

588 Green (1970) at 759. While this is one reading of the case, it can cogently be argued that as the Court was not making any express reference to the 1958 Territorial Sea and Contiguous Zone Convention, the broader inference of all the Geneva Conventions being affected by international custom would not stand. I thank Ted McDorman for making this point.
area, and the doubt that follows from whether innocent passage could be applied to a strait not presently used for navigation, or applicable given the relevant customary or treaty law on the subject - Green concluded the following:

> [I]n the light of the Canadian administrative and other activities in the area, the absence of any concrete claim of opposition by any other State - pace the situation that has now arisen - sufficient time has endured for Canadian sovereignty over the entire Arctic as far as the Pole, and embracing land, islands, sea and pack-ice, to have become a fact in law. Had any question arisen, say, five years before the Manhattan effort, there is little doubt that the world at large would have recognized Canada’s historic title to the whole area.589

All acts of legislation Canada was putting forth should properly be conceived of not as assertions of sovereignty, but acts of sovereignty, he maintained. Canada’s pollution legislation represented a form of de facto sovereignty on the basis that Trudeau could claim to be exercising sovereignty without being the representative governing head of the territory under question. That jurisdiction was being enacted, but formal title not claimed in the process, was “contrary to current trends of functional interpretation of legal concepts.”590 In making its reservation to the ICJ in order to maintain the consistency of the Canadian position that there was no law upon which the court might adjudicate, Canada, according to Green, was merely following a long line of precedents argued in similar fashion. And yet, Canada was speaking in double standards by intending to be acting within the law while simultaneously ‘picking and choosing’ law which it wished to apply to the Arctic case. With the reservation, “Canada has achieved nothing - other than to find herself the recipient of unnecessary international criticism and accusations of hypocrisy and double standards.”591

By way of conclusion, Green postulated that Canada already held sovereignty over the entire area, making the pollution legislation not “world-shattering” but “unnecessary and irrelevant,” the effect of which was to needlessly cast doubt onto the entire claim in general.

Beyond this reproach from one of Canada’s most prominent lawyers, the Canadian government was presented with a strong argument for historical title, not on the basis of applicable rules in the law of the sea, but in accordance with the principles of territorial

589 Green (1970), at 760.
590 Ibid, at 764.
591 Ibid, at 770.
consolidation. Irrespective of whether Trudeau and officials had made mistakes questioning the legitimacy of the Arctic claim, that Canada could have relied on historic title would not rule out that it retained the possibility and the legal right to rely upon the claim as having a basis in international law. Canada had done nothing to damage this aspect of the claim, nor renounce it, unless it chose to offer express statements to confirm the suspension of its position until further notice was given. L.C. Green’s analysis could accordingly be added to the series of opinions holding that Canada could potentially invoke history in support of its claim to the Arctic archipelago, serving in many ways as a legal trump card. The weight of Green’s opinion would provide policymakers with the continuing option of securing through environmental principles international agreement on the legitimacy of its pollution legislation, and also provide policy options for a legal strategy to emerge until a point in time when further legal analysis had been carried out.

Armed with this new knowledge and legal opinion, persuading audiences on the merits of Canada’s position also involved explaining to the international community how states could be expected to make treaty-based international law that would have an obligatory effect in conjunction with state practices also contributing to the shape of legal rules. In other words, how could existing treaty law, un-authoritative and non-binding to some developing states, and the requirement of customary law deriving from states practice within this interim period, be reconciled? Canada needed to explain how this tension needed to be managed in order to both discredit existing law of the sea, but maintain that international legal processes could legitimately move forward. To the First Committee on the Law of the Sea at the United Nations General Assembly on December 4, 1970, Beesley offered the following reasoning. The current law of the sea, he posited, was based on conventional law (via multilateral treaties on the basis of customary principles at times) and customary law.

592 Stemming from the work of Ivan Head (1962-3), at 219; and Gordon Smith (1966), at 245.
593 A further defence of the basis of historic title, or “historic right”, would also follow later that year from Raymond Konan (1970: 199), along with a submission that Canada could pursue alternative tracks of justification. “In summary it would appear that Canada may be able to achieve legitimating of her claimed jurisdiction over the frozen waters of her archipelago under the doctrine of historic right either by meeting the tests of the Norwegian Fisheries decision in a judicial or arbitral proceeding or by receiving a gradual acknowledgement by the world community of states of the validity of Canadian historical practice and claims in conferring territorial jurisdiction to Canada. However, Canada’s case for legitimating might alternatively be made under the standards of contemporary conventional law, apart from the tests of historic right.”
Multilateral conventions had the effect of codifying existing principles but also pushing forward the progressive development of new principles. Customary international law, by contrast, was largely formed through unilateral state action, and while unilateral action “carried to an extreme and based upon differing or conflicting principles could produce complete chaos. Unilateral action when taken along parallel lines and based upon similar principles [as contained in treaties] can lead to new regional and perhaps even universal rule of law.”\(^594\) Treaty construction had a janus-face, Beesley concluded: it could lead to effective law, or the failure to agree upon the specific intention in constructing a treaty in the first place (as had occurred with the breadth of the territorial sea in 1958 and the 1960 Geneva Conferences). Hence, in order to make substantive law that was beneficial for all nations, when multilateral avenues were precluded by entrenched interests of the major powers, unilateral action could be seen as an option of valid law-making in such instances. The Arctic legislation was therefore a prime example of this doctrine of unilateralism undertaken under the heading of necessity.

**Pharand and Henkin**

In early 1971, Donat Pharand again weighed into the debate over Canada’s Arctic claims through an attempt to clarify to the Trudeau government what criteria had to be established in order to prove a claim of historic waters. At this point Canada had not officially claimed the Arctic archipelago on any clear and coherent legal basis, but continued driving forward the environmental debate and subordinate all discussions of Arctic sovereignty until a legal case could be made. Pharand noted that in the throne speech of October 24, 1969, Trudeau had made first a somewhat opaque claim to the waters of the Arctic in what appeared to be based upon a form of historical occupation. But Trudeau then referred to Canadian sovereignty as relating to Canada’s territorial seas, which were qualitatively different from internal waters. The concept of historic waters, as Pharand outlined,\(^595\) is a “regime of exception to the general rules of law to the delimitation of the marine domain of a state,” which had been


\(^{595}\) In what would appear to be a point directed towards L.C. Green’s recent analysis which argued to the contrary.
embedded within the 1958 Territorial Sea Convention (Article 7). Historic waters are intimately linked to corresponding ideas of custom, prescription, and occupation, and as such, required a state to have exercised a constant practice of authority and for this to have been tolerated by states directly affected by the practice in question. A claim of historic waters brought about the full package of coastal state rights associated with sovereignty, including the right of denial for the innocent passage of vessels, which effectively gave the title of historic water the status of internal waters. For Pharand, the criteria for a successful Canadian claim to historic waters in the Arctic was in 1971 not entirely clear given that the 1958 Territorial Sea Convention made no mention of the legal prerequisites for a successful case. However, the codification division of the UN Secretariat had constructed a series of draft articles on the subject in 1959 which could be compared with a memorandum from the ILC from 1957 on historic bays to give shape to the law. Pharand summarized with the following:

Upon reviewing the various pronouncements on the legal requirements for the establishment of an historic title to water areas, one is struck by the consensus which exists as to the essence of those requirements but one is also equally impressed by the disagreement on matters of formal expression of those same requirements. There was, however, a general consensus that the dual requirements of exercise of authority by the coastal state and acquiescence by foreign states were sufficient conditions to be met, and that in addition, “a coastal state may strengthen its claim by showing that its vital interests are involved.”

The nature of authority in this case referred to the requirement that conditions of jurisdiction be tantamount to similar exercises being carried out over national terrain, and that the state must exercise effective control over the area to the exclusion of all states from that same area. The evidence of effective occupation could take either the form of excluding vessels by force, or by having the area be subject to the effect of rules “imposed by the coastal state which exceed the normal scope of regulations made in the interests of navigation”, even though the entire range of occupation is not exhausted by these two factors. Furthermore, effective occupation had to be expressed through the intent of states, which in turn required

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596 Pharand (1971a), at 3.
598 Ibid, at 7.
599 Ibid, at 7, was relying on Gidel’s (1934) seminal study on the matter, perhaps the most authoritative to date.
that intent be expressed by deeds and not merely proclamations. As to the length of time under which the use of authority must be displayed, Pharand concluded that while there was no fixed period, but only terms such as “well-established usage” and “immemorial usage” as indicators by which claims could be measured, what was certain is that the period of time under scrutiny must depend considerably upon the attitude of other states such that they must raise concerns following actions carried out by claiming states.

However, the form of general acquiescence that must be registered was controversial. There was a difference of opinion as to how this expression could be understood, ranging from a strict interpretation stemming from formal consent, to that of passivity, implying that silence or lack of protest was sufficient. Following from the jurisprudence of the Fisheries Case in which Norway claimed that the absence of reaction on the part of foreign states over a long period was sufficient to confirm the peaceful and continuous character of usage, the court allowed this claim to stand. For Pharand, the Court’s reasoning represented the proper criteria for acquiescence and a presumption “almost impossible to rebut.”

In relation to the point of what constituted the ‘vital interests of the coastal state’, considerations which attach to such a claim included geography, economic, and national security. The ‘vital interests’ factor was explored in the Fisheries Case where the Court commented that the Norwegian baseline system was imposed by a particular type of geography but also reflected a claim of regional economic interests in light of extensive fishing practices carried out over considerable periods. On the issue of defence interests, Pharand cited the commentary of Mitchell Strohl, former commander of the US Navy, who held that because the waters of Hudson Bay were vast, Canada should be able to rely upon historic title to make the waters internal in order to strengthen its security in a vital area.

Pharand then went on to make a statement the effects of which would set Canada’s Arctic policy on an institutional path up until the present. He wrote:

A similar reasoning [akin to Strohls] could be made with respect to the waters of the Canadian Arctic Archipelago and it is very possible that Prime Minister Trudeau was making such

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600 Ibid, at 10.
reasoning when he made his formal statement on 3 April 1969 relating to Canada’s defence policy. He might have been thinking particularly about the Arctic regions when he stated that one of the roles of Canada’s Armed Forces was to insure ‘the surveillance of our own territory and coastlines, i.e. the protection of our sovereignty’; indeed, a few months later, in his statement in the House of Commons relating to the Arctic regions in general and to the Arctic waters in particular, he stated that ‘[t]he Canadian Armed Forces carry out continuous surveillance activities.’

By way of summary, Pharand concluded that the onus of proving historic claims to waters rested with the coastal state making the claim, “to prove all of the facts which, in its opinion, support the exceptional claim, irrespective of whether the legal proceedings had been instituted by the party alleging a title or by a party denying the acquisition by its opponent of an historic title.”

For Canadian officials in External Affairs, Pharand’s commentary would prove to be of significant assistance. He had first clarified the standards of existing international law on historic title, and what criteria were required for proof of legal validity. Secondly, whether or not Trudeau’s remarks were actually directed towards the specific intentions Pharand inferred could be asserted, that Canada could rely upon existing United States’ commentary directed towards the rights of national security, and Trudeau declared the waters historic as evidenced through the illustration of acts and promulgation of their objectives, these in toto led to the possible rationalization of Canada’s right to make a historic claim. It only remained for Canada to describe how it had over time committed authoritative acts in the Arctic waters, which was surely possible given the flexible criteria required in proving a state’s consistency of action. Furthermore, L.C. Green had already described at length the measures Canada had historically adopted to solidify effective occupation, concluding that Canada met this threshold. In terms of the need for acquiescence by those significantly affected, Green had argued that prior to the instigation of disputes in 1969, the evidence pointed towards the conclusion that states, including the United States, would have granted Canada’s claim. Hence for the purposes of Canadian officials, it need not have mattered that American opposition arose in 1969 if the claim could have already been met. The central problem was to prove formally that Canada possessed the right to historic title over Arctic

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602 Pharand, (1971a), at 12-13, footnote omitted.
waters, and undertaking such a task would be formidable piece of historical and archival work. Until that research was carried out, Green’s commentary could serve as a basis for the historic claim in the interim, a placeholder for policy, allowing Canada continue to pursue the environmental approach into the law of the sea conference. In sum, the trump card for historical title was effectively constructed through the combination of Pharand’s and Green’s work by the spring of 1971, and such a defence could be shelved until the point of when, or perhaps if, based upon future multilateral outcomes, its use was required. 604

Though the ability for Canada to draw on this legal argument would have proven comforting, the legal analysis of Louis Henkin in the spring of 1971 was ultimately damaging. 605 Henkin’s argument, building on Bilder’s one year earlier, would provide a permanent stain on Canadian actions. He insisted that the Canadian case contained some merit: the law of the sea was where laws of laissez-faire favoured shipping states, the problem of pollution contamination was now obvious and threatening, and shipping states “have the votes at conferences and the principle of unanimity to resist comprehensive regulation.” 606

Furthermore, when international law required change it was only interested states which could generate movement given that often the collective process of granting special rights to states began as a series of unilateral actions. Henkin even went on to hold that “virtually by hypothesis, any state which seeks to make new law cannot agree to litigate under old law”, and that Canada should expect to lose if the case were taken before the ICJ on the basis of division between old and new law. Not only was the purpose of the legislation legitimate for

604 To be sure, the United States position had been consistent that the Arctic Ocean was an area in which freedom of the high seas prevailed, and Canada knew this following Pharand’s analysis in 1969. Hence, that Canadian officials might have assumed that the United States would have acquiesced prior to 1968 as Green alleges, may be cast in doubt. Nevertheless, given the lack of an express statement by any state over the Arctic archipelago through what appeared to be tacit submission, as Green notes, Canadian officials worries would likely have been blunted given the overall strength of Green’s analysis.

605 Henkin’s (1971) title emphasized the legal dichotomy that was to frame the issue: ‘Does Canada Make - Or Break - International Law?’ While Henkin was one of the world’s great international lawyers by this point, his recent work on behalf of the United States government was of significance in revealing his political and legal perspectives. In writing the Henkin Report (1967) on the relationship of international law to ocean resources, Henkin held that the “principal interest of the United States” was “national security”, and no policy should come to disadvantage “the existing, substantial freedom of American and allied naval operations.” The report would have a major impact upon subsequent military thinking on the relationship of US maritime interests and the law of the sea. See Hollick (1981), pp. 187-190.

606 Henkin (1971), at 132.
Henkin, but also fell within the “spirit and perhaps the letter” of the 1958 Geneva Conventions authorizing states to adopt the necessary controls of sanitary relation next to their territorial seas. Many of the specific regulations on vessel construction could be claimed as extensive but reasonable given the re-balancing that had to occur to secure the rights of coastal states.

However, Henkin made the following point stick emphatically: the 1958 Convention allowed for a contiguous zone of twelve miles, and “Canada has claimed almost ten times that”. Henkin then went on to collapse two issues, writing that “Canada may be saying that a twelve mile anti-pollution zone is not adequate and perhaps it is not, but oil pollution was hardly unknown in 1958, and there was no suggestion that there could be larger zones by the same or any other name for anti-pollution or any other purposes, in some seas if not in others.” By implication, Canada was making a somewhat radical claim in law which should not be subject to mitigation given that, when the major codification conference on ocean law was underway a decade prior neither Canada, nor any state for that matter, made the point of requesting an expansion of law.

In terms of the precedent being imposed by Canada, and the argument that the United States had similarly engaged in unilateral practices to make international law, Henkin asserted that

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\text{[t]he law of the contiguous zone did indeed develop in unilateral assertions (some by the United States), but these did not infringe deeply on important, bona fide interests of other states and, not strongly challenged, they slowly added up to custom, modifying previous fluid custom. The Truman Proclamation, some think, was uncertain and perhaps unlawful, but whatever law there had been was uncertain, hypothetical and largely irrelevant; the proclamation responded to a new opportunity in ways which did not affect the perceived rights of others.}^{608}
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To the claim of Canada acting in self-defence, Henkin charged that the environment is a “seamless whole” which faces many threats from activities at sea. Given that the law of the sea is currently threatened, and Canada is claiming a basis to act based upon special circumstances while denying that there will likely be precedent set by it, Henkin asked “how

\[607\text{ Henkin (1971), at 133.}
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\[608\text{ Ibid.}
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do you prove or persuade, say, poor Peru that its interests in fish are less entitled to protection “for mankind” than rich Canada’s concern for its Arctic ecology.” Henkin was thus able in his remark to simultaneously evoke equality under the law for all states, while also denying that there may be unique areas in the world deserving of special protection.

To further drive home the point of Canada’s illegality, Henkin held that Canada had failed to act under existing legal principles (using either the sector or archipelago theory); did not limit its regulations to the twelve mile zone newly enacted; failed even to purport to act within the 1958 Conventions; did not announce its program as temporary pending new international legislation; made no attempt to avoid setting precedent by making its claim in the common interests of the seas, rather than in the name of coastal state interests; and showed no inclination to make ad hoc arrangements with states on the matter. Perhaps ultimately however, irrespective of Canada’s good Canada’s intentions, Henkin maintained, “[i]n international law, too, it ‘is usually more important that a rule be settled, than that it be settled right.’”609 Given the circumstances of the law of the sea, Henkin appeared to infer that legal order ought to trump claims of justice as they related to the re-constitution of the oceans, at least at this time in history. And so contrary to Canada’s novel framing of states’ international responsibility, “[s]urely today, the answer to inadequate law or inadequate process is not in unilateral assertions enhancing national authority and national judging for oneself against others.”610

Despite the damaging effects of Henkin’s analysis, many supportive articles were written in Canada’s favor. In the American Journal of International Law in early 1971, Oscar Schacter and Sewar asked the journal’s readers to consider that even by expert standards, humanity was “profoundly ignorant” of the events occurring in the marine environment, which ought to lead to conclusions about marine effects to be put forth with “respect and caution.”611 They went so far as to argue that “outright prohibition [of hazardous wastes] may be necessary to

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609 Henkin (1971), at 135.
610 Ibid.
611 Schachter and Sewar (1971), at 85.
Oil pollution was an ever present danger that would by fiat force coastal states to act due to their frustration of watching a threat materialize while concomitantly being tied down by international law. Hence, unilateral actions were “not only warranted but necessary if marine oil pollution is to be controlled.” And while there was little doubt for Neuman that Canada had violated the existing law of the sea, there was a discernable presence of agreement in his argument with one of the dominant interpretations of the Manhattan voyage that the United States was dealing with the case in an overly “legalistic” fashion, further contributing to the “frailty of nature straining against the rusty chains of archaic rules of the sea.” However, in Neuman’s opinion, the argument for self-defence ought to be considered both weak and dangerous, having the effect of broadening the basis for defensive action as a matter of unilateral interpretation. Of greater importance, Canada’s attempts to suggest that innocent passage would be prejudiced by oil transport provided too much discretion to coastal states while concomitantly “elasticiz[ing] the standard into meaninglessness.” In relation to the point that the Arctic was a region of special circumstances requiring a legitimate break from existing international law, Neuman categorized this approach as deserving of sympathy but ultimately “unpersuasive” given the potential ability for practically all states to establish unique areas in which they too ought to be able to depart from existing law. Could not the Caribbean beaches, the French Riviera, the Gulf of Mexico,

612 However, the authors also made clear that Canada’s claim in reference to the 1969 resolution by the Institut de Droit International, cited by Beesley in his testimony to the House committee in April of 1970, went well beyond what the Institute had suggested ought to be law. That Canada never returned publicly to this defence was perhaps indicative of the weight of authority that Oscar Schachter carried at this time. See Ibid, at 93, ft. 30.
614 Ibid, at 354.
or the Great Barrier Reef, also denote ‘special regions’, and given this probability it remained incumbent that “it is for the international community to decide and agree on what “special circumstances” require solutions, rather than for each coastal state to be free to proceed in the self-interested exercise of its own judgment.”

**Spring 1971: Canada’s Diplomatic Tour Continues**

On the diplomatic front, by mid spring of 1971, Alan Beesley was busy moving between several multilateral venues in attempting to justify Canada’s ideas about the new law of the oceans and Arctic. By the end of 1968, the United Nations Sea-Bed Committee was functioning and had expanded to include within its mandate most aspects of law of the sea. The Committee had been under direct pressure from Canadian officials to broaden the scope of its inquiry, and Canada had begun to make clear that it would be seeking a “package deal” which included that concessions be made in matters concerning innocent passage and international straits.  

Speaking to the United Nations Committee in Geneva, on March 24, 1971, Beesley held that the time had come for states to “modernize” the law of innocent passage, underscoring that it is Canada’s view that “agreement or failure to agree on this issue could make or break the conference.”

Beesley now drew a distinction between self-defence and self-protection in relation to innocent passage, having judged that the argument for self-defence would not be accepted by the international legal college and therefore required modification given the plea for ‘protection’ and its relationship to the content of innocent passage was central to the legitimacy of Canada’s case.

In now citing self-protection as Canada’s primary justification, Beesley drew on Pharand’s reasoning, the latter of whom at a Toronto conference on ‘Canada-US Maritime Problems’ in mid June, 1971, with prominent US lawyers present, held that Canada could legally adopt this interpretation. Pharand had argued,

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615 See McConchie and Reid, pp. 174-175. Canada at this point both suggested and warned that the resolution of the international straits issue underlay the success of the entire conference and took importance over all law of the sea issues.

616 Ibid, at 197, ft. 67.
I agree with our American colleague, Professor Thomas A. Clingan Jr., that the self-defense argument is rather weak...I believe that the concept of self-protection, which is a much wider and flexible one, could serve as an adequate basis for this legislation. This concept, which is often referred to as the “protective principle” is one of the four generally recognized bases for the existence of state jurisdiction in international law. The right of self-protection is indeed at the basis of most instances where coastal states have extended their jurisdiction unilaterally over ships on the high seas within zones contiguous to their coasts. 617

To the Sea-Bed Committee then, Beesley was signalling for Canada its intent to remake ocean law within a framework that provided for substantial scope for coastal states to prevent passage unless criteria could be assembled with which to re-write the law of innocent passage. Nevertheless, while re-casting the law would bring assurances to maritime states in improving the law’s consistency, these same states at the United Nations failed to be persuaded by Beesley’s distinction between self-defence and self-preservation. Several filed formal protests as a result to the Canadian delegation following his speech.

On April 19-20, 1971, Beesley attended the Legal Aspects of Seabed Petroleum and Resource Development in Houston, Texas, making a speech intended to deepen Canada’s position. Underscoring first the developments that had occurred in Britain earlier in the week as quoted in the New York Times, Beesley made note of the fact that the British Parliament had moved to authorize either the sinking or seizure of oil tankers threatening its shores, whether inside or outside the three mile territorial sea. As this enactment was framed in the NY Times as analogous to the Canadian action taken a year ago, Beesley graciously noted to the British representative John Freeland, “It is nice to have you on board John!” 618 In terms of how and where Canada would proceed to have its pollution legislation codified, Beesley suggested that Canada sought to have pollution matters dealt with at the upcoming Stockholm Conference in 1972, at which time an opportunity would be present for an “intergovernmental multilateral interdisciplinary approach to the problem” to produce a set of principles that could then be applied at UNCLOS in 1973. 619

617 See Pharand (1972) at 79-80, in Lewis M. Alexander and Gordon R.S. Hawkins (1972), and his further restatement later that year in which he points Canadian officials to the historical fact that the United States has relied upon self protection in the courts in Church v. Hubbart (1804), and also in part in the extension of jurisdiction over the continental shelf in 1945.
618 Beesley (1971), at 630.
619 Beesley (1971), at 637.
Canada’s strategy for negotiation at UNCLOS, he argued, was grounded in the belief that numerous pressing issues surrounding the law of the sea could be resolved by delving “into one single issue”: the doctrine of freedom of the high seas, which should properly be seen as a “no man’s land where any state may work its will without the slightest regard to the interests of other states or of the international community as a whole.”

Beesley’s speech concluded with a re-statement made to the First Committee of the United Nations Law of the Sea on December 4, 1970, in which he drew upon Legault’s thinking about Grotius months earlier. Yet on this occasion in Texas, Beesley added a new twist. While Grotius was packaged as the learned publicist observing 360 years ago that things could become exhausted by promiscuous use, he had not included on this list the subject of ‘the seas’ through excessive navigation and fishing. But while Grotius could be excused for not seeing that modern technology through the use of nuclear ships, loaded supertankers, and the dumping of radio-active waste and nerve gas into the oceans had changed calculations made in weighing out the merits of new rules of regulation, it was obvious that the seas could be exhausted beyond that of being fundamentally damaged, Beesley concluded. Interested groups, such as the audience present in Houston, had a responsibility to internalize this argument and communicate it to their governments.

Beesley’s strategy of attacking the doctrine of freedom of the high seas, which would be re-packaged only a week later and promulgated to an important sector of America’s principal international lawyers, derived from thinking generated within the year prior. He was, in fact, exploiting an argument advanced by Pardo in 1970 which had the effect of dividing the concepts that ought to apply to the oceans into two distinct camps: freedom of the high seas, and the common heritage principle. By playing up the point that the former was linked to conservative, imperialist, unregulated “legal thinking,” while the latter was the touchstone for advancing international claims to fairness and distribution based upon sovereign equality and democratic law-making procedures, Beesley drove a wedge between the concepts and tried to contraposition them as a backdrop from which all states had to negotiate. While Pardo had

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620 Ibid, at 638.
delivered his own juxtaposition of concepts in an attempt to get states to think about whether the right of oceans freedom or obligations of common heritage ought to apply to the seabed beyond national jurisdiction, Beesley carried this strategy a step further and attempted to embed the division in the debate over ocean pollution and the Arctic region.

April 29, 1971, saw three of the world’s eminent law of the sea jurists, John R. Stevenson, Bernard Oxman, and Alan Beesley, seated together on a panel at a session of the American Society of International Law general meeting in Washington. With Myers McDougal presiding, the session brought forth the first instance for the top officials from Canada and the United States to espouse their respective concerns. Stevenson began by framing the current crisis in the law of the sea as one in which there existed “a struggle for the supremacy between municipal and international law”, and that the new United States Oceans policy was evidence that a proper balance could be achieved. There had to be limits to extended jurisdictional claims, just as there had to be accommodation made in new law for freedom of navigation. Beesley, however, peered deep into ocean history and suggested that the situation of 1971 paralleled circumstances of the Seventeenth Century when states were forced to advance pragmatic solutions to relatively new problems. In explaining that a new equilibrium was required between coastal and flag state interests, Beesley turned to McDougal and proceeded to quote from McDougal’s and Burke’s 1962 text on the foundations of ocean law.

In lock-step with the policy approach Beesley postulated that, to extent that freedom of the high seas had served to allow the broader community of states access to the world’s oceans, it was equally true that, “even after a consensus had developed that states were not to exercise continuing and comprehensive authority beyond a relatively narrow belt of such waters, it was quickly discovered that the occasional exercise of some coastal authority beyond this belt had necessarily to be honoured if the special interests of coastal states were

622 Bernard Oxman then worked for the United States Navy and the Legal Advisor’s office in the State Department, and went on to be a major contributor to the United States delegation on the law of the sea in 1974.

to be given adequate protection.”624 It followed, for Beesley, that the doctrine of freedom of
the high seas was a product of European hegemony through which European interests were
realized, and accordingly, as it is a “functional doctrine” that most officials regard as
“immutable in nature”, the doctrine should be properly viewed as a “yoke around our neck.”
We would do better, he suggested, by seeing the doctrine in clearer light: one that promoted
the rights and stipulated international law for flag states on the high seas, which was
essentially “nothing but an extension of sovereignty rather than an abdication of it.”625 The
interests of flag states, viz. the major maritime powers, were not synonymous with the
broader international community, and Beesley now attempted to drive a second wedge now
between the collective identities of states. The powerful saw the status quo as desirable,
while the rest of the world ought not only to view the basis of ocean law in its accurate form
as imperial law making, but be bold enough to assert that the new law had to be re-made
from the ashes of the old. As Oxman remarked thirty-five years later, Beesley had come to
the United Nation to “bury Grotius”, and this was one of his first salvos in accomplishing
that aim.626

One final piece of legal appraisal that would have impact upon Beesley’s thought and
Canada’s approach to the Arctic within the emerging law of the sea negotiations derived
from Daniel Wilkes, an American law of the sea expert from the University of Rhode Island.
In April, 1971, Wilkes argued that the new law of the sea had to include and make reference
to a novel set of norms emerging, that of an “International Administrative Due Process”
(IADP), which could be conceptualized as a form of “international trusteeship.”627 IADP,
while new to international law but not legal thinking, referred to the idea that “there are
floors of administrative behavior below which nations cannot go and still expect other to
recognize that behavior as legitimate.”628 In relation to Canada’s claim, the question became
for Wilkes whether pollution control could be seen as an area in which the international
community has recognized some restrictions upon freedom of the high seas. After surveying

624 ASIL (1971), at 118
625 Ibid.
626 Oxman (2006).
the “direction of emerging norms in the area of marine pollution”, it could be concluded that these pointed toward “effective regulation” and the ability for “unilateral control measures” to be undertaken in light of “absent ineffective international controls.”629 As Canada had written the legislation to impose penalties for waste into Arctic waters at a greater level of stringency for Canadian vessels, it followed that the legislation was balanced enough to meet the ‘administrative floor’. However the argument for trusteeship was critical to the Canadian case. For Wilkes:

Canada may also seek to justify the strictness of her controls by claims that the Ottawa government holds Arctic lands in trust, not only for all the inhabitants there, but also for all Canadians and all mankind. If accepted, this argument would then carry with it a trustee’s duty to impose regulations sufficiently stringent to preserve Arctic lands and their ecology as completely as possible.630

Trustee claims on behalf of states would rise significantly as international administrative due process came to be adopted in the international legal system, Wilkes held, and especially so as this was what most citizens expected of their governments. Echoing McDougal, “the strictness of controls applied under this ‘trust doctrine’ ought to be within other government’s expectations of the proper latitude which world public order should allow.” One of the primary tests to determine the application of trust was “uniqueness”, and given that the Canadian Arctic supported a variety of species and interconnected life the concept ought to be duly applied. By way of conclusion in arguing about the permissible boundaries of territorial protection, Wilkes drew out for Canadian officials his interpretation of Thomas Franck’s learned opinion on the death of Article 2(4).631 On the basis of Franck’s progressive thinking, wrote Wilkes, “we could be witnessing a period when governments consider their national interests and prestige to be bound up, not with expansion of territory, but with the expansion of quality, hopefully including both the quality of the environment and the means used to protect it.”632

629 Ibid, at 505.
630 Ibid, at 534. Wilkes here was also relying upon the approach taken to the Great Lakes as argued in the jurisprudence of the Michigan Supreme Court in Obrecht v. National Gypsum Company (366 Mich. 399, 105 N.W. 2d 143 (1960)).
631 Franck’s seminal piece (1970) had come out months earlier in the AJIL.
In diplomatic circles, May 1971 saw significant developments occur between Canada and perhaps the most pivotal state it required acquiescence from in Arctic affairs, the Soviet Union. Trudeau made his first visit to the Soviet Union, which itself was a watershed event in relation to Cold War alliance shifting, and returned with both a substantial agreement on the future of Arctic regulation and greater knowledge of the Soviet position on ocean affairs. Of particular importance, Trudeau was apparently assured by the Soviet leadership that they would tacitly support the Canadian legislation. It is however probable that during this visit the Soviets intimated that they would formally oppose all regional conferences proposed by the United States to solve Arctic issues, even while the United States continued to suggest the necessity for such gatherings. Following the Trudeau visit, the Soviet Union and Canada constructed a Protocol on Consultations, released May 20, recognizing “the responsibility of both sides for preserving and protecting the environment in Arctic and sub-Arctic regions.” On May 29, a joint communique articulated that “the two sides share rights with respect to ensuring the safety of navigation and protecting the balance of nature in the Arctic regions.” Trudeau went on to repeat to international audiences his longstanding belief that Canada and the Soviet Union were the “greatest Arctic powers in the world. We bear a responsibility to all mankind, a responsibility for maintaining the most delicate ecological equilibrium in the Arctic…”

Seabed Negotiations

By June 1971, discussions in the Seabed Committee were underway and the subject of marine pollution had been assigned to Subcommittee III. Beesley, a pivotal figure at the Seabed Committee given his international expertise and extensive diplomatic relationships, let it be again known that Canada considered marine pollution the “most important” issue to

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633 As an indication of the nature of the shifting alliances, Trudeau uttered that the overwhelming American presence posed “a danger to our national identity from a cultural, economic and perhaps even military point of view.” See Granastein and Bothwell (1991), at 195.

634 The consistency of this claim, however, is uncertain, as Franckx (1994: 245) writes to the contrary.

635 The United States would go on to propose eight such regional conferences, all of which were vetoed by the Soviets. See McConchie and Reid (1977), ft. 159.


637 Joint Communiqué on the Stay in the USSR of Prime Minister P. Trudeau of Canada, Pravda and Izvestia, May 29, 1971, cited in Dehner, Ibid.

638 Pravda, May 19, 1971, cited in Ibid.
be evaluated. Due to Beesley’s authority, Canada was able to position itself as an instrumental state in setting an early agenda for the conference. Canadian strategy was expressly orientated to secure a “package deal” in which a broad array of Canadian interests would be protected. In Subcommittee III, Beesley reiterated his conviction that the twin issues of innocent passage and the rules and categorizations of international straits were of greatest importance to Canada.

On August 5, 1971, Canada deployed its primary strategy within the Seabed Committee. The intent was to create and set in motion initial conditions that could lead to the problem of Northwest Passage being solved quickly and without extensive deliberation. A first tactic involved removing the characterization of ‘international strait’ from the Northwest Passage. Beesley postulated that for future conference success a working definition of international straits had to be constructed before negotiations could begin. While this approach ultimately did not come to fruition following the Committee’s dismissal of the idea, what followed was a technical study of how various international straits organized maritime traffic routes. Though undoubtedly disappointed that the definitional solution had failed, Beesley welcomed the secondary study presumably on the basis that investigations into traffic volumes in international straits would indicate that a higher volume was evidence of the “international” component, and thus the infrequent travels of the Northwest Passage would place it in a separate category of waterway. By this point in time Beesley was also well aware that the United States’ position on the necessity of international straits being the subject of “free transit”, rather than innocent passage, would be likely non-negotiable, following John Norton Moore’s submission of the US proposal to the Sea Bed Committee on August 3, 1971.

It is probable that Beesley understood that if Canada were to have any success with securing Arctic protection at UNCLOS, it would come not through negotiations on international straits issues, but via environmental protections. American opposition to the Canadian claim that

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639 To recall, while the 1958 Geneva Convention expressly removed any criteria for determining whether a strait had been “used for international navigation”, the ILC had proposed years earlier that the criteria of “normally used” was the valid way to view the law.
the Northwest Passage was not an international strait was explicit and consistent, and the free
transit rule was for the United States a “make or break issue” parallel to the Canadian claim
in relation to the Arctic deserving of a specialized regulatory regime. However, there was
also a certain and intriguing element of possibility that Beesley must have recognized as the
August session drew to a close. Article II of the US submission on the subject of
international straits was identical to that of Art. 16(4) of the Territorial Sea Convention in
reading that it would be limited to “straits used for international navigation”. It is
striking that even though there had been precedent in which states such as the USSR in 1962
had claimed non-use for certain straits, thereby triggering the possibility of vessel suspension
under the rule of innocent passage, the US Department of Defense was one of the primary
authors of Article II. This certainly strengthened the possibility that the Northwest Passage
could fall under the heading of non-use given its history rather than have to compete for a
designation in the wording if “used for” were to be dropped. For Beesley, then, perhaps
legal accommodation could be found on the matter with the Americans given the lack of
specificity being drawn on the subject of usage.

On August 19, 1971, having re-strategized, Canada placed for suggestion a second category
of proposals focused upon the necessity of creating “functional jurisdictions” for coastal
states in which areas adjacent to the territorial sea would be the subject of anti-pollution
zones and domestic pollution standards. Two issues are of relevance in relation to this
Canadian strategy of functionalism. First, Canada was concerned about being identified with
a group of states associated with the practice and problem of “creeping jurisdiction”, namely
Latin American countries that had extended their territorial waters to unreasonable lengths.
If Canada was perceived as a leader in this movement within the conference, though it had
positioned itself effectively in setting much of the agenda, Canada’s reputation as an honest

640 On the American positions in relation to free transit through international straits in 1971, see Knight (1972).
641 Knight (1972) at 772, was likely the first to bring this to the attention of the US delegation.
642 See McConchie and Reid, at 176, who write that the proposal would be applicable in certain straits parallel
to the new extension Canada had given the functional principle in waters off of the Pacific and Atlantic coasts.
Canada presented these facts to the Committee on August 6, 1971. Beesley was also at this point arguing that
environmental principles should be thought of as governed by existing law, via the Trail Smelter and Corfu
Channel Cases, and that an “umbrella agreement” - or environmental treaty - should be constructed at
UNCLOS under which all environmental issues should fall.
broker in finding balanced solutions would appear tenuous. Second, in order to circumvent this credibility problem, Canadian officials constructed a new vocabulary for thinking about equity, protection, security, and fairness in ocean issues. This linguistic change stemmed from Beesley, who, it is reported, generated new rhetoric in order to change the tone and thinking of the law of the sea debate going forward. Three ideas lay at the heart of the approach: 1) “functional jurisdiction”, which expanded the old idea and aligned it with the managerial concept of pragmatism and the idea of international, cooperative interdependence; 2) “custodianship”, a spin-off from Wilke’s ideas in which states would “govern” an area in trust for the rest of the world and ensure its survival and preservation until the point in which international principles could be agreed upon to regulate the area in good faith (and along the lines of the principles set out by the “custodian”); 3) and “delegation of powers,” which Legault referred to as a “legal fiction” in that the new law of the sea ought to be governed by coastal states being delegated the administration of international law on the basis of resource and environmental management concepts.

The three ideas should be understood as examples of specialized jurisdiction which Canada was deeply intent upon harnessing in order to draw out distinctions between their conceptual meanings and concept/s of sovereignty. While Canada claimed these to be progressive examples of legal/normative frameworks, lending themselves towards greater international cooperation and ecological preservation, Canadian officials also drew upon the historical point that other states, notably the US and the UK, had engaged in similar practices in recent

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643 Beesley would later claim in 1972 at the Canadian Council of International Law meeting that custodianship “represents the idea that what is needed is not domination by the coastal states, simply because it has been around for so long, but an accommodation between the range of interests of coastal states and maritime states, between coastal fishing states and distant water fishing states. And this is the whole thrust and direction of what we’re trying to do.” See Canadian Council of International Law, pp., 106-107.

644 On the delegation of powers concept, Beesley commented at the Canadian Council that, “I can tell you how that arose! It was during negotiations with the U.S.A about the kind of legislation they were thinking of passing in the Arctic. At one point in the discussion we were very close to a stalemate, and I said, personally, that if the U.S.A and the maritime powers couldn’t accept Canada’s right to do these things alone perhaps they could live with the idea that we could do it through a process of delegation of powers and perhaps we could put a gloss on it by an umbrella treaty. The effect of this particular suggestion was to break up the meeting for about half an hour, because the concept fascinated the U.S.A delegation and it has interested a number of other delegations since.” Ibid, at 106.
Indeed, in constructing such forms of jurisdiction in mid 1971, Legault and Beesley, by their own admission, drew on venerable international legal sources to make the Canadian claim persuasive. Canada’s adoption of unilateralism was explained as a policy approach that the US and UK had not only followed in practise, but drew support from through one of the greatest British authorities’ descriptions of law of the sea rules. In relation to the use of unilateralism, Legault now explained that Canada had “dipped into one of the ‘two parallel streams’ of the history of the law of the sea as described by Lauterpacht; namely, the unilateral assumption of protective jurisdiction for special purposes within zones contiguous to the territorial sea. This phenomenon - whose origins and attempted suppression owe so much to British and United States practice - was to become an essential element in Canadian law of the sea policy…”

In sum, by the final months of 1971, Beesley had both accomplished and learned a great deal in international circles by being able to speak publicly and privately about the Canadian defence of the 1970 legislation. In all, Beesley probably felt that the tide was turning within law of the sea circles and that a new normative debate on resources and pollution was possible. With a Canadian legal defence reasonably well secured by several prominent lawyers, he then turned towards outlining to the world the current implication of the 1970 legislation for the broader, though unmentioned issue, that of Canadian sovereignty. Writing in a major maritime journal in October, 1971, in order to summarize and present his beliefs for all international lawyers and statesmen, Beesley maintained that “[t]he 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.”

Canada’s position of unfettered ambiguity on the matter was therefore continued in the richest language possible.

645 Len Legault suggested this line of argument in 1974 (p. 382) on the basis that the United States, for example, had introduced its own proposal for a six mile territorial sea and a six mile contiguous fishing zone in which “traditional rights” would be “recognized in perpetuity.”
646 Legault (1974) at 382, footnote omitted.
647 Beesley (1971-72), at 7. Indeed, Beesley’s piece “Rights and Responsibilities of Arctic Coastal States: The Canadian View”, should be seen as a concentration of the best arguments Canada had assembled by that point in order to legitimize the 1970 legislation and move the environmental debate forward into the LOS session.
The Movement of Canadian Legal Thought

Over the course of almost eighteen months, Canada had managed to secure a great deal of knowledge about the Arctic case and make many of its claims stick with various international audiences. Canadian officials had learned about the strengths and weaknesses of the case in a charged set of interactive engagements with those who mattered in seeing the Arctic legislation internationalized. Legault, in particular, had done much to introduce novel legal analogies for audiences to understand what principles and corresponding rules could be applied to the Northwest Passage. Most critically, the *Trail Smelter* precedent allowed Canada to mix a principle focused on the duty of care across territorial borders in relation to the environment with the obligation for states and other actors not to engage in injurious activity which impinged upon the rights of sovereignty. This principle became applied to oceans law, specifically to the freedom of high seas doctrine, bringing again into sharp relief the point that the doctrine had never been absolute but historically fluctuated between relatively consistent regimes and various rules which carved out exceptions to these forms of practice. Hence, in concluding that harm could be done to the oceans and vulnerable areas in particular, ‘territory’ referred to ocean areas in addition to land masses. That it was now plausible to many scientists that the seas were exhaustible and possibly on the brink of collapse led the bedrock principle of freedom of the high seas toward imminent revision for the benefit of all states and developing countries in particular. Beesley drew extensively upon this narrative, targeting the doctrine in all of its forms and focusing his attention in diplomatic circles on how ‘freedoms’ abuses were impairing coastal states from achieving equivalent legal rights in ocean affairs. This charge referred not only to sovereign entitlement but also the types of malpractices that could occur if duties of care were not undertaken by those who were powerful and had written the law in their favor. As it stood, even from many American commentators, the rules of self help and self preservation could be seen to shade into environmental concerns given that the conceptual distance between territory and the oceans was fast becoming blurred and overlapping.

In terms of the basis of international law upon which Canada could rest the Arctic case, several elements had been learned. First, there was divergent opinion over what could
constitute a claim to historic title, or historic consolidation of title. L.C. Green had put the matter squarely that a variety of factors could contribute to Canada’s claim being already affirmed and that arguments that the Arctic was formerly an area of high sea were largely overdrawn. Yet in Green chastising Canada for being overly cautious about its reservation to the ICJ when a valid legal case was readily at hand, he provided Canada with a possible defence but also a reasonable framework to show that Canada had panicked and been substantially rebuked for its actions. By his account, Canada need not dwell on this series of errors as international law on the matter and by extension, and the policy’s legitimacy, were intact. From a more formal and technical reading of international law, Pharand problematized Green’s interpretation and the law relating to historic title in particular. Trudeau, he intimated, in his pronouncements over the past years might have been going down the path towards setting out Canada’s historic claim, but even if not, much more material needed to be evaluated in order to prove whether Canada’s case could meet the thresholds of history. Whether, for example, silence, or an omission by states to voice dissent against an emerging claim was sufficient to consolidate the acquiescence criteria, was unclear. And given that the ‘modus vivendi’ Canada and the United States had relied upon over the past decades in regulating vessel traffic was neither specific nor formally addressed, it would have been difficult for Canadian legal officials to square whether Canada had indeed been blessed by American inaction or already contracted to see the Arctic as an example in which competing states’ interests already rested on mutual and tacit consent.

Where Canada was vulnerable to critique, however, was in making its claims perhaps too extensive. Though there were mitigating circumstances that might have allowed for new law to take hold in exceptional circumstances, Henkin’s critique highlighted how abrasive and bald Canada’s position was. To demarcate a boundary at a distance of ten times what was then considered legal made it difficult to ground the Canadian claim in necessity and proportionality. Moreover, Canada’s point about the uniqueness of its area requiring strict legislation, while entirely plausible to many, had the effect of unseating intersubjective appraisal on who or what collectivity was able to make such judgments, and what other geospatial areas could similarly be considered to fall under such a heading of uniqueness.
However, rather than continue to both insist and extensively rely upon arguments that the Arctic was a hypothetical area in which claims to water, land and survival were problematic, Canada learned applied new legal vocabularies and shifted its strategies accordingly. In keeping with his hard-nosed, yet deft approach the diplomacy of international law-making, Beesley harnessed the expressive power of law to construct legal categories - its constitutive characteristics - and began to claim that responsible states in dire circumstances could also become “trustee agents” to preserve delicate areas in perpetuity or until sufficient resources were devoted to their attention. States could now be custodians, or gatekeepers of territory requiring immediate attention. Sovereignty could be peeled back from its overbearing meaning of complete authority by states to further include ideas such as the functional nature of political and legal claims. Here entered the politics of international law as a new form of political oversight. Material and normative administration was premised on a weak or reduced form of international legal cover from which sovereignty was splintered into patchworks and the oceans further demarcated into zones of proximate control and title. All the while, international law served as a placeholder for relaxing the degree to which outsiders could be allowed entrance into coastal state areas. Such a move represented valid international law, in Canada framing the issue, residing in the historical practices and thoughts of the world’s legal giants in London and Washington. The latter had practiced unilateral law-making for decades and were therefore privy to understanding the necessities of claims perhaps others could not perceive at first glance, while the former had entertained extensive legal thought relating to why protective and preventative measures were required in further solidifying states’ rights to territory as these wound closer to coastal shores. Both legal histories provided Canada with authority to press the Arctic claim as one of novelty and legal right.

The Practical Challenges associated with the Politics of International Law-making

By the spring of 1972, a new problem had emerged in developing and implementing the AWPPA. The Canadian government had yet to pass the legislation into domestic law due to significant problems arising in relation to ships possibly being granted insurance premiums as a result of the new liability regulations contained in the AWPPA. In short, no insurer
would back a vessel sailing within the territorial range claimed within the legislation, and Canadian officials understood that significant accommodation had to be made if its claim that the ‘Arctic was open for reasonable transit’, as Trudeau had maintained, was to carry credibility. To solve this problem, during May 14-20th, 1972, J.J. Mahoney, Q.C., and John Yates, of External Affairs were sent to Britain for discussions with the London Group of Underwriters on settling the matter. The sticking points remained that the AWPPA specified “absolute liability”, whereas the Underwriters simply would not insure an Arctic vessel under these terms. As Mahoney and Yates confirmed in what was then classified material to the Canadian Government, “if the Act [AWPPA] was proclaimed, there would in effect be a boycott of the Arctic Regions, including Port Churchill, as ship-owners would not enter those waters without P. & I. insurance coverage.”

Lloyds of London sought to have the rules of the IMCO used as was outlined in the 1969 Civil Liability Convention. As a result, Canada was left with few good decisions, other than: 1) amend the Act in favour of the IMCO provisions; 2) establish a Government Insurance scheme; 3) proclaim the legislation without regulations; 4) delay the legislation. Yates, however, voiced a compromise solution: establish regulations on the basis of an interpretation of the AWPPA which would follow the limits established by the Convention and also allow similar legal defences. If proven successful, this strategy could have benefits to whatever courts were engaged in litigation proceedings. For Yates and Mahoney, not only the Underwriters but the Canadian Government needed to understand that that the scope of interpretation between the Act and Convention was significant but could be aligned. Though there was considerable disagreement from the Underwriters, Yates and Mahoney were able to convince them that “in spite of the possible variations in legal interpretations of the Act, the content of the proposed regulations was evidence of good faith on the part of the Canadian Government in limiting the degree and the extent to which the Government would press a civil case against the ship owner.”

648 Formerly confidential documents, on hand with author, dated May 25th, 1972.
649 Supra note 642. This agreement was significant, not only for granting legitimacy and legality to the Canadian Arctic legislation, but also in creating new standards for pollution measures which, according to Yates and Mahoney, "will undoubtedly set an important precedent for the consideration of the 1973 IMCO conference
and Maloney concluded to the Canadian government that the concessions from the Underwriters included not only the provisions of the AWPPA, and coverage for all types of “deposits” and “wastes”, but “recognition on the part of the London Group of the special nature of the Arctic.” Having secured these remarkable concessions which gave international authority to the AWPPA, it was then passed into Canadian domestic law.  

June 1972, also witnessed the convening of the long awaited Stockholm Conference, planned since 1968, and at which Canada would attempt to deepen international principles on the relationship of the environment, oceans, and Arctic waters. Stockholm was a *sui generis* gathering in many ways, as it was understood to serve as a forum for international environmental policy writ large and be the first “formative stage in the progressive development of general legal principles” in which “new -strategies of maw-making” would be on display.  

Stemming from the preparatory work of the 1971 Marine Pollution Conference in Ottawa, the Stockholm sessions draft ended up containing “23 Principles on Marine Pollution” which were used as foundational material at the Seabed Committee in 1972 in the run-up to UNCLOS by the Canadian delegation to set standards for the conference.  

Of interest, however, were two principles that were not adopted by the 1971 Working Group or the delegates at the Stockholm Conference in 1972: the principle of “functional control” over waters due to potential marine pollution; and the “delegation of powers” by the international community as a whole for special areas pursuant to a states “special authority.” Canadian administrative terminology, and its application for pollution prevention, had thus been dealt a temporary blow. Not be deterred however, at the Third Sea-Bed Session weeks later that summer, Canada submitted a comprehensive document on the pollution issue in maritime matters which outlined the need for “management principles” on pollution from ships. It is significant also because the position the ship owners have taken heretofore is that limitation in this area should be related not to the 1969 CLC but the 1957 Convention on general limitation of liability which amount to approximately one-half the 1969 rate. This agreement to treat limitation for all other pollutants on the same basis as oil by the Mutual Insurance Associations will place tremendous pressure on the ship owners to conform.”  

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650 Which was somewhat incredible in that only days earlier the stance of the Underwriters was far apart and unflinching in relation to Canadian intentions, as expressed by P.N. Miller of Thos. R. Miller and Son, in his note to Mahoney on May 19th. Document on hand with author.
652 See M’Gonigle and Zacher (1977), at 125-128, for extensive treatment.
and “concepts” for the use of the environment. Canada also suggested that a bargain be struck between the authority to prescribe special rules and the ability for such rules to be enforced. Overall the Canadian position was to rely upon the Stockholm principles and attempt to impose greater responsibilities upon flag states while simultaneously granting greater authority to coastal states. Canada’s attempt at persuasion about the necessity of having environmental pollution principles institutionalized internationally should therefore be seen by 1972 as having marginal impact. The central principles Canada was endorsing had not been accepted, and had been marginalized in international forum on several occasions. However, to Canada’s benefit, environmental deliberations and the processes surrounding efforts of legal codification were now moving within international affairs with some momentum.

With a range of institutional settings well positioned to continue to work through the problems and promises of environmental protection for the oceans, Canadian officials now turned to explaining to the world what its current visions were on the subject of international law and how Canadian approaches to international law could be rationalized. A paper produced by Alan Gotlieb and Charles Dalfen on Oct. 13, 1972, at the Second Annual Conference of the Canadian Council on International Law, intended to capture this thinking and outline how foreign policy and international law were being reconfigured within the world’s changing international contexts including the law of the sea.653 The new Canadian approach to international legal issues was an extension of the thesis outlined by Beesley in December, 1970, at the UN General Assembly, that there should be an “organic relationship of law on the national and international planes…the seriousness of the problem can determine the urgency of action, which in turn can sometimes dictate the means chosen”654

Revealing the jurisprudential roots of the approach, it was suggested that Canada’s unilateral action in relation to the Arctic “must be regarded as a “claim” in the McDouglian sense, against which counterclaims may be raised and which may or may not become accepted

653 Canadian Council of International Law (1972). As detailed in chapter five, the paper was somewhat controversial in its claim that Trudeau’s foreign policy gave rise to a change in Canadian international legal thought and strategy.
654 Supra note 647, at 245.
community policy.” After several rounds of claim and counter claim between Canadian and international lawyers on the merits the new international jurisprudence emerging, two comments rang out loudly. As if to underscore that Canada was now well associated with McDougal’s approach, Ronald St. J. Macdonald concluded that “any unilateral initiative that is taken now tends to be perceived in the form of an offer…[t]oday, unilateralism has really become implicit transnationalism, with foreign officers becoming aware that important initiatives can best be taken in a reciprocal, principle[d] and reasoned framework.” Legal breaches were therefore instances of legal possibility, even though how remedies were to be calculated to disadvantaged parties was left un-remarked.

Percy Corbett, speaking at the end of the conference on the topic of the world’s new turn to lawlessness, emphasized with poignancy that the Canadian advisors, Gotlieb and Beesley, had presented the world with an “ingenious effort to resolve what they took to be a unique Canadian dilemma between national and world community interests”, but in reality, all such dilemmas were universal. The Canadian representatives were both “counselors and advocates” - inclusive and exclusively driven in policy school terms - but ultimately Canada’s withdrawal from the ICJ was “an assertion of complete subjectivity, which is the antithesis of law.” In other words, masquerading the recent Canadian vision as both novel and required by necessity given the shortfall of international law’s reach of “proper rules” still rang hollow to many lawyers not associated with the policy school.

**Conclusion**

By the end of 1972, Canada had engaged in numerous rhetorical struggles with many of the world’s leading jurists and met with reasonable success through the “shotgun” approach to legal and political persuasion. Several international and American jurists saw the Arctic policy as grounded in legitimacy and legality and a form of new legalism that should be welcomed in light of how much man knew he did not know about ocean biology. Canada had also began to construct several powerful cognitive frameworks through which the Arctic

655 Ibid, at 247.
656 Ibid, 225,226.
and its relationship to the law of the sea had to be perceived. These were captured first in providing a negative narrative to freedom of the high seas, and doing so by accentuating the rights contained within as providing a parallel right to pollute. Such ‘freedom’ was a ‘license’ to degrade the environment, a negative freedom unencumbered by any positive duties of care. And if the trade off were between the ability to retain nuclear first strike capability rather than protect man’s eighth wonder of the world, then international society could not credibly be committed to moving beyond antiquated security practices and push by contrast towards cooperative rules of governance. Above all, the general frame Canada sought was one of re-balancing the scales of ocean utility, which required poisoning the side of unfettered freedom while maintaining a delicate balancing act on the other between two competing doctrines: newly developed states entitlement to greater coastal extensions of their resources, which entailed greater jurisdictional reach, and the right of all states to protect in the form of trusteeship unique geographies. On the whole, the period was for Canada successful in that many of the complexities of the Arctic legal argument had been learned and responded to, and in constructing successfully a series of rhetorical frameworks through which the Arctic should be viewed, Canada had gone some way towards denying the United States the ability to craft reasonable rebuttals to the Arctic policy. In many ways, the infamous dictum of ‘time being on Canada’s side’ in legal terms would have once again appeared prescient. For Canada was now in a reasonably favourable position to either have the AWPPA enacted into international law in the ocean conferences to follow, or through an extensive research investigation have proof granted to its potential claim of historic title. As a result, the Arctic policy was now moving on a path of dependence, as the environmental component was being refined within ocean law codification processes, while the historic title component of the Arctic policy was also being retained as further legal analysis was offered.

The role of international law on the policy’s development during this period was subtle. The law of the sea was both softening and becoming further contested normatively given that Canada had dealt a blow to the authority of the ocean regime in moving unilaterally, reserving before the ICJ, and creating a new dynamic process associated with maritime environmental protection. However, the law was in some sense firming by 1973 also as
states were constructing policy briefs on what the law of the sea ought to look like once institutionalized. Some states, such as Canada, went to great lengths to seize upon the movements towards the conferences and UNCLOS. Indeed, international law was given great historical reach from Canadian officials. They reached back 350 years to debate the origins of the law of the sea on Grotius’ terms, and argued not exclusively that contemporary rules did not match the purposes for which the law was originally set, but that the law had turned in on itself and reached the limits of its positive contributions. Not only were contemporary interpretations dated but the principles central to the legal regime were dangerous and thus obviously without authority and binding obligation. International law was thus interpretively open for Canada, demonstrating the range of choices and vocabularies associated with the politics of international law. But caught within this were brilliant illustrations from the legal college grappling with its role in relation to the technological revolutions in ocean and biological affairs, ones which attempted to explain the law, develop it, and displace the old for the benefit of the new. In sum, the period of 1970-72 witnessed how a range of arguments on oceans law advanced for centuries were at play in Canada trying to push international society towards a new era of state responsibility and moral guidance.
Chapter Seven: The Negotiation of Article 234 (1973-1976)

As Canada moved into the negotiations of UNCLOS III in late 1973, one, if not the central aim, was to come away with a legal guarantee of its jurisdictional authority over Arctic waters. Indeed, the Canadian Government had made it expressly known to its negotiators that they were not to return unless the Arctic objectives could be secured in law. While Beesley understood this as a difficult task in the midst of Canada being both an active and constructive voice at a conference structured to achieve a package deal, Canada had met with much success, even if only peripherally at points in the early part of 1973, in getting the world to take seriously the idea that there were special areas of the world within the oceans requiring unique types of legal protections. The series of multilateral conferences in 1973 on ocean matters presented a promising set of venues to advance the Arctic legislation towards a position of international legality. As delegates prepared their positions for the conferences, it was understood intersubjectively that the regime’s contents were to be thought of, and thus bargained for, as having law creating possibilities. In other words, even if consensus emerged that these regimes were not legally binding, all parties understood the precedential setting, or soft law effects of the negotiations, would inevitably be carried forward to the UNLOC negotiations in 1974. The series of negotiations in 1973 was a horizon of possibilities upon which articulations of *de lege ferenda* would compete with existing ocean principles.

Chapter seven documents for the first time the thinking, priorities, and strategies of Canadian negotiators as they engaged in UNCLOS deliberations from the Caracas session (1974) to the New York Sessions (1976). During this period, Canada was caught up in a protracted period of deliberative bargaining with the United States and numerous other countries, but particularly the Soviets, on the subject of international law for the Arctic. The product of these efforts allowed Canada to secure an international legal basis for its Arctic pollution legislation. Article 234, the ice-covered areas clause, was the culmination of many years of learning and hard negotiations on behalf of Canadian officials with their American counterparts. Chapter seven describes the contours of this policy process by relying on new documentary evidence from Canadian Foreign Affairs, background information which in
many ways reveal the basis of the Canadian approach from its central exponents. Both the process and substance of Article 234 indicate the depths of learning and cognitive understandings that Canadian officials were subject to, and how the bargaining process for Arctic law unfolded.

Article 234 is not solely, as it is sometimes loosely portrayed, an environmental rule, principle, or reflection of a legal regime. To be sure, the contents of the rule constitute how ice-covered maritime areas can and should be protected in accordance with their fragile composition. However, unpinning these formal interpretations at the time of its negotiations were security concerns of the most significant order. Agreement on Article 234 went to the highest levels of Canadian, American, and Soviet governments, and on many occasions Trudeau and Ford discussed the matter intensely. The legal construction of the regime was incredibly difficult to finalize on grounds that it was elevated as a high security issue. All concerned states understood this component throughout the negotiating process. For the Americans, Article 234 was not solely or even specifically a regime of environmental law, but the outcome of a security deliberation, and a major deal for all parties which allowed UNCLOS to move forward with American and Canadian support in various adjacent areas of the package deal. For Canada, Article 234 was central to securing sovereignty over Arctic waters. The intention in what follows in chapter seven is to let the empirical and analytical insights developed surrounding the politics of international law on Article 234 serve as a point of reference for law of the sea scholars in understanding a crucial development at UNCLOS that is heretofore only understood by its primary law-making actors.658

1973: Soft Law Policy Options for UNCLOS

In the IMCO preparatory meeting of February 1973, Canada commenced a forceful diplomatic effort in attempting to structure the legal framework for UNCLOS. It began by referring directly to the principles rejected at the Stockholm conference months earlier centering on custodianship and delegation of powers. To this list Canada also attached a new

658 In particular, in response to Brubaker’s (2005: 44) point that, “[i]t is difficult to know exactly what took place in the negotiation between the Soviet Union, the United States, and Canada over ice covered areas.”
set of articles that would allow coastal states the ability to apply “special measures” to regulate off-shore shipping within the boundaries of coastal states’ national jurisdictions.659 Included within the list of articles were points about the inclusion of “environmental protection zones” if geographical and environmental circumstances warranted their application to a particular state. Canada also floated the idea that these measures could be taken into account either prior to or after international agreement once specific rules of application had been reached. Thus, its strategy appeared to reflect the intention to have a variety of discretionary environmental protections either directly embedded in preparatory documents, or have these remain as a secondary source of, or legal supplement to, the primary directives. While the special measures clause was defeated in the February meeting, Beesley and External Affairs were unswerving in their commitment to its adoption and utility in furthering Canadian goals.660 The special measures clause was immediately inserted into Canada’s March 1973 Document for the Sea Bed Committee titled, “Draft Articles for a Comprehensive Marine Pollution Convention”, in which Art. IV gave significant discretion to states to fall back upon measures “necessary in the light of local geographical and ecological characteristics”, and under Art. X(1) states were provided wide enforcement capability.661

With the formal IMCO Conference scheduled for Oct., 1973, Canada required a new political strategy and legal frame to change the dynamics of the debate and generate coastal state support. In a calculated move, it began to persuade developing states to attend the conference in order to strengthen the bargaining power of those who claimed greater rights and obligations for coastal states’ interests. While it is unclear whether Canadian material assistance was lent to developing states for their attendance, promises were granted in relation to legal support for particular positions to emerge at UNCLOS. Canada was further able to persuade states that their interests were served by attending in a bloc formation, and it

659 See McRae (1987), at 103. Canada’s policy purpose and language was broad, and centered on the proposal that all coastal states should have legislative authority for the environment in waters that fell within their jurisdiction.

660 Because little input from other Canadian Departments was sought in many oceans issues, but particularly in relation to environmental affairs, External Affairs had control over the file tightly at the expense of the Department of Transport and Defence. See M’Gonigle and Zacher (1977), pp. 128-129.

increased the rhetorical volume of its self-characterization as a ‘developing state’ on law of the sea issues in order to introduce accommodation between potential polarizing North and South issues at UNCLOS parallel to the division at Stockholm. Such persuasive efforts proved fortuitous. Canada’s attempt to rally together developing states by the October Conference was overwhelmingly successful as over half of the members attending were developing states.

The orthodox juxtaposition of perspectives and interests between coastal and maritime states set out the primary divisions at the conference, but of crucial importance was how the transformation of international law and the structure of legal rules were carried out in relation to jurisdictional issues. Ultimately, the negotiating challenge turned on not only the content of what would come to constitute coastal state jurisdiction, but also the physical extent of this domain. At the outset of the conference, Canada and the United States were aligned in the necessity of bringing about enhanced environmental regulations as evidenced by their proposal at the IMCO February Conference of “port state” control/enforcement measures. Port state enforcement, an idea generated and cultivated within Ottawa, amounted to the proposition that states would have the right to initiate proceedings against vessels in their ports for pollution violations having occurred in any location. While the restrictions from the IMCO February Guidelines were onerous in that a port state was able to prosecute a vessel for violations occurring in the territorial sea of another following that state’s permission, and could not do so if that state had already completed an initial prosecution, the terms were now relaxed by Canada and the United States in numerous ways to include the rule that a port state had to drop proceedings if a flag state initiated its own within sixty days of first filing.

662 Perhaps the central problem was how specific language would replace the vague wording of Article XI of 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), which allowed states to take measures within their own jurisdiction in matters related to the Convention: “Nothing in the present Convention shall be construed as derogating from the powers of any Contracting Government to take measures within its jurisdiction in respect of any matter to which the Convention relates or as extending the jurisdiction of any Contracting Government.” See M’Gonigle and Zacher’s (1979) seminal treatment of the 1973 IMCO.
Compliance with existing pollution measures had become so marginal by 1972 that states such as Canada and the United States had decided to reverse this trend facilitated by the port state concept. A set of tests during 1971-72 by the seven major shipping states in ports confirmed the compliance problem, but their reports on the issue remained secret and held by these states and the oil industry. Nevertheless, the port-states proposal was in the end voted down for reasons of economics, but also on grounds that the process leading towards UNCLOS pre-structured the bargaining for legal rules at IMCO. Economic justifications ranged from the possibilities of foreign interference with shipping through to increased costs incurred due to arbitrary vessel checks and delays in port. Yet for developing states, the reasons associated with legal codification cut in a different direction in that if these countries gave ground to the port-state proposal at IMCO this would indicate a “premature sacrifice of their more extensive coastal claims to environmental jurisdiction in the entire economic zone.”

Canada’s voting position on the proposal revealed starkly its policy strategy on the Arctic. Upon learning during the conference that acceptance of the port-state proposal would have the effect of diminishing support for a wider claim to jurisdiction by coastal states at UNCLOS, Canada subsequently withdrew its support for the idea, indicating to similar coastal allies that they should correspondingly do the same.

Of benefit to Canada and its developing states allies was that the focus of the IMCO Conference itself appeared to have shifted from strictly a codification venue on the international rules for oil pollution from ships to a venue covering a variety of toxic substances. This acceptance, which must be attributed in large part to the change of thinking generated at the talks in London to the underwriters associations by the Canadian delegation in 1972, identified a broader pattern emerging at the Conference in relation to states’ beliefs about what argumentative boundaries a legitimate middle ground position on environmental protection had to fall within. Something had clearly changed in the minds of maritime states, and of marked significance for Canada was the emerging position of

663 M’Gonigle and Zacher (1979), at 179.
664 Ibid, at 42. And of further interest in relation to effects of legal codification at UNCLOS, states such as Japan and the United States supported the port-state proposal on the grounds that its approval at IMCO would temper the extreme position of coastal states at UNCLOS.
maritime states willing to allow greater discharge standards in certain jurisdictional areas that could be characterized as “exceptionally vulnerable.”" With this new language circulating, Canada was led to drop its more extensive coastal interests immediately and accept the wording on the grounds that it amounted in its eventual legal expression as a tacit recognition of the Arctic waters legislation. To be sure, this was not all that Canada had wanted, given that much of the specific technical provisions worked into the AWPPA were lost in the trade-off. For example, the setting of stricter design, equipment and manning standards was removed, unless these were sought by states against vessels in areas that were exceptionally vulnerable. In the final vote however, the ‘exceptionally vulnerable’ proposal failed to be accepted at IMCO by the two-thirds requirement, but the provision’s defeat did foreshadow that an agreement at UNCLOS was indeed possible on the basis that the political and normative space between coastal and maritime states was narrowing with time through such multilaterally driven, institutional exercises. As McRae put it, the shipping states “were now on notice” of the prominence, consistency and commitment of a new collaborative ocean alliance in having ecological considerations influence the creation of international legal norms.

By the start of the Caracas session in June, 1974, Canada had also been able to internalize Donat Pharand’s writings on the Arctic in his major publication in December of 1973. Although many of the topics had been dealt with before, Canada learned several legal and strategic points from this work. First, Canada would have to be cautious, which in large part

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666 M’Gonigle and Zacher, at 133. The authors chronicle that the reason for the change of ideas is complex but essentially turned on the submission by Canada and fifteen others states of a highly authoritative paper outlining a “basic zonal approach” to pollution, distributed in the summer session of the Seabed Committee of 1973. Presumably, much of the policy change resulted from maritime states by October realizing that they had to make some sort of a compromise in order to see progress in ocean affairs given that the opening of UNCLOS Conference itself was only months away.

667 Which was startling to Canada given that it had through External Affairs representative Edward Lee propounded that the Article on exceptional areas would not have precedential effects as to the “nature and extent” of coastal jurisdiction, “as that question is of course within the sole competence of the Law of the Sea Conference.” The United States, and in particular the Department of Defense, was stridently opposed to the this new wording given its potential to interfere with freedom of navigation and also the ability for United States maritime law from the Ports and Waterways Safety Act to take effect within the territorial sea and internal waters of the United States. On the United States and Soviet strategies in defeating the Article on exceptionally vulnerable areas, see M’Gonigle and Zacher (1979), pp. 14-17.

668 Pharand (1973).
it had been over the past two years, about committing to open up the Northwest Passage to international shipping. Pharand confirmed, as in past, that it was the deeply entrenched right of innocent passage that distinguished territorial waters from internal waters. Innocent passage was only prohibited in internal waters, and thus even though Canada had been stridently emphasizing within all institutional venues the necessity of changing how the concept of “innocence” in unfettered sea routes should be thought of, by suggesting that the Passage was “open” for business, Canada was opening itself up to the charge that if it acquiesced in accommodating innocent passage this might strengthen the conclusion that the Arctic waters were not internal. 669 Canada could, of course, claim that it was merely offering to the world the option of using the Northwest Passage at Canada’s discretion, rather than creating any legal effects through such a statement, but the matter would have be handled delicately and in language less forthright than had been the case typically promulgated. On the crucial point of what criteria combined to constitute and international strait, Pharand wrote that a strait having been used for international navigation is an important consideration in relation to the geographical component. Yet he made no further claim as to how this relationship of ‘use’ was to be evaluated. 670 Pharand also clarified in policy terms how to think about the distinctions between the concept of innocent passage and the newly proposed term of “free transit” put forth by the United States as it applied to international straits. Free transit referred to transit that was carried out in territorial sea straits used for international navigation, and was to be unimpeded for all ships and aircraft akin to their rights of movement on the high seas. Critically, for Canada, removed from this new practice was the ability for states to argue that a maritime act could be categorized as ‘non-innocent’ according to the 1958 Geneva Convention. Such a change, in line with the United State’s reading of law, would bring consistency, fairness, and de-politicization, to the emerging centerpiece of the maritime transit regime.

669 The statement stemmed back to the policy defense made by Trudeau on April 17, 1970.
670 Of note, therefore, Pharand made no mention of the rule indicating that an international strait was characterized by an area which has the “potential” to be used for navigation, which some American commentators had begun to argue was a valid reading of law.
However, Pharand also dealt the Canadian case for sovereignty a significant blow. He began by reflecting on what Prime Ministers St. Laurent and Trudeau had said in the previous decades. In 1957, St. Laurent had called the waters of the Arctic “Canadian territorial waters”, referring to the entire Arctic archipelago. There was some doubt as to the credibility of Laurent’s claim given that up until the Manhattan’s 1969 voyage Canada claimed a territorial sea of three miles, leaving a strip of nine miles of high seas in Barrow Strait.

When Trudeau in May, 1969, held that the waters were “looked upon as our own”, he was making an oblique reference to a declaration of internal waters even though this claim became muddied days later. But irrespective of what Trudeau either stated or meant, Pharand noted, in relation to Arctic waters, “whatever their status, they would not be internal waters yet.”

By a process of legal deduction, the historic title claim became problematic to make on the basis of historical inconsistency with legal terms. However, Pharand did provide to the Canadian Government a critical legal argument to preserve in some sense the potential for a sovereignty claim to materialize over time. His suggestion turned on how Canada could validate the straight baseline claim.

In his prior writing given to the Trudeau government on September 11, 1969, Pharand had outlined that the only legal manner in which strait baselines could be drawn was to place them in separate sections separating the Northern (Queen Elizabeth Islands) from Southern sections (Perry Channel) of the Arctic archipelago. Pharand’s reasoning then was that, 1) given the extensive distances between the sections of islands of North and South, and, 2) drawing baselines around the entire archipelago would prohibit legitimate transit on the high seas, it followed that total encirclement would be contrary to international law. By 1973, however, his position had changed, as a result of one of Canada’s 1970 policy alterations. The central question now, for Pharand, was whether the islands constituted a “single unit, justifying a uniform regime for the various bodies of water between them.”

The answer, now decidedly affirmative, was based on reasoning that in Canada increasing its territorial sea from three to twelve miles, creating an overlap of waters in the Barrow Strait, the
extension had the effect of making the archipelago a single unit under international law as set out in the *Fisheries Case*. It followed that the two areas of territorial waters were linked together by the “same continental shelf”, and given that Canada ought to be able to rely upon a unique combination of the law as it related to both coastal archipelagos and oceanic archipelagos, the string of islands linked within Barrow Strait allowed legal baselines to be drawn.

It is hard to know with what confidence Pharand drew these conclusions, but he did leave Canada with the suggestion that, the “best solution might be for Canada to draw straight baselines and invoke history as an element of support in drawing baselines.” Of secondary but some importance was Pharand’s opinion on the possibility of Canada claiming historic title to the waters, thereby designating them internal. He noted that Canadian law did not make any express reference to historic waters in the Arctic, and the position that Canada either could, or already had tacitly made a legal claim to historic waters, was premature. Accordingly, it had become “necessary to study the relevant archival and governmental documents (British and Canadian) before forming a definite opinion.” For the Canadian government, this conclusion produced extraordinary benefits. Perhaps the world’s most authoritative Arctic legal scholar had held that the historic title argument might be valid, but only extensive archival research could bear this out. And by all accounts this research could take years given the lengths to which one would have to go to uncover all of the British material spanning an historic course of several centuries. Until proven otherwise, the historic claim could be used on a legitimate basis, irrespective of how poorly Canadian officials in past had discharged their language surrounding the ‘Canadian-historic-internal-territorial’ distinctions of Arctic waters. Perhaps quite predictably then, the Canadian government promulgated for the first time an express statement on its legal position over Arctic waters. On December 17, 1973, in response to a query on the legal status of the Arctic waters, External Affairs replied in a public letter that not only were Hudson Bay and Hudson strait

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673 Given that they were not made in his article, published in (1974), for the edited volume by Macdonald, Morris, and Johnston on Canadian International Law. See Pharand (1974).
674 Pharand (1973), at 66.
675 Ibid, at 130.
considered historic internal waters, but also now were the waters of the Arctic archipelago “on an historic basis, although they have not been declared as such in any treaty or by a legislature.” With this legal justification serving as a placeholder for engaging in diplomatic activity, Canada proceeded to take its case over Arctic waters to international audiences.

**UNCLOS - Caracas (1974)**

Moving into the first phase of negotiations for UNCLOS, Beesley and External Affairs had formulated a strategic position they believed could not be breached. There was to be no diplomatic push towards achieving sovereignty over the Arctic given that the dialogue and policy position surrounding such grammar had been recriminated following the earlier *Manhattan* affair. Broadly speaking, outright claims at UNCLOS to sovereign entitlement by states in any territorial area would have been foolhardy and counterproductive. Hence, Canada moved to secure the pollution legislation either by generating a legal rule or regime acknowledging the Arctic’s environmental uniqueness, or by having the Northwest Passage distinctly removed from the list of the world’s international straits with, most importantly, American acknowledgment. Both strategies were complimentary to Canada’s official document presented to the UNCLOS sessions in 1973 outlining its formal policy aims and vision for ocean affairs.  

676 At the outset of the negotiations, however, there were numerous risks associated with having the legislation mirrored or take effect within the framework of UNCLOS. As McRae argues, given that there was a multiplicity of issues to be decided at the conference and the Arctic was only an area of concern to a handful of states, achieving support from the broader set of participants could prove difficult. Moreover, the United States and other shipping states had made it known that the success of the conference turned on a resolution to the problem of shipping in international straits being indiscriminately prohibited. For Canada, if the Northwest Passage became associated with this debate, its outcome would perhaps render moot under international law the effects of the environmental

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The most perplexing choice in relation to a bargaining strategy to circumvent these problems was for Canada to decide whether to begin to create a divide, or draw a hard distinction, between what the Arctic Ocean and territory was (how it ought to be conceptualized as an ice-covered area) in relation to what areas constituted “exceptional vulnerability”; or to defend the Arctic as an archetypal example of an area of exceptionalism amongst many. Ultimately, there was very little difference in the substance of the arguments for either approach, further complicating matters. The former strategy might have the effect of diminishing Soviet support for the Canadian claim given that the Soviets supported freedom of the high seas beyond, but not within, its own Arctic territory. Furthermore, the Soviets were adamant about securing unimpeded transit passage through international straits for submarines. Canada therefore had to finesse the problem and tread delicately given that Soviet support for the AWPPA was perhaps the most valuable piece of international recognition Canada possessed. If, conversely, the latter, broader strategy were chosen, this might dilute the Canadian claim by packaging the Arctic with, *inter alia*, Australia’s claim to exceptional vulnerability over the Great Barrier Reef.

According to McRae, one possibility to the problem of having to deal with states supporting the resolution of international straits issues was to oppose entirely the new international straits regime of free transit. Such a move would have had the effect of aligning Canada with a number of coastal states intending to retain the language and interpretive flexibility of the concept of innocent passage within international straits. This would have placed Canada with allies in the coastal state group with which it had become naturally associated, even though the United States was now insisting that the concept of innocent passage had to be re-clarified or even done away with altogether to remove impartiality of political judgments from vessel transits. Alternatively, Canada also could have supported the construction of a new straits regime while concomitantly attempting to remove the Northwest Passage from

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677 That is, if the Northwest Passage were an international strait this would negate the ability for Canada to claim that passage could be suspended on grounds of its non-innocence. This point would have been clear in the minds of officials at the time.
678 McRae (1987), at 105.
being characterized as an international strait altogether. A third option turned on Canada pressing forward with a rule or regime for the Arctic and remaining disassociated with the international straits regime until such an agreement was complete. With this strategy, as MacRae put it, “Canada could have the best of both worlds.”

Canada was also faced with the dilemma of how to position itself in relation to the archipelagic group of states, particularly Fiji and Indonesia, who were pressing for their geographic circumstances to be treated with special rules, and in particular, for their ability to draw straight baselines around perimeters to bound territory within internal waters.

Canadian officials understood that Pharand’s reasoning on baselines had now changed, even though his original position found legal support in one of Canada’s leading jurists. Maxwell Cohen had in an influential article in 1970 expressly supported Pharand’s original argument, questioning whether Canada’s archipelago was equivalent geographically to other types of island chains absent any concrete mainland sections. On the issue of what could constitute an ocean archipelago, mid-ocean or otherwise, Canadian policy was crafted with great opaqueness, referring to the waters of the archipelago as “Canadian.” The stakes in Canada explicitly positioning the Arctic as a legal archipelago, and accordingly, expending great diplomatic efforts in achieving this characterization, were considerable. Archipelagic status would have proven of enormous benefit to Canada, but Beesley also understood that archipelagic extensions to land territories under international law carried with them international security concerns, some with significant gravity in particular. In extending the archipelagic regime, Canada realized that it would run up against significant hostility from the Soviet Union and perhaps further push an already tense situation between NATO allies,

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679 Canada’s Official Policy Document for UNCLOS reflected these tensions and an overall strategy of ambiguity. On the international straits issue, Canada did not commit to outlining what balance should be sought between the rights and obligations of maritime and coastal states, presumably on grounds that Canada would have a difficult time reconciling its own dual interests in having straits opened but the Northwest Passage closed, in addition to having to accommodate American and Soviet concerns. In relation to policy for the Northwest Passage, Canada fell back upon the reasoning of Pharand, outlining that “any regime devised for straits used for international navigation would not be applicable to the Northwest Passage since it has not been used for international navigation.”


682 See Buzan and Johnson (1977) at 257, and generally for Canada’s negotiating strategies on law of the sea issues.
Greece and Turkey, towards total war. American and Canadian officials discussed these possibilities at length in the early months of UNCLOS negotiations.

Canada had a range of policy options it intended to deploy to realize its sovereignty in the Arctic that could be arranged along a continuum from strong to weak proposals. From strong to weak these were ordered as: 1) the use of environmental principles to create a regime that mirrored the Arctic legislation; 2) have the Northwest Passage removed from the straits regime; or 3) attempt to have the Arctic archipelago be cast as an ocean archipelago which would allow for the natural extension of baselines around the outer perimeter. Canada hoped to navigate deftly within the UNCLOS groups associated with these issues through its representations within the main Committees in order to achieve international recognition in some form.683

Canadian thinking at UNCLOS on Arctic policy is revealed in a document sent from Beesley to the primary Canadian delegates referencing a confidential memo sent to Cabinet from the government outlining various law of the sea issues.684 In the memo, Beesley first attempted to placate concerns that not only was the conference on the whole was both disorganized, but the intent of the developing states was to “establish a radical new regime for the oceans” which could lead to a “total collapse of the public order of the oceans.” Beesley understood through his engagement in numerous preparatory sessions that not only had significant work been done in the sea bed committee, but developing states were not to be disparaged for positions which were in fact quite moderate. This group was arguing from a position of legitimate economic grievance, and had also been a central ally of Canada in allowing the coastal state pollution debate to become prominent over the past year and in the six years

683 As Canada had the third largest delegation present at the Conference it was greatly assisted numerically in being aware of how bargaining was unfolding within Committees, and how the range of UNCLOS participant’s interests, beliefs and strategies were being formed. On Canada’s overall approach to the many issues at UNCLOS, see Beesley (1972); Buzan and Johnson (1977); deMestral and Legault (1979-80); Riddell-Dixon (1989); and McDorman (2008). On Canadian American relations on the Law of the Sea, see Hollick (1972), (1974-75); and Tyman (1979).

684 Document sent June 6, 1974, on file with author. The authors of the memo to Cabinet remain unnamed. Beesley notes that Canada’s approach to the conference was to be predicated “upon the need to manage ocean space and special interest of coastal states in this management [style] (in accordance with statement of objectives unanimously endorsed by Stockholm).” Numerous states were increasingly, in Beesley’s mind, coming to accept the management approach to ocean matters, which would assist Canada’s negotiating abilities.
prior, more specifically. For Beesley, the Canadian government needed to understand that its position at UNLOC would be one of the most difficult to maintain given that Canada “was demanding something on almost every issue, and, in many cases is taking a very tough position well beyond that adopted by other countries.”

In relation to the Northwest Passage, two of Beesley’s comments stand out. The first indicates that he had become aware that both Norway and the United States had shifted their opposition to parts of the AWPPA, a policy turn which opened up the possibility that they might now accept Canada’s rules on establishing hull construction standards for ice infested waters. That Canada’s Arctic legislation was being perceived with greater legitimacy to such key maritime allies was of significant benefit. Second, the memo to Cabinet made the point that the concept of oceanic archipelagos had no direct bearing upon Canada’s interests or strategy. Beesley thought this approach to Canada’s interests to be narrow and replied that as there was still a possibility that the definition of an archipelago might include countries with “off-lying archipelagos”, Canada must “keep its options open on this issue.”

On July 3rd, 1974, the first policy framework to be tested was that of international straits, as the UK submitted its working paper on territorial seas and straits outlining what it referred to as a compromise between the interests of maritime states to have implemented a concept of free transit and the needs of strait states requiring new law for innocent passage. Included also was the point that both ships and aircraft should have the right to traverse freely through

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685 Countries such as Mexico, whose delegate, Casteneda, Beesley had worked with intimately over the years, were for Beesley to be considered as contributing to the ordering of the oceans, rather than those who were pulling it apart, such as Brazil, Peru, and the major maritime powers. The USSR, UK and Japan were cast by Canada as being “consistently negative, rigid and unresponsive.”

686 This point to Cabinet on the complexities of negotiating is all the more interesting as Beesley goes on to say that having a negative outcome on the pollution control issue, or the archipelago and straits issues - that is “non-acceptance of the Canadian position” - will “have very serious consequences for Canada’s long-standing stance on Arctic sovereignty.”

687 This private position, however, ran counter to the public stance Canada had outlined in its policy paper largely removing the possibility of applying the rules of archipelagos to the Canadian North.

688 As McConchie and Reid write (1977: 183), this “compromise” should more realistically be viewed as one between those within the maritime group. See their commentary for further analysis of the UK proposal. At UNCLOS, Committee II dealt with the following issues: territorial sea, contiguous zone, continental shelf, Exclusive economic zone (EEZ), high seas, fisheries and conservation, international straits regime, and archipelagic states. Committee III covered issues concerning the preservation of the marine environment and scientific research. Committee I dealt with sea-bed mining.
Canada would have been initially caught awkwardly between these positions. Beesley had resolutely opposed any re-definition of the concept of innocent passage, while simultaneously trying to remove the Northwest Passage from the category of international straits and encourage its possible use into the future. The UK proposal actually took a new step in relation to innocent passage by attempting to set out a list of actions that might fall under the heading of non-innocence. This typology ran against Canada’s interests, however, as the UK articles made no express reference to whether a voyage that polluted, or even had the potential to pollute, should be considered as non-innocent. The new criteria had the effect of removing ambiguity to the rule and allowed a state to make its case publicly on what transit harm might mean in practice. Furthermore, the UK articles tacitly suggested that national imperatives and domestic law would now not be grounds to suspend voyages on the basis of innocence, which included in relation to the former all references to the construction types of foreign ships included in Canada’s Arctic legislation.

Canada’s response to the UK articles was unequivocal. In his address to Committee III on July 16, Len Legault commented that [the UK proposal] “appears to deprive states not only of their right to protect their environment from the activities of foreign vessels in their territorial sea, but also their right to deny such vessels entry to their ports on environmental or other grounds.” The Canadian call for a modernization of innocent passage “does not appear consistent with this objective.” In relation to the United State’s position that the IMCO be tasked with the assemblage of rules for ship generated pollution, a point which the UK proposal had made expressly, Legault invoked positivist legal doctrine now in support of Canada’s case. Such an approach by the United States “would not appear to be consistent with the fundamental legal principle that states cannot be bound by any rule without their consent.”

689 A position which the United States would also endorse weeks later, led by John Norton Moore. He was then Chairman of the National Security Council Interagency Taskforce on the law of the sea. Moore chaired the agency process that made United State’s oceans policy at UNCLOS, and the Arctic issue went forward under his leadership.
Two other more moderate proposals on the international straits issue were also submitted by Oman and Fiji, the former reflecting the view of most developing states that coastal state regulation ought to be substantive, while the latter was much more circumscribed in allowing coastal states to regulate passage but only in accordance with relevant IMCO provisions on ship design. Ultimately, all members in Committee II continued to deliberate upon the nature of innocent passage as it was to be understood in relation to the demands of unimpeded transit, and how the new straits regime would relate to the existing law of the territorial sea. Canada’s response, after three weeks of debate in Committee II on the UK articles, was described as “cautious”, given that the articles were unclear about the extent to which they would apply to many situations within straits, and in particular, how the concept of “use” would be configured in an international designation that might be subject to environmental principles. However, Beesley also commented that Canada would accept the principle that the “competence” of states in relation to coastal pollution concerns needed to be itemized and specified rather than leaving interpretive discretion open to all states. Presumably, if there was one point Canada could sacrifice in bargaining over maritime pollution and a straits regime, it was the ability for innocent passage to be reformulated into a stricter and more well-defined set of rules.

On July 26, sensing that a new tactic was needed in order to halt the growing movement of the UK articles, Canada and other states introduced controversially a draft treaty proposal for debate in Committee II plenary. Apart from its application to the issue of the territorial sea and archipelagic waters, the most pointed rule was that archipelagic states would possess a right to exercise “sovereignty” over waters following the drawing of strait baselines. An archipelagic state was, by definition, one that had the features associated with continental states with off-lying archipelagos, such as Canada. Ratcheting up pressure, Beesley commented to the Canadian press that if this document were to be accepted, “Canada would have a claim to the Northwest Passage as an internal waterway.” The Canadian move of

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690 The debates were instructive as to the difficulty in achieving consensus on a polarizing set of issues. For further examination, see Miles (1998), pp. 124-129.
691 Ibid, at 184.
692 See the Toronto Star, August 15, 1974, “Canada Wants Ruling on Northern Waters”.
“co-sponsorship” of the idea, which in all probability Canada was driving behind the scenes, has been rightly described as a “negotiating tactic rather than an attempt to secure acceptance for [a] concept of a continental archipelagic state.” Even so, this was a forceful move on Beesley’s behalf to perhaps interject a note of political populism back into the debate in order to garner sympathetic international support for the Arctic waters and pollution issues under consideration. But in many ways this approach was part of Beesley’s style of using all rhetorical methods and political and legal sources to attain his aims in the face of strong opposition, which in this case was the rigidness of the UK articles on straits and how little compromise was being offered by the maritime powers. In rallying Canada alongside a variety of states, Beesley would convey to the conference participants that the UK articles were not the final word on the matter of straits to emerge from Caracas.

On July 31, 1974, Canada adopted a new strategy in Committee III to re-introduce into debate the issue of “special measures” that could be taken by coastal states. Having seen at IMCO in 1973 that there was significant debate and tension concerning how justice ought be understood in relation to whether developing states should incur the same economic costs for pollution as industrialized developed states, Canada now aligned itself with a group of ten states to create the “10-Nation Draft”. Developing states sought recognition of this double-standard and to have it placed in the negotiating text, which was in many ways what the eventual language of Article III(1) of the Draft reflected. States were to prevent pollution “according to their own environmental policies” and in accordance with their capabilities. The Draft also included Article VI in which it was assumed that an economic zone would be constructed. In turn, this language created rights for coastal states to protect and preserve the marine environment. More revealingly, Article VIII intimated that coastal state rights would conform to international standards unless these were “inadequate to meet special circumstances” and in areas “where stricter standards are rendered essential by exceptional hazards.” Predictably, these proposals met with intense opposition from the major maritime

693 McConchie and Reid (1977), at 182.
694 As McGonigle and Zacher (1977) write, developing states bristled against developed states who wished to set legislative pollution standards higher than international standards, a move which would only hamper developing states’ abilities to increase revenues from shipping. See pp. 135-137.
states, even though there was general support from the Conference attached to them. Nevertheless, Canada’s shifting strategy did cause it some loss of credibility in that it appeared Canada was potentially poised to sacrifice broader environmental principles for the sake of its own domestic and narrow interests. By the end of debate over the 10-Nation Draft, which also included the insertion by Canada of its clause on “special measures” for areas of exceptional hazard, it became clear that compromise on the problem of pollution would be found not on states’ ability to claim jurisdiction to set standards, but through states being able to wield jurisdiction to enforce them. It had become clear to Canada for the need to “uncouple” the issue of the Arctic from the 200 mile vessel source pollution regime emerging, given that states were now casting Canada as greedy, and the pollution measures under consideration were too extreme in bringing Arctic policy under the umbrella of the negotiation process.

The latter part of July through to the first few days of August 1974 changed the trajectory of the Arctic policy significantly, as documents reveal. Canada and the United States had began to engage in bi-lateral discussions on the pollution issue held over a course of a series of three meetings in July, and what appeared to be a tacit agreement of compromise on the Arctic and Canada’s support for the international straits regime was beginning to emerge. While it is unclear what motivated a change in policy by the United States, it can be assumed that their initial aims for the UNCLOS were becoming partially strained and that elements of the ocean policy needed to be reformulated. The United States had complicated objectives at UNCLOS, structured around achieving a set of articles that were satisfactory in terms of both American and more broadly, global interests. Central to this was the issue of unimpeded access to international straits. For American negotiators, no LOS convention would emerge unless the straits articles were constructed, and it was critical for the United States that Canada not undermine that effort. From the perspective of American negotiators, contrary to the opinion that Canada and the United States entered UNCLOS with divergent preferences, Canada and the United States had far more similarities than differences. Central to this was

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695 Ibid, at 138. The authors made this claim with prescience in 1977 prior to the final drafts of UNCLOS emerging, largely along these lines. For a general discussion on the drafting dynamics in Committee II and III, see Miles (1998), pp. 123-125, and Sharma, in Anand (1980), on international straits.
seeing an oceans regime constructed, and the Arctic issue and the straits regime solved. From American eyes, the United States did not want to use the Convention to solve a bi-
ilateral issue with Canada, but rather, through a bilateral deal move the Convention forward and achieve consensus and American political and domestic support. By August, 1974, it had become clear that a compromise, or “relationship”, would have to be cultivated to deal with the central issues the Convention fixed for both parties.

At the first two meetings between Canada and American negotiators in mid July, Canada set out its position centering on the need for international standards and the ability for states to retain permission to extract from other states the right to establish higher discharge standards and vessel construction in “certain defined circumstances.” In response, on July 31, the United States put forward an “anonymous draft” on the preservation of the marine environment, which followed in letter and spirit the Canadian draft articles presented to the Sea Bed Committee weeks earlier. The United States did, however, omit the Canadian articles dealing with, 1) coastal state jurisdiction; and, 2) coastal state enforcement of rules for vessel source pollution. In a further step, the United States “for [the] first time indicated its willingness to accept the concept of what they termed dangerous areas (i.e. such as the Arctic)…they stressed however that such areas should be defined extremely narrowly.”

On August 13, Canada and the United States sat down to discuss a paper crafted by the United States titled “Vessel Standards: Vessel Source Pollution”. The origins of a compromise were revealed in the following gestures.

Canada was now “in agreement with the new exception for separate treatment of international straits”, and “expressed satisfaction of [the] USA’s willingness to envisage the existence of critical areas” to the Arctic and perhaps the Great Barrier Reef, even though these areas had to fall within a range of no more than fifty miles. In terms of where standards could be set and by whom, the United States held that they were ready to limit the discussion of standard setting to “dangerous areas”, while Canada, giving considerable ground, “did not

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envisage the need for a right to make higher discharge standards throughout the economic zone if no special circumstances existed.” Asked by a member of the US Coast Guard what Canada’s reaction might be if the United States proposed at an upcoming meeting that the Arctic be made a special area, Canada replied “we might not necessarily object if this were done by a third party; however, it would have to necessarily apply throughout the Arctic and not simply to our own area.” Soviet support would obviously be necessary from the Canadian perception for an Arctic provision to be given legal form within UNCLOS. These meetings between the delegates occurred four more times over the course of two weeks in an exchange of papers and remarks on coastal state pollution enforcement. On balance, and by August 29, there was general agreement on not only the principles but the specifics of pollution standards, and the delegates agreed to meet in two months to work out a joint proposal in light of their new “rapprochement…on a number of basic issues.” The “USA delegation manifested a new and very welcome desire to attempt to understand and if possible to meet [the] Canadian position.”

Cautious optimism: The intersession period (1974-1975) and Geneva session (1975)

Following the close of the Caracas session, and having the benefit of seeing how alliances and policies were beginning to take shape, Canada constructed its most comprehensive, strategic policy document to date on the issue of maritime pollution, prepared for Canadian delegate’s eyes only. The document reads like a master blueprint for Canadian policy success at UNCLOS. Of the many points revealed, one in particular is the overwhelming belief of Canadian officials that Canada could best achieve its objectives by aligning itself with the proposals and principles advanced by the Indian Delegation. India presented itself as a unique partner, one which represented a position of compromise on most law of the sea matters. On the issue of international straits and the relationship between unimpeded transit

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698 On August 26, Canada did however hedge its options in relation to the straits regime. It submitted its suggestions on international straits with the orthodox postulate that a definition of an international strait was one that had been “traditionally used for international navigation”.

699 Titled “Discussion Document: Problem Areas with Respect to Maritime Pollution”, (paper on file with author), it is unclear who its specific authors were, or the exact date it was constructed, but the heads of the delegation were clearly its authors and appears to be dated in either October or November 1974.
and costal state rights more broadly, the Indian representative Shri H. R. Gokhale had explained that even though India supported unimpeded transit,

Being a developing country ourselves, and sensitive to the interests of other developing States in safeguarding their essential national interest, particularly in areas which are close to their coasts or which form part of their internal waters, we would be prepared to accommodate their essential interests in safeguarding the quality of their marine environment, preservation of their resources, as well as their national security. These may have special reference to the question of passage through straits, or through the waters within archipelagos. It thus behooves our national interests to share the concern of other maritime countries to insist on a stronger safeguard in regard to passage through straits.  

Canada thus had a natural ally in India with which to advance its aims on international straits and the territorial sea, but even more central to Canadian interests was the issue of marine pollution where Indian thinking would be most useful and their support and range of ideas relating to ocean affairs paramount.

The first item of discussion in the Discussion Document is titled “Standard-Making Operational Discharges from Ships-Coastal States Powers.” In the territorial sea it is made clear that the “policy” at a minimum must retain for Canada the right to be able to set higher ship generated discharge standards than those currently existing internationally. The “means” entailed securing an acceptable definition of innocent passage through the territorial sea allowing for broad state jurisdiction. The “reasons” for this stemmed from Canada having in past adopting higher discharge standards than those set internationally, and that Canada had made the argument repetitiously now that the right of innocent passage neither trumped nor precluded national standards from having legal effect. It was now felt that the 1973 IMCO Convention might contain acceptable rules for Canada in relation to operation discharges from ships, but the key was not to grant the point that these rules applied only up
and until the end mark of the territorial sea. Too much was at stake in this previous position, as these short limits were “particularly relevant with respect to the Northwest Passage where if all else fails in terms of Archipelagos, ice infested waters or the adoption of international standards it will still be possible for Canada to argue that the ships passing through our territorial sea at various points in the Northwest Passage must comply with our laws. Extensive coastal state jurisdiction in the Territorial Sea is therefore the irreducible minimum of the Canadian position.”

In relation to Canadian historic waters, including the Arctic, the “policy” was for Canada to have the right to set discharge standards at a level higher if required beyond international standards. Canada now understood that “compromise on the question of standard-making throughout the economic zone will almost certainly be necessary”, and that the IMCO Convention standards might be sufficient for certain purposes, but not for all historic waters issues. Within the economic zone it was thought prudent to make the allowance that Canada would accept international standards, a point which the United States was advocating adamantly, but that the exception set out in the 10 Nation Draft on special circumstances be inserted as a minimal rule of protection on “functional” grounds that coastal states were the first to feel the effects of pollution. In “critical area (ice infested waters)” the policy was clear: coastal states must have the ability to make laws that “are insufficient in carefully defined circumstances - essentially ice infested waters”. The Arctic waters legislation was posited to be law “upon which no compromise is likely to be possible.” To whom, and against what standards, this compromise was referring to, was not spelt out, however. Under the second heading of discussion, “Standard Making-Ship Design and construction equipment and manning - Coastal State Powers”, Canada wished to preserve its freedom of action while also developing the concept of innocent passage. In relation to “critical areas (ice infested waters), the strategy remained to acquire extensive standards in this area, and in strategic terms, to deploy the following principle at the next UNCLOS session: “Whatever right is given to coastal states must be clearly defined so as to ensure that only a minimum number of specially vulnerable areas are covered to ensure that there be a minimum of interference with international commerce and navigation.”
Towards the late days of 1974, it had also become clear to Canada that the power and influence of its alignment with similarly interested states in the coastal group was beginning to recede. In many ways, and for numerous reasons, the coastal state group was collapsing. There was now little concurrence in bi-lateral meetings on central issues, and given that much had been achieved in relation to coastal state aims, it is possible that the group’s demise was brought about as states realized that their other objectives were now better served in being better integrated into the broader conference proceedings.\textsuperscript{702} In all probability, Canada was not weakened by this change in group dynamics, and may, indeed, have assisted in bringing it about. Given that Canada was making significant strides in constructing a bi-lateral arrangement over the Arctic with the United States, and the British had intimated that they might also place their weight behind such an initiative, Canada was in the process of achieving its primary objective at the conference and thus could moderate its position to support other groupings and issues of concern.\textsuperscript{703}

**Constructing the Canada–United States Agreement**

By early 1975, the possibilities of compromise between the United States and Canada were beginning to materialize. In late February, John Norton Moore met with Beesley in Brussels to discuss a “review mechanism” that would be applied to vulnerable areas. Moore, on March 14, 1975, phoned Edward Lee at External Affairs to tell him that the United States had an idea to be put to Canada on the basis of a de-briefing that Moore had received from Admiral Price of the US Navy. The proposal Moore submitted to Lee conveyed the following:

\textsuperscript{702} Buzan and Johnson (1977), pp. 274-5 make this suggestion, and also argue that the group’s fall may have been brought about due to internal contradictions relating to some states emerging territorial policy aims; or that the coastal state group’s aims were not incompatible with the Evensen Group, an aggregation of numerous ocean experts from all states with considerable drafting experience that had come in 1974 to play a significant role in synthesizing draft proposals. For further description of Evensen, see Buzan and Johnson at pp. 280-81.

\textsuperscript{703} As Buzan and Johnson reveal (1977: 275), the Canadian Minister of Energy, Mines and Resources in February of 1975, stated publicly that the government was “actively and urgently” evaluating how revenue sharing would be carried out beyond two-hundred miles, a position that in past Canada had refused to endorse. Now, by contrast, overtures were being made to disparate groups such as land-locked and disadvantaged states that they would possibly be supported by Canada when the Geneva Session commenced in March, 1975.
1) “For the one vulnerable ice-covered or ice-infested area the basic outlines or general principles or kinds of standards that would be required in such areas would be adopted by IMCO…”

2) “a provision in [the] LOS Convention that once IMCO approved general principles the coastal state could implement them by promulgating specific regulations concerning construction of discharge”

3) “specific implementing regulations would not be submitted in any binding way to IMCO…”

4) “there would be dispute settlement provision applicable to promulgation of specific regulation[s]”

In Lee’s words conveyed to Beesley, Moore explained that “there was basic agreement between US and Canada at [the] principles level. Consequently there was no need for US/Canada technical teams to discuss details of regulations or to put our [Canada’s] existing legislation or regulations to IMCO for ipso facto approval. There was only a requirement that general principles be submitted to IMCO. Moore thought [the] Soviets might be attracted to this proposal because specific regulations would not be submitted to IMCO under [a] binding process.”

Within American legal and governmental circles, John Norton Moore pushed extensively to see an Arctic clause constructed. Most United States officials were, by contrast, resolutely opposed to Canada being granted substantial legal rights in the Arctic on any set of grounds related to UNCLOS negotiating positions. It was Moore who at this point fought extensively for the process on the American side in the face of rigid opposition to what was perceived of as giving into Canadian unilateralism and the hypocritical appearance of legal principles being conditioned within political frameworks. Moore was persistent nevertheless, driving negotiations forward in order to gather Canadian support for the international straights regime. With reciprocity guiding the relationship, the United States sought also, by acting in support of Canada’s Arctic position, to get Canada to diminish its support for the broader movement of coastal states rights and remove its efforts to include vessel source pollution in the EEZ. The United States believed that, while Canada had anchored itself to the idea of

gaining Arctic sovereignty from 1970, its real interests also resided in free movement and minimal regulatory provisions for ocean vessels. Having lost the ability to regulate the design of vessels as a result of the insurance regulators disagreement, Canada lost its most coercive policy element, that of forcing the maritime industry to construct a multitude of new industrial designs to accommodate environmentally hazardous areas. From the American perspective, it was making a major concession in allowing Canada to set ship construction and standards in maritime straits and the EEZ.

Beesley, during the lead up period to the Geneva Session, had been busy meeting with delegates to ascertain and discuss their new positions entering the conference. Beesley’s confidential note to Canadian delegates on March 17 outlined an interesting discussion with UK representatives. The UK delegates had made clear to him that they were approaching the session determined to achieve substantive results and that “ways of achieving compromise had to be pursued.” Of concern, in relation to the Arctic, Beesley noted that the “Brits were particularly interested in [a] paper on pollution control” which Canada had circulated concerning the designation and control over certain special areas. Beesley maintained that the UK representative Anderson was reasonably confident that with a little thought this problem could be ‘finessed’ so as to meet both our requirements and concerns of shipping states. [The] UK see[s] two possible ways of dealing with our environmental concerns: (A) provision in convention for more stringent but international formulated pollution control regulations within carefully specified ice infested areas. (B) removal of Arctic from application of convention leaving it to states most directly concerned to formulate appropriate regime.

Whether or not the British had been in communication with the American delegation about the growing possibility of a bi-lateral arrangement being made on an Arctic exception is unclear, but probable however, given the strong position both had adopted on the straits issue and their need to find further support from an influential law of the sea delegation and current

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705 He had also instructed Paul Lapointe to reveal to the world Canada’s argument and strategy for handling the Arctic issue. Speaking to reporters in mid March, 1975, with a private understanding of the positive United State’s position in mind, Lapointe held that Canada was “attempting to sell the idea that the Arctic is so special it should be separated from all other waters in question.” Characteristically, the Canadian press framed these remarks in hostile terms. See the Ottawa Journal, “Canada/US Fight Looms over Strait”, March 13, 1975. 706 Confidential cable from Beesley to Canadian delegates, March 17, 1975. Document on file with author.
NATO ally. Regardless, Canada would have understood that the mood on the Arctic provision was now in many ways more accommodating given that the issue was becoming embedded within the interactions of close historical friends. If all that was required was a policy reflecting “finesse” in order to consolidate the Arctic strategy, in all probability the principles of such an agreement had already been agreed upon by the UK.

While the Geneva session opened with great fanfare and optimism on the part of the delegates on March 26, 1975, within two weeks moods had darkened significantly. The press reported that many governments did not believe in the possibility of a single treaty text emerging. Even Beesley, one of the conference’s most ardent supporters and optimists admitted that Committee II had become stultified in its treatment of the economic zone and international straits problems, a position which in many ways set the tone for whether the conference would be successful. As a partial solution to this rift, the Evensen group was now meeting with frequency to consider “middle ground positions”, as Beesley put it and encouraged them to do, rather than continuing with the “polarizing process” which had frequented the Caracas negotiations.\footnote{Beesley acknowledged to the Canadian delegation in confidence his belief that the intercessional meetings occurring in the Evensen group in New York since Caracas were now “beginning to bear fruit”. This initial success of working within informal structures would likely have taught him the potentially immense benefits of continuing to pursue informally with a necessary group the regime for an Arctic exception. Included within these \textit{ad hoc} discussions were also those focused on the rules associated with the drawing of straight baselines. By the first week of April, the straits issues remained undetermined, along with the rules for archipelagos.\footnote{Canadian delegates were to make clear that the fourth Evensen draft was unacceptable given that it still prohibited states within their territorial seas from enforcing construction standards on vessels and exempted straits from coastal state regulation.}} Evensen was becoming overwhelmingly influential in setting out the possible wording of texts within several critical areas beyond the straits and economic zone, including fisheries, the continental shelf, and revenue sharing. Given this focus, pollution issues in Committee III were being put on hold by Evensen for formal debate until at least April 7 when the primary issues had been deliberated upon. Such was the case even though Evensen delegates, of which Canada was now a major contributor, had by April drafted the marine pollution articles four times.\footnote{Canadian delegates were to make clear that the fourth Evensen draft was unacceptable given that it still prohibited states within their territorial seas from enforcing construction standards on vessels and exempted straits from coastal state regulation.}

Within the formal Committee III structure, however, Canada faced a difficult predicament on maritime pollution. On the opening day of the session, the UK introduced a document for
discussion which fundamentally cut against the Canadian position at Caracas on the zonal approach to pollution. Based upon Beesley’s interpretation, the UK plan was considered by most states’ delegates to be “too restrictive” on the basis of its disapproval by even Norway and the United States, leading Canada, India, Tanzania and Senegal to formally express serious reservations to the UK proposal. From many of these same states though, the Arctic policy was, by contrast, greatly improving with time. As Beesley reported in confidence on April 2, 1975, Norway has “left the door open on special regime for vulnerable areas” and the UK had reaffirmed that it had not rejected the possibility “assuming we [Canada] are able to resolve contradictions between USA and USSR positions (and inconsistencies with respect to the latter).”

As to the substance of the inconsistencies, Beesley did not comment further, but it can be assumed that this referred to the Soviets wishing to have maximum environmental protection within the Northeast Passage, preserve overlapping claims of internal historic waters, while also retain the right to free transit in all ‘other’ international straits.

Behind the formal engagements in Geneva, a cadre of Canadian officials continued to debate the textual substance of an Arctic exception and how to move the interchange with the United States forward in a productive manner. Beesley had by late March set up a small working led by Legault, tasked with debating what norms and principles could be used from the AWPPA to serve as a basis for a new Arctic exception regime. It was established within the group what was considered “essential” in the AWPPA that needed to be incorporated into an Arctic exceptions clause. Central to this understanding was that Canada had to retain the ability to mandate what types of ships, and in particular, what varieties of designs were to be considered permissible within Arctic waters. How this was to be accomplished remained uncertain, but it was agreed that the best strategy was to continue to move in an “ad hoc” fashion by letting supporting ideas at UNCLOS become linked to Arctic issues. An example of such an idea was the possibility of having the Arctic exception become aligned to the emerging provisions on the EEZ. Indeed, when Kenya first outlined the concept of the EEZ in 1971, Beesley was overwhelmed with the possibility of it being the necessary connection

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709 Cable sent from Beesley to Canadian delegates, dated April 2, 1975. Document on file with author.
to securing an Arctic clause. The EEZ was a considered an umbrella model, or negotiating framework, both from and within which other Canadian interests could be argued for and secured.\textsuperscript{710} Given the positive association with zonal ocean extensions, the overwhelming movement behind the EEZ gave the Canadian working group optimism to believe that the Arctic clause could either fit within its framework, or alternatively, be cast as legitimate through the zone’s extension of coastal states’ rights. By April 8, 1975, however, it was still unclear what the specific shape of the agreement would look like and in what venue it would be constructed. The United States and Canada had not come to an agreement on whether the Arctic exception would be reached and included within UNLCOS or in the IMCO. If the latter, both states understood that it would then be “left to the coastal state to legislate in accordance with these [IMCO] norms”, as Beesley put it.

On April 11, an import luncheon session occurred between Canada, the Indian delegate Jain, and Tanzanian delegate Kateka, three remnants of the formerly cohesive coastal state grouping. Each considered themselves the vanguards of coastal state protection and at the meeting agreed that the Evensen Group paper on pollution control was “too complex”; coastal states had to possess the right to prevent and control pollution in both the territorial sea and economic zone; and that there was a need for international standards for ocean pollution. India and Tanzania, however, diverged from Canada in now seeking a “functional” rather than “zonal” approach in that as Canadian documents reveal, they sought “the power to set such standards where necessary on an area-specific basis (which they distinguished from the IMCO internationally designated “special areas” approach).”\textsuperscript{711} Canada was shown by Jain the existing group of 77 draft on ocean pollution which was very similar to that presented at Caracas, and told expressly that this block wanted a “general formula” which would cover all discharge standards by states. In relation to how India, Canada’s natural ally, Tanzania, and the rest of the developing world perceived Canada’s attempts to reconcile stricter pollution rules with its Arctic demands, the Canadian delegation

\textsuperscript{710} Conversation with Armand deMestral, August 29, 2008

\textsuperscript{711} Confidential cable sent from Canadian delegates to Beesley, April 11, 1975. Document on file with author.
recalled that Jain and Kateka were “concerned” that Canada’s approach on critically vulnerable areas was too narrow and covered Canada’s interests but not necessarily theirs. They seemed willing to help us look after our problem so long as we helped them with theirs, and they appeared to recognize that an even more stringent and coastal state regime might be necessary for Arctic waters (not so explicitly designated) than for other areas - so long as that particular regime was not advanced as the total solution to the problem of coastal state standard-setting powers.

Canada was left in a tenuous bind in its relationship with its former coastal state partners in addition to those willing to make reciprocal trade-offs against rules favoring maritime transit.

The Canadian delegation summarized their findings to Beesley in the following way: “Canada is still caught between those who may support our ship-generated pollution approach only if it is more restricted to ice-infested waters (obliquely defined) and those who will support us only if our approach does not exclude more general coastal state standard setting powers.” India was the quintessential example of this conundrum: too many special rules devoted to particular areas in the world would carried the possibility that the 200 mile EEZ might not stand as a universal principle for ocean affairs. If Canada continued to pull the coastal state group towards the special areas idea, in part through its support of the EEZ concept, it followed that the EEZ could be subject to amendments as negotiations wore on. As a result of these tensions, in many ways Canada remained wedged between the twin pillars of legitimacy and effectiveness. It required United States and Soviet approval in order to make its Arctic claim effective, but also to generate legitimacy to the broad thrust of the Arctic legislation which the United States had been the harshest critic of. However, Canada required a broad international consensus also emerge given its previous position that the Arctic legislation was meant to protect an area of international commons and tacitly promote the industrial relations of developing states’ uses of coastal sovereignty. As the entire ocean legal regime was underdetermined and Canada’s aims in the Arctic were fast materializing, it is probable that a move away from the broader coastal states agenda was a necessary policy strategy given the tension Canada faced with both old and new allies.
The emergence of the SNT’s

By mid April, two important processes were occurring within UNCLOS committees. The first related to the special areas debate within Committee III. Within the Evensen group, several varieties of what constituted “special areas” within the economic zone were being debated and circulated. In a text entitled ‘Preservation of the Marine Environment’, the Evensen Group, which Beesley was now centrally involved with, proposed that:

Where internationally agreed rules and standard are not in existence or are inadequate to meet special circumstances, coastal States may within the economic zone adopt reasonable and non-discriminatory laws and regulations additional to or more stringent than the relevant internationally agreed rules and standards.712

The roots of this language stemmed from two Swedish proposals put forth at the Caracas session (1974) in which it was suggested that:

1. Any State or States adjacent to a sea area, which due to ecological characteristics, taking into account also traffic conditions, is exceptionally vulnerable for pollution, are entitled to establish regulations for the prevention of vessel-source pollution in this area which are more stringent than or additional to the provisions of generally agreed international conventions, provided

   (a) that the regulations are not discriminatory, and

   (b) that the competent international organization has decided on the basis of recognized scientific criteria that the area in question shall be treated as an area of exceptional vulnerability as regards vessel-source pollution

Canada thus received much of what it wanted in the 1975 Evensen draft in line with its recurring idea stemming from Trudeau that when international rules were either “inadequate” or “non-existent” states should retain the right to legislate according to their particular needs. In the new text, Trudeau’s rhetoric was included virtually verbatim. Canada had solidified that there were areas characterized as “special” and required greater legal protections.

The second development in mid April involved the informal working group in Committee II dealing with the straits issue. Following an absence of almost one month it began to discuss what legal outcomes remained politically possible. By this point, the issue of straits was

becoming acrimonious to the wider aims of the conference due to maritime states believing that their bargaining power was weakening over time. Many states began to make overtures that military capacity would suffice if the conference was not amenable to resolution on the straits issue.713 Canada was similarly concerned to ensure that the conference produced a tangible document and not collapse the conference. Beesley took an affirmative stance on this emerging ‘crisis’ and supported the Conference President, Amerasinghe’s proposal to prepare a Single Negotiating Text (SNT) for all three committees, one that was not binding but could serve as a blueprint for future discussions.714 But while non-binding in form, it was understood by all parties in an informal political consensus that the texts emerging from Geneva would serve as a basis for negotiation at the next session in New York in 1976. This knowledge had the effect of giving the texts wording extreme importance in not only what was a critical time in the law of the sea process, but also in how states could measure their success following two years of negotiations.

In term of the substance of the SNT from Committee II dealing with straits, for many delegates the language was described as “most confusing” given that the distinction between transit and innocent passage was “ambiguous” on the basis that passage could not be suspended in either case.715 Of great concern for Canada was that the SNT contained none of the wording Canada demanded in setting out a definition of international straits. Canada had insisted that the criteria for international straits be centered upon waters which were the subject of “traditional usage”, but the SNT referred back to the language of the 1958 Geneva Convention and held fast to the criteria of waters simply “used for navigation” constituting a strait in international law. Hence the rule had a temporal element attached to it in that one

713 McConchie and Reid (1977), at 185.
714 Informal Single Negotiating Text. Parts 1,II, and III (A/Conf 62/WP.8, 6-7 May, 1975. Following a Plenary Meeting on April 18, the Conference requested the Chairman to move forward on the construction of the three SNT’s. As McConchie and Reid note, Canada was upset with the developments that spun out of this procedure when learning that there was “behind-the-scenes manoeuvring to influence the chairman of Committee II.” An anonymous document “Consensus Text of Private Group on Straits” was submitted on April 18, 1975, to the Chairman, which effectively repeated the wording of the UK draft Articles on straits. Ultimately the SNT was submitted to be tabled on May 7, 1975 to the Chair, without any deliberation within Committee II. See Ibid, at 186. For discussion of the Chairmen in producing in producing the texts and a measure of “consensus”, see Buzan (1982).
715 Buzan and Johnson (1977), at 278.
could argue that a strait could be considered international through “usage” being either a necessary or new feature of a waterway. But nor did the SNT contain any reference to a new and modernized concept of innocent passage that Beesley and Legault had tirelessly promoted. And neither was it possible when ships were engaged in transit passage for coastal states to suspend their voyage on grounds of national pollution standards, whether accidental or deliberate in nature. The SNT was written with American and British intentions in mind in referring expressly to “international standards” of pollution that applied to states attempting to prevent harm within their straits. Moreover, the SNT also included in relation to the criteria of non-suspendable innocent passage the wording of “any act of willful pollution”. This caveat had the effect of removing from discussion Canada’s longstanding argument that innocent passage had to account for the rule’s scope when assessing how preventative action should be associated with the possibilities of “innocence” becoming harmful. In many ways, the argument for the ability of states to undertake preventative action was the cornerstone of justification for the Arctic waters legislation, a point driven extensively by the likes of Beesley, Legault, Pharand, and L.C. Green, among others. It was therefore a touch disingenuous for External Affairs Minister Allen MacEachen and Beesley to report to the Canadian press following the close of Geneva that Canada had a great deal to celebrate as a result of the Geneva text.\footnote{Even though the Government was touting its latest sovereignty exercise as a triumphant success, that of parading Prince Charles through the Arctic for six days in late April. See \textit{Ottawa Journal}, May, 1, 1975, “Charles Helped us Assert Sovereignty”.}

The SNT produced within Committee III however, brought about productive results for the Arctic issue. Under the heading of “Protection and Preservation of the Marine Environment”, Article 20 (5) read:

\begin{quote}Nothing in this Article shall be deemed to affect the establishment by the coastal state of appropriate non-discriminatory law and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstructions or exceptional hazards to navigation, and where pollution of the marine environment according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance.\end{quote}
This was the wording Canada had fought at length to have embedded in the final text, even though it was inherently vague and made no mention of the Arctic and its special circumstances. However, with negotiations moving forward with the United States and Canada cognizant of not upsetting other states with similar ecological predicaments, it must have been pleased with such a textual reading. Furthermore, Article 20 (3) established the right for states within their territorial seas to establish laws for the prevention and control of pollution caused by shipping. This provision accordingly allowed Canada to extend environmental coverage over the twelve mile entrances to the Northwest Passage. However, Article 20 (3) also stipulated that entire scope of the law was not to prejudice the right of states to travel in accordance with international standards on the basis of innocent passage through the territorial sea. Canada would ultimately seek to have these last qualifications removed from the text.\textsuperscript{717}

Following two weeks of exchanges within the Canadian Parliament and between committees, Allen MacEachen found himself before the Standing Committee on External Affairs and National Defence on May 22. In light of what had been written into the SNT’s he defended the Canadian negotiating position and future legal developments in the following terms. The Northwest Passage could not be considered an international strait because:

\begin{quote}
[The SNT] provisions define the straits as only those which are used for international navigation and exclude straits lying within the internal waters of a state. As Canada’s Northwest Passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the regime of transit passage does not apply in the Arctic.\textsuperscript{718}
\end{quote}

This was the \textit{first} concrete and unambiguous statement, one based in law as it made reference to legal terms, that Canada presented to the world on the Arctic. Canada was claiming sovereignty \textit{de jure} without an explanation of what international rules conferred such title. There was no pressing need to explicate any specific legal reasons given that the case for historic title lay as a possibility in its practical application. For domestic purposes, Canadian officials had only to convey to the public that UNCLOS negotiations were successful in

\textsuperscript{717} See McConchie and Reid (1977), at 187.

solving the former Arctic crisis once and for all. With numerous promising routes serving as means to that end converging in the near future, there was every reason to make a formal declaration to shore up support domestically for Canada’s law of the sea efforts. MacEachen’s declaration was simply one more piece within the broader “tapestry” of policy efforts, as Ivan Head had described it, to validate a legal claim to sovereignty.

**The New York Sessions (1976)**

Between the fall of 1975 and the commencement of the first New York session on March 15, 1976, Canada met frequently and directly with the United States delegation and also in inter-session groups to work on legal drafting of the SNT texts. Prior to the commencement of New York Canada faced two obstacles in advancing its Arctic policy. First, on February 3, 1976, Beesley cabled the delegation to inform them that he had been “caught off guard” in not being privy to the Evensen group’s re-drafting of the SNT Committee II text occurring only several days from then. Apparently, Beesley was not told by Evensen himself at an earlier meeting that numerous states would be presenting re-drafts. After consultation, Beesley concluded that while he and his associates had gone over Canada’s intended changes, “in most cases, we can leave it to others (NZ, Australia, and developing countries) to make running on most of the changes made and Canada can devote its attention to ensuring the preservation of its position on the Arctic exception.”

Canada eventually made significant modifications to the various texts put forth and embedded these within the group’s further re-drafting exercise on marine pollution. In the drafting process in Committee III however, the Evensen group had developed a lengthy article intended to replace Article 20(5). Much of its language underpins the principles of what would eventually become Article 234 of UNCLOS. Article 20(5) read:

> Where international rules and standards are inadequate to meet special circumstances and where the coastal State has reasonable grounds for believing that a particular, clearly defined area of its economic zone is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources, and the particular character of its traffic, the adoption of special mandatory measures for the prevention of pollution from vessels is required, the Coastal State may for

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that area, after appropriate consultation with any other countries concerned, establish laws and regulations for the prevention, reduction and control of pollution from vessels, implementing such rules and standards as have been made applicable by the competent international organization for other “special areas”.

Through this provision Canada had now secured language that focused on the ‘preventative aspect of pollution control’ and linked this type of action to the ‘protection of a state’s resources’. Both of these points had been advanced by Canada as central to ‘new and progressive thinking’ in the run-up to UNCLOS. Canada had also included the sequence that states may enact non-discriminatory laws first when required, followed by a state then having the right to “implement” these rules with existing international laws relating to other special areas. With a greater degree of emphasis, the exceptional areas clause was being given shape and mirroring much of recent Canadian argument on the matter.

A second obstacle was similarly awkward and challenging. Canada faced a credibility problem in relation to resource extraction in the Northern areas. Officials had been thinking about the possibility of oil and gas drilling in the Beaufort Sea in the summer of 1976 and plans were rapidly moving forward in public and private domains. In a secret memo written sometime in February, 1976, Canadian officials deliberated upon the idea that the decision to drill might prejudice the Canadian position at UNCLOS. The memo outlined two questions of concern, one of timing and of substance. On the issue of timing, it was concluded that deferring the decision until the completion of the Conference would be advantageous. Conversely, however, “the public announcement of a go-ahead decision before the end of the conference, notwithstanding any feasibility of justifying the decision publicly on environmental grounds, would have a negative impact on our attempt to secure acceptance of a provision in the Convention giving the right to arctic coastal states to take appropriate unilateral measures to protect the delicate environmental balance in the arctic area (the ‘arctic exception’)

720 Emphasis in original, Article 20, para. 5. See Nordquist (1985), at 395.
721 Authors unknown, message sent to Canadian delegation. Document on file with author.
Canada to exercise exceptional powers to protect the marine environment in the arctic.” In relation to the substantive question, it is worth quoting the memo at length in order to demonstrate how Canadian officials perceived their Arctic strategy to date.

[T]he basis of Canadian efforts in the Conference has been our strong desire to ensure ourselves, and to convince other states of the need to do so, that the arctic is fully protected environmentally. We have stressed the importance of this general proposition in terms of both a right and an obligation on states to act accordingly. If any possibility appears to exist at this time that all risks have not been fully developed, this could be used at the Conference by other states, particularly the USA, to attack the legitimacy of our professed concerns for the arctic environment…given the already expressed USA concerns, it is not entirely certain that our position on the risk question and contingency capability would be convincing to other states. Thus there remains considerable potential, on the substantive question, for embarrassment and for weakening the Canadian negotiating position.

Several implications can be drawn from this admission. Apart from the awkward prose perhaps indicating that Canadian officials themselves required convincing of their global nobilities, Canada remained unsure of the American position on the Arctic and how any bi-lateral agreement would be carried out. Indeed, a substantial degree of mistrust remained given that Canada appeared to believe that the United States might rescind on an Arctic exception if the Canadian position could be stripped of its legitimacy. To be sure, Canadian beliefs could be cast as cautious planning on behalf of policy officials, but the memo displayed a palpable fear that Canada could be exposed as acting hypocritically in subordinating its norms of environmental protection and prevention to economic gains. To infer that Canada could be seen as acting hypocritically was in many ways to admit that Canada was already acting in that fashion given that the drilling was only at a minimum to be rescheduled until UNCLOS drew to a close. At stake in this dilemma, a follow on memo would note, was the “adverse effect” on these negotiations, “call[ing] into question within the conference as a whole the credibility of Canada’s position” and rendering Canada to a position of acting with “double-standards.”

Comprehending International Positions

In the opening week of March 15-20, 1976, indications of states’ perceptions of the Arctic exception clause began to be understood. Canada learned in closed consultations that Brazil would not support an article dealing with ice-infested waters, nor one even more broadly
phrased and applied to the effect that coastal states would have the right to regulate vessel design and construction. By contrast, the Indian delegate, Justice Minister Mochtar Kusumaatmadja, demonstrating once again critical support, was requesting that his assistant for environmental law be allowed to visit Canada to, in his words, “study the system of environmental legislation and administration enforcement thereof, particularly concerning system of pollution control...and with special reference to [Canada’s] arctic waters legislation”. Following Beesley’s consultations with UK delegates in London, Canada and the UK sat down in New York on March 22 to discuss vessel source pollution on the initiative of the British. By this point, the UK remained equivocal in their support for broader coastal state rights and an Arctic exception, but Canada believed that the conversation seemed to indicate “new possibilities for the resolution of these problems.” Given that Canada and the UK were agreeing that the territorial sea was an area which warranted states setting higher discharge standards, and that states should also have the ability to legislate higher international discharge standards, it appeared as though the British were arguing that the Arctic was an isolated issue without application to other ocean domains. Canada’s beliefs were revealed in that “we [Canada has] the impression that the UK remains skeptical about the possibility of agreeing on a sufficiently anodyne provision concerning special areas (leaving aside provision relating to our Arctic concerns). In discussing the problem of the Arctic exception the UK went so far as to enquire whether, if it took some time to work a trilateral solution between Canada/USA/USSR, it might not be possible to separate this problem from the law of the sea convention.” Presumably, therefore, the British were not only holding Canada’s Arctic regime as a bargaining chip with which to gain support for the straits regime which had ground to a halt within Committee II, but had a genuine concern that casting the rule on special areas too broadly might severely impact the possibility of moving towards a final package agreement. Canada responded to the UK delegate in saying that it intended to have the matter dealt with at UNCLOS, given that Canada had failed in multilateral attempts to find a solution at IMCO and solve Russian

722 Document on hand with author.
interests in the Arctic. For Canada, there was no incentive to move these discussions out of conference given past practice and the current momentum being generated.

On March 29, Commander R.A. Evans of the Canadian Forces, contacted Beesley through a confidential memo on the subject of what the Canadian military saw as its key law of the sea objectives over Arctic waters. Evans conveyed what had been outlined in the 1970 Defence Whitepaper: the need for the protection of Canadian sovereignty; the defense of North America in cooperation with US forces; and the fulfillment of NATO commitments. However, the Canadian military also realized the tensions involved with these goals given that the protection of sovereignty was at odds with NATO force postures and US Naval and strategic thought. For many in the Canadian military, the national interest and its structure of military policy were best served by international freedom of navigation and the right of over-flight. In the Arctic, by contrast, where this policy had not been applicable, Evans held that “Canada’s first priority for defense requires that all foreign military vessels and aircraft enter these waters only with Canadian consent. Outside of the Canadian Arctic archipelago, ie, beyond 12 miles from the straight baselines which would enclose the Arctic islands, Canada’s other two defence priorities apply. Thus, in this area a regime of free navigation for military vessels and aircraft should be in effect.” The Canadian military therefore sought two objectives at UNCLOS, according to Evans: 1) firm Canadian control over all vessels in “water areas contained by the notional baselines of the Arctic archipelago”; 2) priority to all Canadian and allied vessels throughout the remainder and broader stretch of Arctic waters. However, there was a broader problem to which these objectives related. The AWPPA, it was believed by many Canadians, restricted the freedom of warships both Canadian and foreign, which placed an unnecessary burden on Canadian and international security affairs. Perhaps more troubling for the Canadian military was that the new “Arctic Overlay”- as Evans and Beesley had apparently characterized the Arctic regime in a meeting

723 Confidential cable from Evans to Beesley, March 29, 1976. Title: Defence Interests – Canadian Arctic. Document on file with author.

724 Evans held that the AWPPA applied to all maritime vessels, and though the legislation authorized that exceptions could be made, the only one to date was limited to the qualification of shipboard personnel. Evans points out that he had discussed this legal interpretation with Armand DeMestral, who agreed subject to certain caveats.
days prior - might extend to the limits of the new economic zone at two-hundred miles from land or the law tide mark. This further extension was a significant problem Evans intimated, and thus “Canadian security objectives require a clear differentiation between the waters within the archipelago and this beyond it. In the former, control of foreign warships and aircraft by Canada is essential; in the latter, such control would be detrimental to defence interests, and should not be pursued.”

Beesley now faced a significant challenge. If the Arctic exception was to have effect and be seen to be a legitimate representation de lege ferenda, the extension of the new regime had to match the AWPPA in its one-hundred mile jurisdiction. To broaden this to the economic zone, though undoubtedly tempting, would invite not only strong American opposition and probable denial of legal recognition, but now also rebuke from Canada’s military personnel. And yet the Canadian government had recently claimed the Arctic as internal waters subject to the full effect of domestic law. As such, the AWPPA now extended itself into the perimeter that Evans found objectionable to not only Canadian vessels but all voyages. Hence, a solution needed to be crafted that could accommodate the distance requirements and the substantive elements of pollution control. In light of these constraints made by the Department of Defence, Canadian negotiators proceeded to a crucial meeting with the United States and Soviet Union on the same day as the Evans cable.

**Isolated Negotiations**

Canadian officials had known for some months going into the meeting that the Soviets were supportive of an Arctic exception. But it was also well understood that the Soviets would not undertake a proactive role in its legal drafting due to overwhelming military power within their own straits and unflinching legal justifications on the absolute nature of claims to Soviet internal waters. When the issue of an Arctic exception was initially vetted to the Soviets they were resolute in stating that Canada was to “leave them alone” and that Canada needed to solve the problem within its immediate circle of allies and interested states.725 American recollections of this dynamic recall the Soviet delegate engaging in a form of boisterous

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725 There were never any meetings on the Arctic with all three delegations present.
“shoe-pounding” that there would be no Arctic covered international law made at UNCLOS. For the Americans, Soviet involvement imposed significant complications. The United States and USSR had entered into UNCLOS under the pretext that neither would through the course of constructing the oceans treaty use it to consolidate Cold War political and security aims, nor create new security challenges. This was tricky for the USSR in particular to remain consistent with given that in 1968 the Soviets became an international ocean power militarily seeking unlimited transit rights within straits and now the EEZ. Yet the Soviets also wanted sovereign control over Northern Arctic areas and explained their interests in terms of ‘pure sovereignty’. The KGB, in charge of coastal security, saw the Arctic deliberations as an instance of ‘pure security’, by contrast.\textsuperscript{726} Soviet reasoning turned on their belief that they had a long standing practice of maritime movement in the Northeastern waters and Arctic sea route and that this was sufficient for the purposes of Soviet interests in Arctic debates.

However, as Canada needed the Soviets because they possessed power and authority over developing states which Canada desperately required, officials ignored what they saw as the Soviet’s “coy and curious game” of non-commitment. In order to draw attention to possible negotiating outcomes, Canada was persistent in pointing out to the Soviets the international and security implications if the development of straits regime continued to unfold in its current form. A Soviet policy of non-negotiation was harmful to their self-interest, and Canada developed two arguments in support of this postulate. First, Canada drove home the point repeatedly that the articles as they currently stood on international straits would allow the United States to traverse Soviet international straits at any time. Canada had repeatedly framed the issue as a question of whether the Soviets could live with the prospects of the Americans “barreling through their straits without consent.” While the Soviets were at first uninterested in engaging in such possibilities, as Canadian negotiators continued to explain

\textsuperscript{726} Interestingly, the distinctive roles set out between the KGB (coastal protection) and Soviet Military (blue-water security), would possibly indicate that when the American Navy vessels were turned away from Soviet maritime space in 1968, this evidenced a problem of internal security coordination at the time given that both states had agreed on the necessity of moving ahead immediately with a world’s ocean conference.
their rational as it related to military strategy the Soviets eventually came to realize how a protective Arctic Ocean provision might alter an unpalatable and more dangerous outcome.

Second, Canada comprehended that the Soviet positions at UNCLOS were riddled with contradictions in that they sought on the one hand to tighten obligations on maritime states to protect the environment and the economic zone, while concomitantly taking a hard stance on the right of unimpeded transit through straits and demand the exclusion of military vessels from environmental protections clauses. Canada attempted to explain that the emerging law could not accommodate both needs. Accordingly, an Arctic exception was therefore in the Soviet interest given that all parties understood that the new Soviet security identity was one of a global maritime power and security practices in future would follow this new posture. In internal discussions, Canada felt that the Soviets were actually tacit supporters of Canada’s Arctic aims even though their ‘eager’ support was distinctly lacking. At the meeting of March 29, 1976, this belief was confirmed as the Soviets responded positively to Canada’s suggestions once again that an Arctic clause had mutual benefits and absolute gains for all parties. Soviet endorsement led Canada to alter its Arctic strategy significantly only two days later. On March 31, 1976, a confidential memo was sent out to the primary negotiators for Canada, one which had profound implications for the future Arctic policy.727

### Policy Reconsolidation

The first point of note was that Canadian officials were now deliberating the possibility of drawing straight baselines around the archipelago, assessing the “pros and cons” of such a move, as it was put. Such necessity stemmed from two factors. Though the memo does not state it expressly, the pressure from the Canadian military was a possible factor and the advantages of such action were that Pharand had already confirmed in 1973 that baselines could be considered legally valid. More importantly however, the March 29th discussion with the United States and USSR had confirmed that agreement “may be achievable” on the Arctic exception “subject to [a] sovereign immunity article that would wholly exempt military activities of other states in [the] arctic from application of convention’s

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727 Author unknown, sent to the lead Canadian delegates March 31, 1976. Document on file with author.
environmental and dispute settlement provisions (and from Canadian legislation).” A tacit bargain had apparently been struck in that the “relevant Article would be constructed...as to avoid prejudicing or prejudging Canadian, USA and Soviet views on rights of access to Arctic waters claimed by Canada, (which would not be precluded by proposed Article so as to leave open question of access by use of submerged subs to USSR (and Canadian) Arctic.” In other words, the Arctic overlay would not trump the existing portfolio of legal arguments all sides possessed. Moreover, it appears to have been expressly endorsed by the parties that the access of submarines to all Arctic areas was an open question to be solved in the future. Of course, the wording of the Canadian memo could suggest that all states had also agreed to let submarines traverse Arctic areas freely, but this interpretation would seem implausible given the greater Cold War security dynamics. Canada’s previous thinking, when coupled with the idea that if the Arctic exception and rule of military immunity were brought about, led it to believe that a “possible Canadian response might be to assert and delimit this historic internal waters claim by application of strait baseline system. Canada could on this basis make access subject to Canadian authority and discretion. USA itself would not subject its warships and paramilitary vessels to such Canadian authority but might conceivably make only pro forma noises about Canadian action in drawing straight baselines.”

Canada now had adopted Pharand’s legal argument that the 1958 Convention need not apply to the Arctic case. The *Fisheries* provisions could be relied upon in support of Canada’s reading of international law, thereby negating the obligation to allow for innocent passage following the enactment of the baselines. Striking in the memo is the degree to which Canada believed the United States to be in a weakened position on the Arctic issue and the principles upon which baselines could be drawn. Indeed, the United States had always opposed the drawing of baselines and had repeatedly cautioned Canada against making a move in the Arctic. Given that Canadian thinking made no mention of when the baselines could be drawn, it is possible that Canada would wait indefinitely before a baseline enactment. On one possible reading of the memo, then, the tone of Canadian thinking smacked not only of opportunism, but optimism, in Canadian policy not being subject to any significant American sanctions. However, there was much else at stake in Canada’s
calculation which further revealed a distinct level of unease in squaring its strategic
calculations with an appropriate response.

The memo went on to point out that developments in Committee II also counseled the
application of baselines given that a “majority of states are against [the] application of [the]
“archipelagic concept” (which gives coastal sovereignty to archipelagic waters, but only
those of oceanic archipelagos such as Indonesia and Philippines) to off-lying coastal
archipelagos.” In a measure of legal desperation, for a solution to unfold Canada “might
have to rely solely on its historic waters claim and coupled perhaps with ‘ice as land’ theory
and even drawing sector theory and implemented through ‘fringe of islands’ provisions of
1958 Territorial Sea Convention.” In highlighting further Canadian uncertainty, officials
believed that as Canada’s claim had never been accepted by many maritime powers, it was
“arguable also that Arctic islands constitute, geographically, an archipelago rather than fringe
of islands.” By contrast, Canadian officials also noted emerging positive political and legal
developments to assist the sovereignty case. One opportunistic development turned on the
idea that the

Inuit claim to both land and sea in Northwest Territories could significantly strengthen the
both historic basis of Canada’s arctic waters environmental and sovereignty claims and the
validity of drawing straight baselines under fringe of island provisions (as ice conditions
prevailing in arctic would in a unique way satisfy criterion that ‘sea areas lying within the
lines must be sufficiently closely linked to the land domain to be subject to the regime of
internal waters’)...if the Canadian government wishes to avoid criticism of abandoning in
international forums the claim of a significant element in Canadian society (on analogy of
position of Newfoundand concerning Canada’s East coast margin claims) action such as the
baseline system may be only option.

In terms of how Canadian law of the sea ocean negotiators, many of whom were top officials
at External Affairs, saw the Inuit issue in relation to constitutional provisions and Canadian
federalism more broadly, they reasoned that the

suggested use of Inuit claims of course is not intended to and need not have the effect of
prejudicing federal government position vis-a-vis those claims. We strongly recommend,
however, that pending results of LOS conference and eventual decision in regards to the issue
of strait baselines in the Arctic, no statements be made or action taken in relation to Inuit
claims that could be interpreted as suggesting that the Canadian government views concept of
sovereignty over arctic waters/ice as legally frivolous or invalid...for the purpose of the
Canadian delegation, it would be useful to have further information on Inuit claims, especially extent thereof and whether they include part of Northwest Passage.

In conclusion, the memo listed a series of issues all of which pointed towards the positive consequences of drawing baselines: the protection of Canadian interests if the United States extended its pollution jurisdiction to two hundred miles; Canadian customs agents had been discharging duties throughout the Arctic for five years without clear legal authority; the ability to strengthen Canadian enforcement capacity given that a Polish ship, the “GDYNA”, had recently sailed through the Northwest Passage undetected for several days; and the need to clarify the reach of Canadian criminal law within and between the Arctic islands.

It would appear from these admissions and strategic points that Canada was panicked by developments in UNCLOS in relation to the sovereignty claim and the lack of support given to the Arctic issue. Indeed, the Canadian language seemed to infer that the time had come to make an express legal claim to the Arctic archipelago by drawing baselines. Conversely, it is tempting to posit that Canadian officials had diminishing faith in the historic waters claim. Given that the sector theory was now being expressed as a possible legal solution in conjunction with other options such as the ice as land theory, and the sector theory had been previously discredited publicly by Trudeau and numerous legal authorities, such a position underscored a belief by Canadian officials that the legal validity of the Arctic case was weak. Furthermore, the route of claiming the Arctic under archipelagic theory, akin to mid-ocean archipelagos, had been ruled out. The United States had pressed Canada on the matter, holding that it had to remove itself from this possibility if Canada were to continue to receive American support on the Arctic exception. Moreover, the possibility of armed conflict between Turkey and Greece over territorial claims including the right to claim internal water in archipelagos was real, according to American and Canadian counterparts.

What then explains the grounds of Canada’s beliefs and strategy about the possible use of baselines? Developments at UNCLOS pointed towards the right to regulate and speculate about the conditions of innocent passage being seriously curtailed, and thus arguments about passage carrying possible environmental consequences being subject to self-defence and preventative action would become problematic over time. Hence, even if Canada decided to
allow for innocent passage once the archipelago was circumscribed, the scope of this right would be severely contracted and Canadian discretion diminished accordingly. Yet it is certainly the case that Canada was simply layering legal possibilities onto others in the hope of creating a legal net of claims which precluded a more persuasive counterargument from emerging. If the historic title argument was valid, the sovereignty claim was secure. If the historic title claim was faulty or difficult to substantiate, then the drawing of baselines delimited the outer range with clarity so that Canada’s territorial waters could be marked. Canada accordingly had the option if forced to postulate the Arctic waters were internal, subject to innocent passage, or subject to the innocent passage of warships which Canada deemed worthy of transit. Should the Arctic exception become a legal provision, Canada would benefit in possessing the regulatory, technical, and administrative capacity in managing the region, along with being granted a further element of authority to the compilation of arguments pending over legal sovereignty.

In other words, Canada was likely not concerned at this point with absolute legal consistency in the case and the need to reconcile the possible competing legal rules that would in many combinations lead to conflicts of norms, conflicts between norms and obligations, and conflicts between obligations. Constructing a reasonable basis for a successful sovereignty claim from the mosaic of legal possibilities was paramount. Moreover, it was profoundly apparent that the Canadian delegation knew little about how Inuit claims might relate to the Arctic archipelago and what areas the Inuit were making claims to. The Canadian delegates admission calls starkly into question the degree to which Canada could have believed in 1976 in its historical claim of internal waters, given that the Inuit, or “Northern Peoples”, were always mentioned as constituting an important component of that historical claim. Ultimately, Canada’s beliefs and thinking on March 31, 1976, pointed toward a combination of legal uncertainty and political and legal opportunism.

And yet in a remarkable turn of history, Canada’s thinking about the possibility of drawing straight baselines became subject to incredible fortune. The memo had posited that Canada could expect only “pro forma noises” from the United States if baselines were drawn, given that United States military vessels would be allowed unimpeded passage and exemption from
the application of environmental conventions and dispute settlement provisions. Unbelievably, in large part, Canada, and Beesley in particular, arrived at this view it would appear on the basis of conversations with some unidentified members of the American delegation. In a memo written the next day, April 1, 1976, Beesley held that, in the context of Canada possibly drawing baselines after the completion of the Arctic exception, and that following an agreement that the regime would neither “prejudice nor preclude” Canadian, American, or Soviet legal opinion on the rights of access to Arctic waters, Canada might want to take the following advice:

Some members of the USA delegation have suggested privately from time to time that if this approach raises concerns in Canada about the Soviet military vessels to waters within the arctic archipelago claimed by Canada...then the possible Canadian response might be to assert and delimit historic internal waters claim by application of straight baseline system.

In other words, some segments of the United State’s delegation were advising Canada to draw the baselines, which by extension these individuals thought to be a legal policy response given the uncertainty of security developments as the Cold War wore on. While the possibility of drawing the baselines had never entirely left the minds of many officials as a solution to the Arctic problem, express American support from some quarters on the issue in all probability tipped the scales given that Canada was cautiously probing United States officials for their reaction to such a move and was receiving positive assurances. What is unbelievably fortunate for Canada, however, is that if some of the leading figures in the United States delegation would have known that Canada was contemplating such a move, let alone that some Americans had advised Canada on the range of repercussions that might follow, the possibility of Article 234 being constructed and sold to the American Government as a part of UNCLOS would have been immediately destroyed. In no uncertain terms would negotiations have proceeded from the United States had this knowledge of Canadian intentions been conveyed to top United States officials before April 11. National Security Council authority would never have been granted had they known that Canada was going to move forward with straight baselines even after the Arctic exception had been carved out. As it stood, Beesley believed that he had understood both the foundations and the limits of the American negotiating position. However, and by chance, Beesley was unknowingly
within a short space of having the benefits of six years of negations completely revoked on the basis of Canada reaching too far in its pursuit of Arctic sovereignty.

**International and Domestic Negotiations**

By mid week, a new problem had arisen for Canada. India was now making strong overtures that the two varieties of “special areas”, those referring to ice-covered areas, and the other as a catch-all heading for all vulnerable areas, should either be subject to IMCO review, or not. In other words, ice-covered areas could not remain beyond the reach of international rule making as Canada was intending, and of further complication, the USSR was explicit in declaring that the ice-covered areas would never be subject to IMCO. Legault went about advising India to resolve the problem for itself, given the critical stakes, and Canada on April 5, met with the UK to conclude the issue. The UK was maintaining that issues of special areas and vessel source pollution had the possibility of “wrecking” the entire conference, a belief likely supported by the United States. Legault conveyed to the UK that it would speak with India and get them to understand that they could get what they wanted from this issue “by various means”, rather than having India collapse entirely the special areas deliberations. The UK was for the most part unflinching, and told Canada that it must also get Australia to back away from their special areas proposal and their “declaratory process” of driving it forward. If Canada could not achieve these aims, the UK would remove its support for Canada’s Arctic exception. In terms of what type of international oversight was required to advance the debate in Committee III on marine pollution, Legault, following the UK rebuke, sought to turn the discussion towards the Evensen text and asked the UK if they might view it as a “starting point” for discussions to move further forward. The UK response was turgid. The Evensen debate and its text were now “beyond an end point”, and the text itself was now more than “window dressing” that not only made no sense but did not protect the marine environment. The UK was concerned with the role of the IMCO and its ability to function, as was becoming clear during the New York negotiations when some states were determined that the IMCO would only have the ability to either approve or disapprove of special areas regulations. The UK, and all maritime states, it added, sought that the IMCO had to have “the power of review within [it] and perhaps a
special procedure should be established within the IMCO to deal with the new smaller areas (in a manner different from the 1973 Convention on special areas.” The solution to special areas, the UK intimated, was “international designation and international regulation making” for such areas, and that “IMCO participation must take place from the outset.”

By April 5th, Canada had also formulated in part a solution to the problem of drilling in the Beaufort Sea. At an intergovernmental meeting the week prior, it was decided that in relation to how the United States and Dome petroleum would be handled in regards to domestic law, the AWPPA would apply in full force to the United States leaving no legal recourse under its provisions. The Inuit, by contrast, would be granted legal recourse “but only where they had property rights, (i.e.) not natural resources.” The manner in which to get around the problem with the United States was to get Dome to “voluntarily agree to compensate the Americans”, and this principle would be written into their insurance policy. It would also be embedded in explicit wording that any legal case raised would be tried in the Trial Division of a Canadian Court, and if the Canadian Government were to pay the United States damages Canada could then claim this amount against Dome. The Canadian Department of Indian and National Affairs had agreed to make all of these points prerequisites for drilling in the Beaufort Sea. Moreover, the United States was now assured that they would be compensated for any problems associated with drilling.

By April 7, three weeks into the New York session, Canada remained in a somewhat comparable position prior to the conference commencement. According to Beesley, there was no possible way that a final text would be put out by the end of the session, and thus there was further time to secure Canadian interests within Committees which had become bogged down in procedural wrangling. Committee II had in particular failed to make substantial progress on any issues, and revision would be required for the territorial sea and international straits provisions in order to secure the support of straits states. Similarly, the text in Committee III, in Beesley’s mind, would also have to be significantly revised away

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728 Confidential document on file with author, from M.H. Walsch, to lead Canadian delegates, April 5, 1976. Title: Discussion with UK Delegates on Marine Pollution Issues.
from “flag state orientation” towards the position of coastal states. The economic zone concept was under significant pressure and public attack from numerous states, even though within Canadian strategy this was not a problem as its Arctic application was “being amply protected by large numbers of like-minded states and similar considerations apply to territorial sea and straits issues.” On the Arctic exception, Beesley reported that significant progress had been made in bringing around delegates who had previously been divided on the merits and significance of the new regime. Even though India was insisting on comparable standards in all special and ‘highly special’ areas, it had suggested that the article generally should refer to “cold climatic conditions.” And though Canada had been reassured privately of its backing by Australia, the latter publicly held that there should be similar rules for vulnerable areas and the territorial sea. Support had also emerged from New Zealand, Iran, and Indonesia in private discussions. Most importantly however, it also appeared that Canada had been successful in demarcating the Arctic from other special areas. The Arctic was now being linked to the text’s language of “highly special areas”, rather than being merely “special”, and the bulk of debate in relation to these designations turned on the idea that special areas required applicable rules to be made by IMCO rather than coastal states. How this distinction became absolute is unclear, but presumably had a great deal to do with the fact that Canada had been making a credible case on the Arctic’s uniqueness for several years and was a engaged with the United States and USSR, the world’s maritime powers, on an exceptional clause.

729 The initial meetings within Committee III reveal that in relation to the question of whether the SNT was going to be an appropriate document upon which to generate compromise and eventually law, fifteen supported the text, and thirty-nine, with various qualifications, amendments and reservation, opposed it. Beesley maintained that, following conversations with like-minded states, they believed the text to be biased, one-sided, and in desperate need of revision. The American delegates expressed criticism at the lack of rule based enforcement standards it contained and overall selectivity, and held that rules were required which secured full coastal states’ powers subject to innocent passage in the territorial sea.
Bilateral Negotiations

On April 13, 1976, Canada and the United States sat down to discuss several critical ocean issues. Present for the United States was the new ambassador Vincent T. Learson, along with Bernard Oxman, Leitzall (Canada Desk Officer) and Rolph (State Department). Accompanying Canadian Secretary of State for External Affairs MacEachen, were Beesley and Legault. While Learson lacked both legal and ocean experience, he understood the extent to which Canada was adamant about securing the Arctic exception, and also that American representatives were prepared to accommodate Canada. In relation to the Arctic, MacEachen asked Learson what his views were on the possibility of the Arctic exception moving forward and Canada potentially accepting the United States’ position on international straits. Learson replied that it was “absolutely essential” that Canada and the United States cooperate on these issues, and that he considered the Arctic exception his “personal initiative” to secure. On the whole, Learson intimated that if the United States were to help in supporting the Arctic article, he would hope for Canadian support for the international straits provisions, and would recommend this exchange to Henry Kissinger when the Canadian delegation made clear its intentions. Learson also agreed with MacEachen’s ideas, which had been outlined earlier that morning, that there should be compulsory adjudication of disputes concerning transit through international straits, but Learson held firm to the position that negotiations should cease in relation to the straits articles. MacEachen handled this exchange rather deftly. He explained that Canada had misgivings about the straits articles and that the United States was “doing a bit of bargaining with us” given that there was no intimate connection between the two issues and that each was intrinsically important. And although the straits articles could not “fatally damage” Canada’s interests, they could be improved. When asked how he would proceed in recommending the “package”, Learson held that he intended to endorse its contents to Washington. At this point Beesley entered the discussion to add that although there was no direct link between the issues, “agreement on

730 Learson was the head of the company IBM by 1967. From September 1975 to January 1977, he served as Ambassador at Large to the United Nations Law of the Sea Conference, and also served on the advisory committee on Law of the Sea. He had no prior knowledge of ocean and legal affairs prior to taking his position.

the “environmental overlay” could “ease the Canadian position on the Northwest Passage.”

The problem, Beesley enunciated sharply, was that while the United States knows the language of the Arctic article, Canada does not know what it is being asked to accept on international straits. Given that the straits articles “had never really been negotiated”, and that there was little chance of movement within the strait’s group, Canada was being asked to “buy a pig in a poke”. Beesley had to achieve approval in Ottawa on the “philosophy (not on all the details that might emerge).” Both sides ended the meeting by agreeing to put the “package” to their respective governments. Having both flustered and ingratiated the new American ambassador at large, Beesley was very close to achieving Canada’s Arctic aims. His thinking in a confidential memo to Canadian delegates on April 21, 1976, confirmed this.732

The package in Beesley’s mind met Canada’s “immediate, narrow, national interests” in that the Arctic exception would “provide recognition of the legality of Canada’s [1970] legislation” and should be considered a great concession from the United States. In terms of the relationship of Article 234 to the Northwest Passage, Beesley believed that the environmental overlay would apply and thus would effectively preclude the United States from making arguments that the Passage “is a strait unlike any other”. He stressed emphatically that it had been a continuing problem in the negotiations with the Americans to ensure that the Convention provisions on international straits were not “made applicable by the specific terms of the arctic exception to any straits in the arctic.” In Beesley’s mind, Canada had made a partial but significant achievement: “while we would not have achieved international recognition that the Northwest Passage is not an international strait, we would have achieved international recognition that passage through that strait is subject to Canadian environmental legislation.” Conversely, for Beesley, it was possible to argue that the environmental overlay is “exactly what is implied by that term (coined by the USA) and nothing more). It is not an environmental underlay”, and consequently would not in itself prevent submerged transit by nuclear submarines, nor have any effect on the right of over

732 Memo sent to Canadian delegates April 21, 1976. Title: LOS – Arctic Exception. Document on hand with author.
flight for those states insisting that the Passage was an international strait. “It was for these reasons”, Beesley noted, that Canada was debating whether to draw straight baselines “with a view to ensuring that those waters would be viewed and accepted as internal (thereby preemiting any rights of submerged transit or over flight, always provided of course that Canada could make its claim stick). We have conflicting reports from within the US delegation as to how controversial such a measure by Canada would be seen by the USA.” If coupled with a clear treaty guarantee of transit rights for the United States, but excluding the USSR, it was thought that the United States might accept the baselines. Beesley believed that the USSR might protest but also perhaps be deterred from doing so given that such a move would appear inconsistent with their declared position concerning both Soviet and Canadian Arctic claims. In sum, the Arctic overlay did not resolve all of Canada’s “preoccupations” concerning the Northwest Passage, but did go a great way towards resolving a “major problem.”

The legal drafting of international straits engendered a twin set of challenges. Beesley let it be known that he had questioned a number of aspects on the straits issue with the maritime powers but had not attached in a memo to them the “basic philosophy” of free transit embodied within the proposals. Canada had “successfully walked the tightrope on this issue” since no military power had expressly voiced their displeasure to Beesley’s latest statement within Committee II on the extensive scope of rights associated with free transit. This group was, moreover, ready to accept several of Canada’s drafting amendments originally put forth by Norway. However, a significant dilemma remained in that the proposed amendments would not alter the rule that “the status of straits previously accepted as internal [could] be gradually altered through usage into international straits.” With respect to straits that connected the territorial sea to the high seas and were accordingly subject to innocent passage, “such usage could be based upon convenience.” Speaking broadly on the straits issue, Beesley worried that even though the United States, Britain, and USSR all agreed on the straits regime, China did not, which might have a profound effect on whether the conference accepted the rules as law. Further, he pondered the potential problems of world order that might arise if all of the major navies had maximum freedom of mobility. As a
final point of Canadian strategy, or as Beesley referred to it, “tactical considerations”, in order to “protect our position on the Northwest Passage, Head Harbour Passage and the straits of Juan de Fuca, we have in the past attacked USA positions, although for a year now we have adopted a position of neutrality [sic] (in return for USA neutrality with respect to arctic exception)”. Now, however, if Canada were to accept the package deal, it must “be the sole judge as to when and how to express support (reluctantly, in light of the overwhelming acceptance of the Articles) for the proposed treaty provision on international straits.”

And the scope of this judgment was critical. The United States was making clear to Canada that if the Arctic exception and package deal were to be carried through to Prime Minister Trudeau and President Ford, not only would Canada support the straits articles, but refrain from being rhetorically critical of these rules possible interpretations. The United States delegation had made it known to Beesley that he must dampen his interjections on the subject of what “used for navigation” meant in practice as it related to the international component of straits. Thus, not only would criticism cease on the problem of how much use was required for straits to be international, but that Canada would, by implication, refrain from publicly promulgating that the Northwest Passage was not an international strait owing to its unique characteristics.

Finally, for Beesley, there was the issue of special areas and how Canada would handle this concept. The United States told Canada that it must oppose the general special areas regime even if this entailed poisoning Canadian relations with Tanzania, India and Kenya, all of which insisted upon a regime not subject to international review. Canada’s reputation was therefore poised to be cast as self-serving, or in Beesley’s terms, Canada’s refusal of support to its former allies “could give rise to accusation of an ‘I’m alright Jack’” approach. Canada would be cast as a “deserter” of friends once its interests were satisfied, or worse, in Beesley’s mind, accused of “having used the developing countries in question in order to win our battle against maritime powers, and then deserting them on questions of importance.” Both Beesley and the Canadian delegation were “troubled by these tactical considerations (which may actually be ethical or moral issues as much as tactical issues).” Of course though, Canada might not gain conference acceptance of the Arctic exception, and thus the
question of former allies needed to be thought through carefully in evaluating the package
deal which the Minister of External Affairs was shortly to brief Cabinet on. From Beesley’s
perspective, and by way of conclusion to the Canadian delegation, he held that:

I find the proposed package deal rather unpalatable and have considerable difficulty in
making a judgment as to whether I should recommend acceptance or rejection of it. On
balance, however, I am inclined to the view that so long as the Canadian delegation remains
fully in control of the whole range of tactical considerations as to exactly how to present its
position to the conference, there is enough direct benefit to Canada in the proposal that we
ought not to reject it in spite of our well founded scruples and reservations concerning it.

With these sentiments fresh in mind, Canada proceeded to have its interests expressed in a
new drafting text, the revised version of the single negotiating text (RSNT). 733

While the RSNT issued on May 6, 1976, contained new language in relation to the Arctic,
the textual origins of the Arctic exception had begun to take root in mid April. Following the
submission that month by the “Chairman of the Informal Meetings”, Casteneda of Mexico
submitted an “outline of issues” concerning vessel source pollution which drew a distinction
between “special areas” and “critical areas” in the exclusive economic zone. In relation to
critical areas, the provision spoke of the “[r]ight of coastal States to establish, on the basis of
scientific criteria, non-discriminatory national laws and regulations more stringent than
international rules and standards to protect vulnerable areas where ice creates obstructions or
exceptional hazards to navigation.” As the commentaries to Article 234 note, this portion of
text was the first to mention the problem of “ice-connected vulnerability”, and the
Chairman’s text emphasized the role that ice played in obstructing navigation and creating
exceptional hazards. 734 Following several revisions of the text in which navigation was
treated centrally with the protection of the marine environment, ultimately better balancing

733 On the next day, April 22, any hope of applying archipelagic theory to the Northwest Passage were
completely removed as the United States opened the debate on archipelagos with an amendment precluding law
on archipelagos from applying to areas of territory having affiliations with continental land masses. The USSR
entirely backed this move, leaving a range of developing states including India in an outlying position absent
Canadian support.

734 See Nordquist (1985), at 395.
the two issues, the RSNT produced the following language in a separate section entitled ice-covered areas:

Coastal states have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection of the marine environment based on the best scientific evidence.

This wording represented a major concession for Canada in shaping the final contours of the Arctic debate and the emerging legal regime on marine source pollution. Moving into the summer recess, Canada felt as though its aims were coming to fruition even though much work needed to occur in shaping the final contents of marine pollution law.

**Beesley’s Final Act**

On August 2, 1976, the second New York session resumed, followed by two weeks of intensive debate about the relationship of marine pollution to the territorial sea and innocent passage. These issues remained unproductive throughout the period as Canadian officials lamented at high level meetings occurring between Henry Kissinger and Canada’s secretary of External Affairs on the specifics of the package deal and broader ocean interests. The two would have had much to agree upon given that their respective delegations had come to close agreement on the issue of coastal state jurisdiction over resources and the preservation of security interests. It was also realized that the United States was seeking greater freedom of seas protections within the EEZ and lobbying to have the EEZ formally delegated as a section of high seas. Canada tepidly opposed this tactic, but understood that it had to move

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735 As emphasized by the authors in Ibid.
736 Article 43, Section 9. Ice Covered Areas, RSNT, Part III. The sole commentary relating to this draft of the text stems from the Chairman who held that the revisions had occurred “in the light of all the negotiations conducted, taking into account all the proposals and amendments submitted and results reached” during that sessions of the conference. See Nordquist (1985), at 396.
737 For evaluation of Canada’s role in the marine pollution section of the RSNT, see McGonigle and Zacher, (1977), pp. 138-146. In terms of how academics viewed the existence of the ice covered area clause, the authors’ thinking is instructive. Not only was it assumed that the Article provided “international recognition” to the AWPPA, but in combination with Canada’s recent assertion of the Arctic being internal waters, “Canadian sovereignty in the area is gradually being consolidated”, at 142.
cautiously given that Cabinet had given its approval on July 30th to accept the package deal with the United States. As long as the Americans responded “favorably to the Canadian approach” it was thought by August 14 that Canada would be in a position to lend support once the straits debates opened up in future.

On August 17, 1976, the bargaining reached its conclusions, and the Canadian and American delegations sat down to consolidate their deal. Beesley led the Canadians along with Lapointe, Wang, Commander Evans, Walsch, Mawhinney and Major Chenier. The United States was represented by Learson, Oxman, Clingman, S.P. French, Rear Admiral Morris, and Vice Admiral Minter. At the outset of the meeting, Beesley revealed Canada’s new policy intentions that it intended to draw baselines around the archipelago, “delimiting the waters regarded historically by Canada as internal.” Why Beesley floated this point to the American delegates is unclear. It is possible that Canada was merely trying to gauge in person critical United States’ opinion on the matter, and if the delegates were resolutely opposed, Beesley would then have removed the baselines as a potential policy option. It is also plausible, as some delegates have recently intimated, that Canada was taking advantage of Learson’s inexperience in law of the sea matters and attempting to solidify gains in the bargaining process.

Beesley assured the United States that the move towards baseline delimitation, described as a “reaffirmation” of the Canadian claim, would not however prejudice United States’ military vessels operating in “pursuance of common defence interests”. It was also made clear that Canada would accept the American proposals in the package deal if it, perhaps in writing, would refrain from applying the straits provisions to Head Harbour and Juan de Fuca Strait. Following Learson’s comment that he could not guarantee anything until the proper American authorities had been consulted, Oxman stepped in to ask the following: Was Canada now prepared to support the straits articles drafted in the RSNT? Beesley replied affirmatively, giving assurance that he would not interject himself into final deliberations on the straits regime and refrain publicly from promulgating that the Northwest Passage was not

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738 Much of the following is based on a confidential document sent to Beesley from B. Mawhinney, August 17, 1976. Title: Arctic Exception: Meeting with USA Delegation. Document on file with author.
an international strait. Would Canada refrain from seeking to widen the scope of the archipelago regime so as to embrace islands off continental shelves? Beesley responded that Canada would do so at UNCLOS. Oxman then asked, what were the reasons behind Canada’s intentions to draw baselines when, from the perspective of the United States, such action would not appear to change the situation juridically? Beesley countered by listing three main points: 1) “the long standing claim of Canada’s native peoples which embraces water as well as land areas in the Arctic and the political necessity for the Government to take action which would establish in unequivocable terms, vis-à-vis foreign states, that the waters in question were subject to full Canadian sovereignty”; 2) baselines would create “necessary legal safeguards” which enhanced security; 3) and the absence of baselines might hamper the ability to clearly delimit the exclusive fisheries zone. Oxman then queried whether Canadian authorities, and in particular the Department of Defence, could agree that the baselines could not affect the question of legality as these applied to the straits regime. Did Canada understand that the two criteria rooted in international law would still apply, viz, that the waters be considered historically as internal and the area in question used for navigation? To this point Beesley replied in somewhat opaque fashion. Canada recognized that the baselines “cannot of itself change the previous status of a body of water and hence it might still be open to the USA to argue that our actions changes nothing…[h]owever we are firmly of the view that the drawing of straight baselines will simply reaffirm and delimit what Canada has always considered to be internal waters.” Canada, Beesley held, was hoping that the United States would not raise concerns in public about this, and in the interests of the bi-lateral friendship, Canada would confirm in writing its mutual understanding of the legal situation.

As to the timing of the possible action, Beesley held that it would likely conduct the policy after UNCLOS had closed. Oxman then queried whether the “USA delegation [could] assume that Canada is not seeking an acceptance in principle of the drawing of straight baselines around the arctic archipelago”? Beesley held that this assumption was correct. And when asked if Canada would “actively support” the existing straits provisions in the RSNT, Beesley replied that this was Canada’s intention, but to intervene too early might “do
more harm than good” given the “ill feeling” that would be generated from Canada’s coastal state friends. The most promising strategy would be to remain “silent” for some time. Canada left the meeting feeling as though the United States had greatly understood and respected their position, though the future possibilities of the package deal remained politically uncertain.

Why, then, did the American delegation not immediately cancel the Arctic exception, or take great offense to the baseline policy being thrown out provocatively? As previously mentioned, some American delegates would have been inclined to jettison the entire provision and seeing Canada’s move as duplicitous and overly self-serving. However, with Canadian assurances that the baselines did not perhaps change anything in legal terms in that as Beesley had stated, baselines could not change the existing status of water, Beesley was explaining Canada’s position consciously in ambiguous terms. Canada would draw the baselines pursuant to the *Fisheries Case*, and not, as the American delegation assumed, in relation to the 1958 Geneva Conventions, or the equivalent language in the emerging UNCLOS text. For the United States, a Canadian action with respect to baselines did not alter what UNCLOS said, and with the Arctic exception implemented in law, this would have the effect of putting to rest all bilateral problems in the Arctic. What would become Article 234 was for the United States what the UNCLOS stated about Arctic oceans law, rather than being reflective of a negotiation about bi-lateral Canadian-American issues. Though the Canadian delegation had used the UNCLOS negotiations to deal with bilateral issues and achieve the Arctic exception, that the United States sought a complete oceans treaty, and believed Canada’s legal position did not and could not amount to a claim of sovereignty over the Arctic archipelago, goes a significant way towards explaining why the baseline policy was merely accepted as a perhaps a future *fait accompli*.

Moreover, Canada and the United States had worked tirelessly to keep the treaty deliberations on track, including coming to agreement over what would become Article 60, concerning the use of artificial islands, installations, and structures in the EEZ, and the right to establish jurisdiction over these and surround such items with navigational safety zones. Beesley had understood that the United States would withdraw entirely from the UNCLOS
negotiations if Article 60 did not reflect American intentions given its substance in dealing with the installment of security mechanisms of great sensitivity to the US Department of Defense. With great diplomatic skill, Beesley apparently went to the Norwegians and persuaded its delegation from continuing to challenge the substance of Article 60 provision. Were it not for Beesley’s efforts, the United States would have withdrawn from UNCLOS, American officials admit. There was, therefore, good reason to believe that Beesley could be relied upon to keep his word on the international straits relationship to the Northwest Passage, and that even with Arctic baselines drawn, there would be no legal effect to an area already protected by the world’s most extensive environmental protection regime, Article 234.

**Article 234: Final Text**

Ultimately the Canadian and American governments came together on the package deal following years of what has been described as arduous and complex negotiations. Article 234 was made a rule of international law. It reads:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

According to American commentators, there were three bases of understanding between Canada, the United States, and USSR, which supported the adoption of Article 234. 1) there be an appropriate normative standard by Canada and the USSR that due regard for navigation be protected; 2) the Arctic would not be subject to vessels given sovereign immunity, namely warships and government vessels; 3) and that coastal regulation be subject to dispute resolution. Two textual changes were also carried out in the final stages. First, from the former wording in Article 43, states now had the right to “adopt” rather than “establish” and enforce non-discriminatory laws, a change perhaps indicating the tension between legal provisions being adopted domestically, as Canada would have sought in the use of
“establish” its own arctic pollution legislation, while the use of “adopt” would support a reading of the priority of international standards in reference to IMCO provisions the United States intended to retain. Second, the “due regard” clause was inserted at a late date which pointed towards emphasis being placed upon at least minimal consideration for navigation when evaluating appropriate environmental protections. In relation to how the parties interpreted Article 234, much of the text can be interpreted literally as meaning that in ice covered areas states can apply more stringent standards unilaterally, that non-discrimination must be applied to all vessels in concert with identical clauses found throughout UNCLOS, and that the limits of 234 run parallel to those of the EEZ.739 In relation to the concept of “ice”, the parties agreed that while there is no definition that should be included on an “ice-covered area”, they did hold that the article is not limited to ice which originates at sea but all ice encountered at sea.740 Perhaps intentionally, there is no succinct explication of what “most of the year” refers to as this applies to the presence of ice and severe climatic conditions occurring within a certain area. The issue of what would occur should the ice melt for a sustained temporal period was never broached at UNCLOS, which problematizes what will become of Article 234 should such conditions materialize. What can however be claimed, according to influential American interpreters, is that Article 234 applies to the construction, manning, equipment and design of vessels, so long as there are some ice covered areas within 200 miles of the Canadian coast.

Article 234 must also be read in conjunction with Article 236 which holds that warships and other vessels entitled to sovereign immunity, in relation to the protection and preservation of the marine environment intended by the rule, do not fall within its scope. Article 234 is distinctly interrelated to Part XV of the Convention on the settlement of disputes and must be adjudicated according to these provisions.741 Finally, it was understood that 234 has “no implication for any claims to sovereignty or other aspects of jurisdiction in any polar or subpolar regions of the world….it provides a basis for implementing provisions such as those

739 Moore, in 1980, wrote that Article 234 must be understood as the one exception to the entire body of law of the sea, the latter of which applies in toto to the Arctic Ocean as in any ocean area. See p. 232.
740 Nordquist (1985), at 397.
741 According to Nordquist (1985: 396), these two attendant rules were necessary in order to reach a compromise on the issue. See also Moore (1980), at 232.
found in the 1970 Canadian Arctic Waters Pollution Prevention Act.”\textsuperscript{742} The broader question of how Article 234 was understood to relate to the Northwest Passage remains uncertain however. Moore has written, for example, that the only special right afforded to coastal states in the Arctic is “pollution regulation of commercial vessels in ice-covered areas within the economic zone (including overlapping straits)”, and that the right of innocent passage and freedom of navigation apply to the Arctic except for the narrow circumstances of Article 234.\textsuperscript{743} However, it is indeed possible to assume, as Pharand would with Legault by 1984, that the argument for the application of Article 234 was the subject of straightforward logic. Because by the end of the negotiations on international straits no express provision was included to exclude the Northwest Passage from the regime, Canada and the United States were not required to take a stand on the matter.\textsuperscript{744} The intentions behind this compromise are clear in that the ice covered areas provision is not included in the sections of Part XII on the international straits regime. Since the former is not ‘subject’ or ‘related’ to the latter, it follows that the international straits regime is not applicable to the Northwest Passage.\textsuperscript{745} At the time of the negotiations it was understood by Canadian participants that 234 was to be excluded from the general application of rules on international straits, as confirmed by it being put into a separate section.\textsuperscript{746} In conclusion, while US commentators would have undoubtedly disagreed with these conclusions in 1976, and also by the time the straits regime was finally constructed, Canada and the United States were able to extricate themselves from the Arctic controversy after a polemically charged interchange for the better part of seven years.

\textsuperscript{742} Ibid, at 398. As a footnote, Nordquist concluded that the AWPPA was at the time of its enactment “widely regarded as being in violation of international law.” Ibid., ft. 7.

\textsuperscript{743} Moore (1980), at 232. Article 234 was designed to apply as an overlap to straits beyond even the Northwest Passage, to oceanic areas that fit the physical characteristics contained in the Article. Article 234 therefore applies to the straits regime, according to Moore. McDorman (1983: 307) has added that “there is no constraint on the right of a coastal state to impose national discharge standards and navigational standards in the territorial sea, except that innocent passage must not be hampered. The coastal state can enforce suspected discharge violations and violations of internationally agreed rules regarding construction, design, equipment and manning of vessels if ‘clear grounds’ exist to believe that the suspected vessel is the responsible party.”

\textsuperscript{744} See McRae (1987), at 110.

\textsuperscript{745} As Pharand and LeGault conclude in 1984, at 119-120.

\textsuperscript{746} Moore in 1980 wrote that Article 234 reflects that “in ice-covered areas within the economic zone (out to 200 nautical miles), including straits, the coastal states may “establish and enforce non-discriminatory laws...”, see p. 232.
How was Article 234 made Possible? What Role for International Law?

How may the policy change towards Article 234 be explained? What effects did existing and emerging international law have on this process? A range of approaches shed light on these queries which are interrelated in that the processes of legal creation gave rise to the possibility of a successful bargain and consolidation of legal drafting. Nevertheless, because the politics of international law-making remains a relatively under-theorized area of study, the conclusions drawn out here remain in a somewhat preliminary form. Before turning to how eclectical theory can contribute depth to explanations of this nature, the insights of McRae (1987) deserve further treatment in evaluating Canada’s policy sequence. In McRae’s interpretation, when Canada moved into UNCLOS it was tacitly reflecting that if the AWPPA could find legal expression in the treaty’s text this would remove the need to pursue vigorously a legal policy based upon historic internal waters. However, this outcome was by no means assured, and Canada’s success in constructing Article 234 resulted from four factors.747

The first was timing, in that the issue of environmental protection arose at a propitious time and there was a “general movement” away from the idea of freedom of the high seas being the dominant principle to guide ocean affairs and international law. Moreover, the jurisdictional issue surrounding Arctic regulation might have been contentious as a matter of principle had it not been for the fact that numerous other issues were being negotiated as part of a broader law of the sea package. States without a direct interest in Arctic matters were therefore inclined to engage in an issue that likely had little precedential value or ability to derail negotiations in other areas. Second, the UNCLOS venue itself proved beneficial in that the larger framework provided “an opportunity” to gain support from other states which, in turn, was essential in the early stages of the “special measures” provision. UNCLOS also provided a “context” within which trade-offs could be made between Canada and the United States on central issues. The attendant pressures associated with attaining a package deal at the conference reinforced the need to ensure that both states got what they wanted where possible and when appropriate. To this end, in comparison to the more extreme Soviet claim

of seeking unlimited sovereignty to its Arctic waters, the Canadian claim appeared far more modest and in keeping with the current dominant norms structuring the conference proceedings. The third variable, Canadian personnel, reflected the leadership and tenacity of Beesley in being able to move forward from a consistent position politically mandated from the Canadian government. The fourth was tactics, which turned on the ability of Canadian officials to bargain in informal consultations outside the conference framework, and specifically to ensure that other states with parallel claims to areas requiring “special measures” were forced to deal with these in a different bargaining environment not aligned with the Arctic region.

To McRae’s criteria, we may add the insights of several theoretical propositions. Constructivists would argue first that we need to understand legal creation as in large part structured by complex and meaningful histories. David Whippman’s comments are central in describing this effect.

The establishment of new legal rules and judicial bodies does not take place in a vacuum, where everything is up for bargaining and all outcomes are controlled by the distribution of power among the protagonists. Instead, law-making takes place against the backdrop of existing legal norms and institutions, which condition and limit the range of options viewed by the participants in the process as possible, and which simultaneously shape the process itself.748

As such, areas of substance informing UNCLOS deliberations were not created de novo nor on new terrains and distanced from legal precedents, but as complex extensions of processes that had reached a peak of contestation in 1960-70 following the law losing for many states its aura of authority and fairness. Technological development did much to unhang the binding effects of maritime law along with the role of epistemic knowledge about humanity’s relationship with the fragile webs of nature challenging the existing legitimacy of the ocean’s legal regime. Modern man was cast by many internationalists at the time as existing in a “paradox of extremes” in his ability to destroy and yet enhance his condition through technology. In this context, the period prior to UNCLOS in which the environmental conditions and existing pollution law were developed should be perceived as a time when

748 Whippman (2004), 158.
soft legal construction commenced, even though all parties were well aware that the Stockholm Conference, for example, was an institutional exercise of a non-binding character. It was these histories, traditions, normative frames and practical precedents that largely shaped the legal dialogue of negotiations and the contexts for arguments to prevail at UNCLOS.\textsuperscript{749}

And yet realists and rationalists, to the degree that both dismiss the effects of soft law, social norms or normative histories as having effects both on and in law, ignore the power of pre-legal standards evolving into participatory positions and eventual UNCLOS hard law. The Stockholm process brought together the disparate views dividing North and South and created joint policies to reconcile the competing political visions of economics, pollution, and use of the oceans. Such a debate on these terms was what decolonization required in moral and political terms for the South. Stockholm provided the institutional venue to voice concerns about the necessity of industrialization and how to curtail its deleterious environmental effects. As importantly, the new global values to emerge from Stockholm were ultimately the first part of a longer structural process that set out the terms for international environmental law. These enunciated norms carried on into the London Dumping Conference of 1972, the MARPOL Convention of 1973 on oil pollution, and then UNCLOS the following year. As constructivists points out, the norms of environmental protection and precaution were an example of a process of transference in that existing norms were strategically ‘grafted’ to new circumstances and new ideas surrounding sovereign protection, and thus broadened institutionally.\textsuperscript{750} But this process could not have been carried out were it not for developed countries understanding that the existing status quo for the developing world, and the necessity of adopting environmental standards in the oceans and on land, amounted to the “freezing of the present international order.”

For Canada, this alteration in international relations and international law was profound. Even though the special areas clause was ultimately defeated in 1973, having been built successfully and defended within collective groups of states who would years prior have

\textsuperscript{749} See Kratochwil (1989), at 33, for more general appraisal of this necessity in international bargaining.  
\textsuperscript{750} On normative grafting more broadly, see Price (1995).
likely never agreed to its relevance in making new maritime pollution law, the special areas clause became an idea to be squared within the broader environmental debate and normative framework. Indeed, it was the numerous seminars and lead-up deliberative forums to Stockholm that assisted in turning the energies of many states, developing and developed, towards environmental analysis. The concept of special areas indicated that rather than universal international law, laws that had relationships with nature could perhaps be thought of as requiring regional consideration and the subject of particular and unique rule sets. As the norm of special areas became more robust, a form of moral authority became attached to credible examples of these areas globally. By extension, in generating the argument for preventative action on environmental grounds Canada captured a plateau of moral appropriateness and used the legitimating power of its discourses to compel the United States to bargain for Article 234 and allow the straits articles to become a workable and functioning regime.  

But there was also a distinct sense in which Canada, by shifting its identity successfully within some state’s perceptions, allowed the developing state identity to constitute for it ‘norms of importance.’ Constructivists have long referred to this idea as the ability of identity to be constitutive of norms, which in turn give rise to state’s interests. In the case of Article 234, there was a natural connection at UNCLOS between developing states and the idea that their sovereignty was a territorial domain and exclusive province of resource entitlement upon which maritime law had to be built. This idea competed with a second that it was unjust for developing states to assume the economic burdens associated with environmental pollution controls in light of the necessity of economic development. In Canada’s case, because Article 234 did not impose external obligations per se, or costs on states by extension in maritime areas, the rule spoke to the uniqueness of Canada’s environment and the requirement of exceptional forms of law-making and sovereign

751 For treatment from a critical constructivist position of the use of moral arguments in treaty construction, see Eckersley (2004).
protection. Thus, being a developing state in some relation to its opposite – that of maritime states who insisted upon freedom of the high seas and the reduction of sovereignty in coastal waters - Canada could strike middle ground in bringing developing states to its side while also guiding states such as India in setting out unique environmental regulations for their coastal areas. In large part, Canada was able to capture in international law what constituted the international public interest, specifically this public component as framed by states struggling against the historical tides of colonialism and lack of territorial administration.

The politics of law-making also allowed Canada to learn both what the law would countenance in environmental protections and how Canada could bring about its desired interpretation of law. Canada began to understand through its interactions with other states what Arctic law both ought to be, in reference to other unique geographic areas, and could become, based upon ground that its negotiators were willing to give. This included not only interpreting and understanding United States and British perceptions, but also a range of developing states including India and Tanzania. Yet as importantly, Canada learned what would be required in dealing with Article 234 to allow the international community to arrive at consensus on a package deal for the oceans. Constructivists have drawn attention to the role of learning in foreign policy situations based upon states understanding the contexts of norms and what interactions between states reveal about each other’s positions.752 In viewing law as a discursive exercise in which knowledge proceeds to grow as interactions clarify arguments and produce greater amounts of information for audiences to evaluate, law can be understood to develop its own “self-knowledge” and “working practices” which form the corpus of international legal structures and the intersubjective understandings underpinning such practices.753 These foundations form the basis for states to learn what the law requires in certain situations and the approximate range within which good arguments can be distinguished from those considered spurious.

Moreover, constructivists can also assist in unveiling how the debate over Article 234 changed as a result of it being embedded within a ‘legal domain’ and in some sense now

752 See Wendt (1999), and Checkel (2001).
beyond the political. While negotiations for UNCLOS were structured by political overtones and strategic inclinations, as in all codification efforts, when the debate arose in a legal setting the tone of political debate began to change in a more formalized manner. States became less likely to remove themselves from short term proposals in the pre-UNCLOS phase because the codification effort required a sustained commitment to realizing a package deal. Hence, any calculations associated with political and diplomatic expediency were shifted to ensure states’ legal positions were taken into consideration and given substantive input within the international legislative process under the principle of fairness and sovereign equality. Though the conditions of bargaining for legal rules and Article 234 in particular were driven by self-interest, states understood that a legitimate outcome would only prevail if the conditions of procedural fairness were met. Hence, the deep ‘politicization’ of the environmental multilateral efforts proceeding UNCLOS was diminished as states began to advance broader legal frameworks reflecting genuine attempts at treaty construction.

We may also note the utility of interactionalist legal theory in explaining how the legislative process of Article 234 became circumscribed by an overlapping set of normative and legal structures. For interactionalists, rule composition and treaty construction are but one instance in the longer process of international law being formed in a process of continual interaction. Here, for legal rules to be born and thus proceed along a path towards legality and eventual legal obligation, there must be initial agreement, or shared understandings based upon communities of practice, between negotiators. Moreover, for a rule to become law it must meet Fuller’s eight tests of legality, and any rule may exist in a position of being partially legal. One of Fuller’s central tenets of relevance to legal drafting was the degree to which law must through its authoritative directives exist in congruence with the practices and patterns extant in society. To this end, social norms framing environmental care in special areas were congruent with a majority of societal expectations. Hence, as interactionalists note, these shared normative understandings began to give rise to legal fidelity between the parties negotiating Article 234. To be sure, the United States and the Soviet Union saw it as a means to achieving other ends at UNCLOS, namely the right of freedom of navigation and other critical points on scientific research and fishing within the broader package framework.
Nonetheless, they felt obligated to negotiate with Canada and see the terms of Article 234 largely along Canadian lines given that these reflected the sentiments of numerous states and dominant ideas existing within international society.

This points leads directly to the insights of rationalists. Article 234 is best understood as a compromise in Canada wrestling with the numerous identity, interest-based, and strategic problems of law-making and the promise of law delivering justice to all parties and the developing world in particular. However, rationalists can credibly argue that Article 234 represents a shrewd trade-off as Canada got what it wanted by holding out for the possible undercutting of the straits articles through its various political alignments. Here, rationalists can note that what counts in legal construction and the practice of international law thereafter is the need for law to reflect a relationship of reciprocity for states. Reciprocity in this guise refers to states engaging in transactions in which their interests are achieved by trading these off with one another for political and legal advantage. Such reciprocity gives rise to predictability, which was the outcome in the trade-off between the United States and Canada in light of their interests. Indeed, the binding effect of law, even within the process of legal drafting and the obligations to see this process through to conclusion, is rooted in self-interest and stability.

For rationalists, reciprocal obligations only arise as a result of this function of law. Once again, in congruence with the conclusions drawn by rationalists about motives of self interest in Canada’s compliance of the AWPPA with existing international law, there is undeniable truth in the proposition that reciprocity of interests drove forward the possibility of Article 234 emerging. And yet, as with many rationalist premises, this conclusion can be deepened by the interactionalist point that the concept of reciprocity is what gave the parties an idea of law in the first place. Beyond the transferable soft law framework that structured much of the authoritative bargaining at UNCLOS over maritime pollution and its relationship to freedom of ocean movement, it was the idea that these competing values, and the obligations which they imposed on various parties, had to be reciprocated for an ocean regime to be born. In its broadest sense, law presupposes a society, as Allott has written, and thus as the values and interests of states came into close alignment, reciprocity allowed bargaining over
specific policies to move forward. It is in these instances, such as the formation of Article 234, where the blurred horizons between strategic and normative interests, motives and values, counsel understanding legal construction as the archetypal exercise in the politics of international law.

Conclusion

The construction of Article 234 was an extended and conflictive affair squarely capturing how competing political and legal visions eventually coalesce. Canada had attempted to develop norms of environmental protection in special areas for several years prior to the commencement of UNCLOS and used this process as a structural basis to continue its momentum into the conference deliberations. As realists and rationalists would predict, Canada proceeded to use political relationships as bargaining tools from which to make gains in relation to the environmental overlay provisions. Moreover, Canada succeeded in linking the terms of Article 234 to the fate of the straits regime, which it understood was fundamental to the United States’ position on the possibility of a successful conference outcome. This type of political maneuvering should be seen as consistent with a position of self-interest being deployed to great advantage in a multilateral codification process. And yet as constructivists would predict, Canada was able to move relatively fluidly through the domains of law and politics in allowing the legal process of textual construction to move forward, while also making claims to its allies, such as India and Tanzania, that international political considerations and sovereignty concerns were paramount in any legal compromise. The final result for the United States and Canada was a piece of international law that validated Canada’s domestic interests, both political and legal, allowing the Cold War maritime framework to remain intact and institutional order brought to the contested nature of the world’s ocean regime.

754 See Allott (2000), at 70.

Following the drafting of Article 234 in 1976, Canada believed that it had secured international legal recognition for its Arctic waters pollution legislation (AWPPA). Moreover, it was assumed that from a formal reading of law, Article 234 provided parallel authority to the AWPPA and was therefore consistent with Canada’s Arctic objectives. To be sure, Canadian officials understood Article 234 contained measures of legal ambiguity and would likely not represent a watertight solution to policy problems assumed to arise in future. Yet even in light of interpretive legal challenges, there existed an overwhelming consensus within official Canadian circles that the environmental overlay provisions could control Arctic policy for a period of time and allow policymakers to both “relax” and recuse themselves from Arctic legal matters in the interim. As a result of the drafting achievement of Article 234, considered by all Canadian participants as a pivotal accomplishment in Canadian international legal history, Canada’s international lawyers and negotiators were provided with an opportunity to attempt to finalize UNCLOS deliberations and see the treaty through to its conclusion and possible ratification. Marking this continuity of effort, Canada conducted further policy actions to solidify its ocean interests by extending on January 1, 1977, its fishing zones to 200 nautical miles, and Part XX of the Canada Shipping Act was moved outward to 200 nautical miles from its previous length of twelve.755 In July, 1977, Canada established the Voluntary Traffic System (NORDREG), encompassing Eastern and Western Arctic waters within a single transit management system.756

By late 1978 at UNCLOS it had become apparent that no significant changes were being contemplated in relation to the international straits articles which had remained unaltered from the wording contained in the Revised Single Negotiating Text of May 6, 1976. However, an area of concern for Canada, one which necessitated further legal analysis, was the legal relationship of the Northwest Passage to the new straits articles and how this

755 Parallel to the AWPPA, Canada’s jurisdictional fishing extension was viewed by many states as a unilateral act at variance with international norms and practice. See McDorman (1983), at 304.
756 NORDREG’s primary purpose was to ensure the safety of maritime traffic and prevent pollution primarily in ships over three hundred tons, but also in practice for all vessels. Ships were to report to the Canadian Coast Guard twenty-four hours before entering the Arctic archipelago and report daily to the Canadian Coast Guard on their movements. The system as originally configured was however voluntary for international vessels.
characterization should be integrated into the broader UNCLOS framework. If the Northwest Passage were designated an international strait, this precluded the ability for Canada to prohibit innocent passage on grounds unrelated to pollution prevention as set out in Article 234. As such, there was international law yet to be written on the matter and a great amount of politics driving the process given that an exemption for the Northwest Passage from the international straits regime by the United States had to be calculated against other major ocean straits being found similarly exceptional.

And yet, by 1977 the United States believed that it had constructed a mutually accommodating agreement with Canada on the Northwest Passage’s relationship to the straits regime. An explicit bargain had been struck on the matter, and with Beesley in particular. Canada was to remain silent on the Northwest Passage so that Article 234 could emerge, the straits regime constructed and ultimately consolidated in law, and UNCLOS brought to conclusion. However, with Article 234 complete, Canada, in American eyes, broke this understanding. Beesley would go on record publicly, and on many occasions, to hold that Canadian geography contained no straits used for international navigation, thereby implying that the Northwest Passage fell beyond the international straits regime and was subject to Canadian domestic legislation excluding the right for states to engage in transit passage. Following a period of relative harmony between Canada and the United States in bringing to a close Article 234 and the straits regime, Canada’s final move in de-linking the political bargain underpinning the legal authority of both components deeply disturbed United States’ lawyers and policymakers. Such an “end-run” by Canadian officials, as American lawyers describe it, brought into sharp relief Canada’s strategic priorities on Arctic matters and how the politics of international law would likely play out on the matter.

Chapter eight has four primary objectives. It first picks up Canada’s policy sequence from 1978 and chronicles the historical events that occurred between then and 1989. This was a significant period of policy change for the Arctic, as following an initial period of policy consolidation which became punctured by new information discrediting Canadian beliefs on the range of administrative effects associated with Article 234, the legality of the Arctic policy was once again tacitly challenged in 1985 through the sailing of the US Coast Guard
vessel the *Polar Sea* through the Northwest Passage absent Canadian consent. The incident resulted in the final major change in Arctic policy structured around six significant policy pillars, the most critical of which was the drawing and implementation of straight baselines around the Arctic archipelago in 1986. The second aim of the chapter is to demonstrate how, and on what basis, Canadian officials learned to construct a valid argument in relation to a series of new legal critiques on the depth of existing Arctic sovereignty before and after the straight baselines were drawn. The third objective turns on the shifting relationship of the politics of international law during the period. It has been cogently argued that international law did not play any distinctive role in Canada’s foreign policy, or policy change, from 1980 through to 1986. This claim is made on the basis that if Canada had wanted to enact the straight baselines it could have done so in the early 1980’s, as the coordinates had been intricately mapped for well over a decade by External Affairs, UNCLOS was concluding, and all that was required was Canadian political will to initiate the policy. As a result, when an external United States political intervention finally stoked domestic ire and a corresponding need within the Canadian government to respond with an appropriate and resolute response, it was only then that international law was used as a tool to solve a political problem. As this chapter details, there is a great deal of truth to this reading of events, and especially so given that it appears plausible that the intentions of the United States voyage were not driven by the need once again to challenge Canadian claims to sovereignty. However, two issues, and only in part, point towards a revised interpretation.

First, to infer that Canada could have enacted the baselines legally in 1983, following the close of UNCLOS, is possible, but would have been seen by Canadian officials as a legal problem which gave rise to a significant gamble. Because the treaty was not yet in effect its provisions on straight baselines were caught in a position of what Oscar Schachter referred to as the “entangled” nature of treaty law and customary international law. That is, it was unclear what the existing international law was at it applied to Canada, deriving from

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758 This is Huebert’s primary conclusion, although there can be some room for doubt which will be explored within this chapter. See Huebert (1994), Chapter 4, pp. 205-212.
UNCLOS, the 1958 Geneva Conventions, customary international law, or some combination thereof. Accordingly, for Canada to make a legal claim to straight baselines in 1983 the evidence required would have been hard to assemble and meeting the thresholds of legality difficult to prove though several Canadian lawyers were arguing for the legal validity of such action. Second, to argue that the origins of the 1986 Canadian policy on straight baselines were political discounts the fact that even though the early parts of policy interactions between Canada and the United States prior to the voyage of the Polar Sea in 1985 were benign and not intended to create legal effects, as interactions wore on, it became apparent to Canadian lawyers in External Affairs that an American voyage not requesting Canadian consent would have a negative precedential effect on the legal status of the Northwest Passage. Rather than politics motivating the entire policy sequence it can be argued that Canada responded with its best legal argument in order to fend off a legal challenge. As such, the major policy sequence of 1985-1986 is further example of the politics of international law unfolding within a period when difficult policy choices were required.

Fourth and lastly, the final part of the chapter shows how Canadian policy and the reasoning behind it from 1988 through to the present has been structured. The principal work on Arctic international law as it relates to Canada, Donat Pharand’s *Canada’s Arctic Waters in International Law* (1988), was the final chapter in Canada’s policy consolidation. Pharand’s seminal text was intended to put to rest all doubt as to the illegality of Canada’s claim to Arctic waters, and in many ways served as blueprint for why the Arctic archipelago was “Canada’s”. Moreover, the text was able to demonstrate what was required in protecting the Canadian claim rather than having the status of the Northwest Passage ‘lapse’ over time and become an international strait. Several of Pharand’s critical and controversial points culminating over a thirty year engagement with the topic are highlighted in response to a series of rebuttals from the international legal college, who once again called into question Canada’s ability to claim the Northwest Passage as internal waters. In many ways, Pharand’s analysis facilitated within the arguments of international law a generative basis for Canada to learn on the basis of what reasons international legality could be secured.
Arctic Policy in the Late 1970’s: Reconciling Legal Rules and Policy

Canada was very much consumed with law of the sea matters in the late 1970s, not only in relation to the finalization of UNCLOS, but also over an impending international legal dispute with the United States over the Gulf of Maine to be litigated at the ICJ in the early 1980’s. The Gulf of Maine delimitation issue was one of five maritime issues Canada was attempting settle with the United States in a package deal, which included the Strait of Juan de Fuca; inside Dixon entrance (the A-B line); outside Dixon entrance; and the Beaufort Sea.\textsuperscript{760} Len Legault was Canada’s lead official for what would materialize as the Gulf of Maine Case, and at the time perhaps Canada’s greatest authority on law of the sea matters. Due to his legal knowledge and senior status within External Affairs over this period, Legault would also largely be tasked with solving any problems relating to UNCLOS legal interpretation on Arctic issues and Canada’s existing position under international law. By this point, Legault’s knowledge of oceans and law and its application to the Arctic more specifically was intricately tied to Donat Pharand’s thought. The duo had cultivated a close working relationship for some time, and indeed it was Pharand who, during his in residence for one year at External Affairs in 1977-78, wrote the brief arguing for Canada to litigate with the United States over the Gulf of Maine at the ICJ. Pharand had been originally invited into External Affairs for the year to write legal briefs on the subject of Canadian Arctic sovereignty in direct response to the American position that it would again begin to transport oil through the Northwest Passage from Prudhoe Bay in the Beaufort Sea to Eastern United States ports.\textsuperscript{761}

\textsuperscript{760} See Lalonde and MacDonald (2006), at 33.
\textsuperscript{761} This process in the United States had been moving rapidly for some years following a 1973 study by the Maritime Administration of the US Department of Commerce, concluding that Arctic tankers up to 245,000 DWT (dead weight tonnage), could operate from west to east in the area, greatly reducing the costs of an equivalent transfer via a trans Canada-US pipeline. A 1974 study indicated that sixty-two new Arctic icebreakers designed for the Northwest Passage would be required by 2000 to meet then existing United States interests. The American corporation, Seatrain Line Inc., also announced plans to transport oil from Prudhoe Bay. And in 1979, the US Arctic Pilot Project was set in motion to move liquefied natural gas in two icebreaking tankers through the North Passage following the 1978 planning conclusions derived from the US Department of Commerce. These examples of the potential and actual activity to emerge within the archipelago were among many to emerge throughout the 1970’s. See Pharand (1979).
Over the course of the late 1970’s and early 1980’s Pharand and Legault’s interests in solidifying the Arctic claim brought them together as lawyers and co-authors. To a significant extent, over the course of the period from 1978-1988, Legault and Pharand were Canada’s foreign policy advisors for the Northwest Passage given their knowledge of substantive issues and Legault’s authority within government. With the latter caught up in UNCLOS and an emerging legal case against the United States, in an attempt to settle the issue of how the Northwest Passage related to the international straits regime, Pharand wrote in 1979 the lead article in defense of the Canadian position.\footnote{Pharand (1979). Pharand also summarized this debate for the broader range of international lawyers worldwide in a parallel article in Recueil des cours (1979). During his year of academic in residence at the Department of External Affairs one of his three tasks was to prepare an opinion on the status of the waters of the Arctic archipelago. By June 1978, Pharand had completed a 315 page study entitled “Canadian Jurisdiction over Arctic Waters”, within which two recommendations emerged: to draw baselines around the archipelago to confirm the status of the waters as internal, and to construct a polar ice-breaker to ensure of the possibility of year-round surveillance. See Lalonde and MacDonald (2006), pp. 34-35.}

The central question Pharand faced was whether the new passage regime for international straits would apply to the Canadian Arctic. In unpacking the problem of what characteristics constituted an international strait, in characteristic fashion, Pharand drew extensively upon existing international legal opinion. Fitzmaurice’s commentary on the 1949 Corfu Channel Case was cited as lending support to the claim that the ‘amount of use’ was a central criterion in the internationalization of a strait. For Fitzmaurice, “in the Corfu case, the Court clearly thought that the Channel was used to an \textit{important} extent.”\footnote{Fitzmaurice (1950), at 28, emphasis by Pharand.} According to Pharand, it followed that a strait was international not if strictly a “necessary route for international navigation”, but only if it is a “useful route”, or perhaps even an “alternative route”. The volume of actual use had to be significant, and the sufficiency of use that would constitute a straits international status turned on the number of ships using the strait along with the number of flags represented.\footnote{Pharand (1979), at 107. Pharand was also trying now to refute Ruth Lapidoth’s thesis penned in 1972 that the criteria for straits was that one be “capable of use for international navigation”, a position that the United States greatly supported. See Lapidoth (1972), at 31. Lapidoth, a famous Israeli lawyer, was attempting ostensibly to strengthen the case for Israel’s control over the strait of Tiran.} In relation to how the geographical and functional elements must combine to indicate international status, Pharand referenced the thinking of D.P. O’Connell from 1970. For O’Connell,
When it is said, then, that a strait in law is a passage of territorial sea linking two areas of high
sea this is not to be taken literally, but rather construed as a meaning of passage which
ordinarily carries the bulk of international traffic not destined for ports on the relevant
coastlines. The test of what is a strait, unlike the test of what is a bay, is not so much
geographical, therefore, as functional.765

In applying this test to the Northwest Passage, Pharand claimed that irrespective of Trudeau’s
belief voiced in 1970 that the Beaufort Sea could never be considered as “high seas”, the
Northwest Passage revealed geographically that it had to be considered a strait under
international law. Trudeau’s position had largely turned on the idea that because there was
significant ice in the Beaufort Sea for most of the year, this geographic effect precluded such
a legal designation. However, Pharand noted that there was in fact increased traffic in the
Beaufort Sea and Arctic Ocean more broadly, confirming that the Northwest Passage did not
exist in isolation from maritime traffic. On the issue of functionality, which could then
internationalize the status of a strait, Pharand held that the rule cited in the Corfu Channel
Case that a strait be “a useful route for international maritime traffic” was the benchmark for
the Northwest Passage. In other words, there had to be utility for states in making use of
such a waterway. Given that there had to date been eighteen crossings, all of which were
either consented to by Canadian officials or had on board Canadian representation, it
followed that this limited number of crossings was not of sufficient use for commercial
navigation to change the legal status of the Northwest Passage.

As to the primary American objection that international status materializes on the basis of
potential rather than actual use, that is, on waterways carrying the geographical possibility of
transit when a material change occurs in the future, Pharand argued that the United States
was misreading the law given that the Corfu Channel represented existing international law,
the 1958 Territorial Sea Convention ran parallel to this interpretation, and the ICNT in
UNCLOS retained analogous language of actual use. There was, moreover, an important
distinction to be drawn between actual and potential use in relation to “international
waterways”. In 1964, the authority on such matters, Richard Baxter, had drawn out this
critical point convincingly, and Pharand noted the validity of his position in order to ground
the Canadian case. For Baxter, explaining the distinction between potential and actual use

required understanding that international waterways are “rivers, canals, and straits which are used to a substantial extent by the commercial shipping or warships belonging to States other than the riparian nation nor nations.” 766 This criterion had to be distinguished from that which United States’ courts had used to determine whether or not a waterway is navigable. American domestic law and jurisprudence reflected the idea that potential use, or a capacity for navigation, is determinative. As set out in 1921:

A river having actual navigable capacity in its natural State and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future navigation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of change to conditions or because of artificial obstructions. 767

For Pharand, regardless of the clarity brought about through Baxter’s distinction, international law was not consistent with United States domestic understandings, and the former was required in determining legal consensus between states.

As a result, the central question as Canada moved forward into an era of intensive resource transportation in the North was, under what conditions could the Northwest Passage become the subject of legal change and have its status altered to that of an international strait? Currently, Pharand argued, the Arctic archipelago required the right of innocent passage for all states, including warships, and the rules of the existing ICNT once again did not alter the existing position. Moreover, these facts needed to be taken into account when evaluating how much volume would internationalize the Northwest Passage. Pharand was, however, ambivalent about what would trigger a legal adjustment, noting that in an “isolated part of the world” within which “special bodies of water necessitat[ed] special ships”, perhaps the only rule of guidance was that an international tribunal need not apply the volume test as stringently as was done in the Corfu Channel Case. There, in the North Corfu Channel, 137 crossings a month during a twenty-one month period representing seven flag states was sufficient for the status of internationalization. 768 To use this measure as a template from

766 Baxter (1964) at 3, cited in Pharand (1979), emphasis added by Pharand.
768 See Pharand (1979), at 114.
which to evaluate Arctic transit, it followed that, in the absence of certain “precautionary measures” undertaken by Canada a “rather brief history of transporting oil and gas by a few flag states” might in fact trigger legal change.\footnote{Ibid.} If the legal status were to be changed following activity of this nature, maritime passage could not be suspended on the grounds of innocence and the new regime of “transit passage” would apply in full: the obligation of coastal states to non-suspension of transit from all ships and aircraft provided these did not threaten or use force within the voyage, along with the right for all ships, including submarines, to travel in their “normal mode”. There was no uncertainty for Pharand as to the validity of this position, given that John Norton Moore had argued for an identical interpretation only three years earlier, and William Burke, among others at UNCLOS further granted it credibility.\footnote{See for example, Burke (1977). Most interestingly, Pharand, in making mention in his 1979 article to John Norton Moore, was referring to a seminar held by Moore in Thessalonki, Greece, September 6, 1976, on the subject of international straits and at which Pharand presented a paper. While Pharand’s arguments in Greece about international straits and innocent passage were parallel to his thinking in 1979, his comments on archipelagos were quite revealing. Noting that the emerging UNCLOS provisions on archipelagic islands would apply only to archipelagos with other islands, thereby excluding the application of these rules for states such as Canada and India, and possibly Spain and Ecuador, it followed that “since their archipelagos can hardly be characterized as constituting ‘a fringe of islands along the coast’, they would find it very difficult to draw straight baselines under the provisions of the 1958 Territorial Sea Convention which have now been reproduced without any substantive change in the Negotiating text.” See Pharand (1976), at 87. One must wonder to what degree the audience present had an effect on this evaluation.} Pharand also attempted to settle any legal controversy surrounding problems associated with Article 234, the use of straight baselines, and the law on international straits. Perhaps his most convincing point to this end was that Article 234, having been constructed for the Northwest Passage (a point understood by all the parties), was not included in the section of the UNCLOS treaty framework referencing the straits regime. Hence, even if the Northwest Passage was designated as an international strait the rights and obligations contained in Article 234 would continue to apply.

In relation to the straight baseline issue, Pharand continued to suggest that Canada might rely upon customary international law to successfully make its argument. Because Canada was exempt from the obligations of the Territorial Sea Convention of 1958 due to its non-
ratification, it could use the customary international law of the *Fisheries Case* to preclude the right of innocent passage from applying to the Arctic archipelago.\(^{771}\) Beyond such a move, Canada was counseled to demonstrate “control”, the *sine qua non* of territorial occupation under international law. Icebreaking and navigational capability were to be deployed and the Canadian Coast Guard presented the opportunity for possessing some element of presence in the area given their inability by 1977 to operate for more than four months throughout the year. Pharand concluded by note of caution and alarm, however, a point which would resonate in Canadian policy circles for the next thirty years: “[I]f Canada is not there to enforce its own regulations and exercise proper control over activities in the Northwest Passage, its jurisdiction might become nominal only and the present status of the Passage, as a national sea route, will be in considerable jeopardy.”\(^{772}\) As such, Canada’s legal foundation was structured upon the requirement to carry out administrative tasks in the area consistently and over time in order to preserve the case for sovereignty.

A parallel process unfolding in concert with Pharand’s analysis was occurring within Canadian government bureaucratic circles. On June 27, 1979, an Arctic Waters Panel was convened and tasked with the mandate of reviewing Canadian policy in the Arctic following the election of the new Liberal Government in May, 1979.\(^{773}\) Lorne Clarke, then Director of Legal Operations at External Affairs, constructed the panel on grounds that the new government needed input into the status of the waters due to increased traffic and the convening of the eighth session of UNCLOS. Numerous departments were tasked with thinking about Arctic policy in relation each department’s interests in the North, the main issues being faced, and what possible policy options were best suited to challenges arising.\(^{774}\) Prior to this tasking to various Departments, External Affairs also carried out a review on the broader sweep of Arctic issues, including how to deal comprehensively with the sovereignty

\(^{771}\) Pharand’s article actually refers to the *Corfu Channel Case* of 1949, but would have meant the *Fisheries Case*.

\(^{772}\) Pharand (1979), at 132.

\(^{773}\) See Huebert (1994), Chapter 4, at 137. Huebert’s work remains to date the most comprehensive treatment of the 1980’s period and is drawn upon here.

\(^{774}\) Huebert (1994), Chapter 4. See also footnote 172.
question. While it would appear that the entry of the new government caused the Arctic review to commence, along with the policy imperatives underscored in Pharand’s analysis, two external processes occurring in the United States likely also contributed to Canadian action.

In 1979, the United States reconvened the Interagency Arctic Policy Group (IAPG), originally constructed in 1970 and given policy structure by among others, the Departments of State, Transportation, and Defense. The IAPG was to report to the National Security Council and consider the development of “a comprehensive Arctic Policy for the Federal Government.” The US Department of State had also assembled a new institution, the ‘Freedom of Navigation Program’, tasked with identifying excessive maritime claims and presenting policy solutions combining diplomatic action and operational assertion of US navigation and over-flight rights. Where coastal states primarily, but any state generally, sought to limit maritime traffic beyond the limits of international law, the Program informed the US Department of State so that the latter could begin to facilitate the enactment of countermeasures. Hence, the United States was now preparing to re-engage in Arctic security matters, but do so beyond mere military posturing. Law and power were to be combined in forcing legal compliance when possible, and American interpretations of the law of the sea as it emerged from UNCLOS standardized how foreign policy on maritime issues could be measured and given direction. In American eyes, that order in the oceans could only be enforced by bring the practices of maritime transit in line with new international legal provisions, novel institutional forms were required to inject a form of legalization into the system, including the Arctic region.

As such, by 1980, there emerged a renewed focus on Arctic matters within the United States and Canada. And unsurprisingly for the latter, the sovereignty question was again moving to the forefront with importance. During the period from 1979-1982, Canadian officials

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775 Ibid, Chapter 5, at 321, cites a note sent January 19, 1980, from Legault to Ivan Head informing him that the review and the possibility of straight baselines are the subject of consideration in the future briefing of the relevant Ministers entering government.
776 Huebert (1994), Chapter 4, at 210.
deliberated within all government agencies the criteria required for a successful international legal argument, and how Arctic policy could be built from the foundational successes of Article 234. 778

The Limits of Article 234

In late 1982, the relationship of Article 234 to the international straits regime was severally critiqued, and this time by a prominent Canadian lawyer. His argument would ultimately force Arctic policy makers to rethink Canada’s legal strategies on the sovereignty question. The author was Don McRae, then professor of law at UBC, along with a legal student, Goundrey. 779 The authors’ central questions asked, what was the scope of Article 234, specifically in relation to the abundance of economic activity occurring in the Arctic and the real possibility of the release of oil or natural gas into the area? What environmental protections were present to both protect against and provide a remedy to the impacts of vessel passage and oil discharge? McRae and Goundrey began by pointing out that the contents of Article 234 needed to be reconciled with those contained within the AWPPA. Even though Article 234 had been posited as legitimizing the AWPPA, it was unclear how the stringent rules on vessel design, construction, navigation, and manning standards could both be squared with Article 234 and also legally deployed for the first time given that a challenge was inevitable. The central issue was one of the legal interpretation of Article 234, and in particular the problem associated with the use of the word “where” in the clause reading that, “states have the right to adopt and enforce laws and regulations for the prevention, reduction and control of marine pollution where particularly severe climatic conditions and the presence of ice covering such areas for most of the year creates obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.” Under a

778 However, there was neither clarity nor coherence in this planning. As Huebert writes of events in October of 1981, External Affairs had to reel in other Departments at times, notably the Department of Indian and Northern Affairs, who intended to publicize a Green Paper pointing out that Canada did not exercise to a high degree regulatory activity in the Arctic region. This was seen by External Affairs personnel as a public admission of legal weakness. See Huebert, Chapter 4, pp. 207-210. Canada had only recently, on September 17, 1980, declared once again that the status of the waters were internal. See CYBIL (1981).

779 McRae and Goundrey (1982).
broader reading, “where” defines the area within which the state has power and may enforce law, but under a narrower interpretation, “where” merely “defines the circumstances in or the occasions on which laws and regulations can be enacted. It has in this context a meaning similar to ‘when’.”\textsuperscript{780}

McRae and Goundrey further highlighted that when evaluating the origins of Article 234 from its genesis in many of the debates in the Seabed Committee in 1973, it was not clear Canada had historically intended a broader interpretation, implicating spatiality, was to apply. Such uncertainty thus gave rise to the practical problem of what substantive difference would result if either the broad or narrower interpretation were adopted. If the broader option were taken, it followed that there were no limitations on the power of the coastal state in relation to prevention, reduction, or control of marine environmental pollution, and further that these legal protections need not result from the area being subject to severe climatic conditions.\textsuperscript{781} Alternatively, under a narrow reading, all legal regulations would have to be subject to problems arising from climatic conditions, the presence of ice, or harm or disturbance to the ecological balance of the area. Furthermore, this created a scenario through which two legal regimes emerged governing the regulation of marine pollution in ice-covered areas within the EEZ: 1) pollution that did not result in major harm or irreversible disturbance of the ecological balance, or did not arise as a result of severe climatic conditions or of obstruction or exceptional hazards to navigation, would be governed by the EEZ legal regime; 2) all other forms of pollution could be regulated by the coastal state, which in Canada’s case would be the AWPPA, without impact from existing EEZ rules.

On the issue of how Article 234 related to international straits, McRae and Goundry’s analysis problematized the Canadian government’s case even further. Article 234 was placed, it would appear by design, from both the Canadian and American delegations, in a strategic position within the UNCLOS text. Article 234 exists in section XI, and therefore is not included in sections VI, VII, and VIII which are intended to relate, and are presumably

\textsuperscript{780} McRae and Goundrey (1982), at 216.
\textsuperscript{781} Ibid, at 218.
subordinate to, the international straits regime. Section XI is a ‘stand alone’ section and exists, as Pharand had argued, outside the regime and hence not subject to it. Accordingly, the question arose over how the relationship between Article 234 and the international straits regime is conceived of depending upon what legal interpretation of Article 234 is adopted. If the broader, then the question of whether the Northwest Passage is an international strait is irrelevant as international law otherwise applicable to the EEZ would not bind the coastal state. If the narrower, “the normal rules governing the exclusive economic zone, including the question of whether particular areas were subject to the international regime governing straits, would be relevant where the purpose was to regulate marine pollution that did not result from the conditions mentioned in Article 234 or was not likely to cause the consequences contemplated in that article.” The central issue that remained, however, was what practical difference these competing interpretations would make in the policy’s implementation and enforcement.

For McRae and Goundrey, the issue of practicality turned on what was meant by “due regard to navigation” because the requirement placed restrictions on the ability of coastal states to enact law when acting within the broad interpretation of Article 234. As the authors noted, at the very least, the clause indicated that *some navigation* is assumed to potentially have taken place, and thus it could not follow that a state under the rule could prohibit all vessel transits in a region subject to Article 234. Hence, it ought to be concluded that in determining the scope of “due regard for navigation”, as the legal strength of these rules must constitute some combination of legal rights in relation to those included within the territorial sea and EEZ, it followed that the due regard for navigation clause

imposes an obligation to act reasonably when derogating from the international rules and standards normally applicable in the economic zone pursuant to the power granted by Article 234. …[t]he real difference between the broad and narrow interpretation of Article 234 comes down to the issue of international straits. Whereas under the broad interpretation of Article 234 the regime of international straits is irrelevant, under the narrow interpretation the international straits regime may be relevant for certain purposes.  

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782 McRae and Goundrey (1982), at 220.
783 McRae and Goundrey (1982), pp. 221-222.
The environmental and jurisdictional reach of coastal states enacting Article 234 was therefore not unlimited, whether interpreted through either frame. Furthermore, it would be unclear whether submarines would fall under the ambit of Article 234 if traveling in their ‘natural’ submerged mode. And finally, as Article 234 made no mention of the territorial sea and applied strictly to the EEZ, and it could not be the case that greater powers of coastal state protection were accorded in the EEZ rather than in the territorial sea, it followed that “due regard to navigation” could well mean that innocent passage applied within the EEZ under Article 234 as it would ordinarily within the rules associated with the territorial sea. If so, Canada would have either the marginal ability to legislate against vessels it considered as hazardous, or a conflict of laws would prevail as to how the preservation of the marine environment could be squared by the right of innocent passage.

Canadian officials were thus faced with a twin problem. First, not only was the substance and scope of Article 234 now called into question, possibly removing the protective capacity of the article and perhaps also Canada’s ability to build the ‘case’ for sovereignty; but also, Canadian officials had been inconsistent on whether the broader or narrower framework was to apply and how broadly the scope of Article 234 would reach. If the narrow interpretation were to be accepted as law by the international community, as a result of the drafting history of the article or the ambiguity associated with the due regard for navigation clause, Canada would be left with the option of having to act unilaterally to secure enforcement over the archipelago or become subject to international standards of pollution protection as designated through the IMO. Second, there were ominous signs that the Northwest Passage could be subject to internationalization if maritime traffic patterns increased and the Liberal Government did not deepen its legal claim through greater political presence. Ultimately, the convergence of marginal state action with increased foreign activity was narrowing the legal window through which the claim that the Northwest Passage was strictly a ‘strait’ could be preserved.
Following this challenge, McRae then released a second piece in 1982 further calling into question the ability of Article 234 to solidify Canada’s Arctic position. His argument opened by suggesting that as the United States by 1982 had not accepted UNCLOS, it was unclear as to whether Article 234 could be considered as effective international law, if not enforceable law, given the problem of the United States failing to consent to the treaty even though it was the primary party to develop Article 234 with Canada. If it was the case that Article 234 did not bind the parties, this begged the question of whether Canada could do something to assert its sovereignty and specifically if the legal weight for Article 234 was too significant to uphold following a challenge on the basis of its application to maritime movement in the Arctic. Because of such uncertainty, the central question was whether Canada was legally entitled to draw straight baselines around the Arctic archipelago.

McRae’s response was in many ways an argument within which was embedded a warning for the Canadian government to do something quickly under international law to get around the problems associated with the non-ratification of UNCLOS. The elements of the issue were unpacked as follows, with much of the reasoning resting on orthodox assumptions.

Under the Territorial Sea Convention of 1958, areas enclosed by baselines that were previously considered subject to free navigation were now subject to innocent passage, and this rule was also embedded in the UNCLOS treaty. However, the Court in the Fisheries Case did not pronounce that innocent passage had to be retained following the enclosure of baselines around an archipelago. As Canada had not signed the 1958 Territorial Sea Convention, it was not legally bound to its rules, and nor those in UNCLOS, but could rely upon the Fisheries ruling which precluded the obligation for innocent passage to apply if it could be argued that the Fisheries rule had become customary international law. McRae added, however, that while it also could be argued that the new UNCLOS provision may be claimed as reflecting customary international law, such a conflict of laws would in fact be moot as the relevance of the rule was dubious in the Canadian case. Because the purpose

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784 McRae (1982-3).
785 Emphasis is added on this point, that the international straits regime may have become customary law, given that several prominent lawyers have written incorrectly that McRae stated affirmatively that customary status had been reached. See Franckx (1994: 105-106), and McKinnon (1987), at 815.
of the rule concerning innocent passage was to prevent states from impairing vessel transit formerly considered legal, the rule did not impact upon Canadian practice for three reasons: 1) the Arctic archipelago had never formally been designated as territorial waters; 2) no foreign states or vessel had ever claimed or exercised the right of innocent passage; 3) and Canada had never formally agreed to designate the right as applicable. It followed for McRae that the drawing of straight baselines “would be acknowledging an existing status in the waters, one that does not include a right of innocent passage, and not changing a hitherto generally recognized status.”

As McRae went on to note, Canada’s unique position in relation to the possibility of drawing baselines illustrated the strengths and weaknesses of Canada’s case. To its favor, because there had never been extensive vessel transit in the Arctic, Canada was not then impinging upon a right that had hitherto existed and would continue to remain in a position of non-interference in relation to other states. Conversely, the weakness of the Canadian position led to the conclusion that time was now not on Canada’s side and that the baselines should be drawn quickly. For McRae:

[t]he purpose of the Canadian claim to treat the waters of the Arctic as internal waters would be to ensure that Canada has complete control over any future shipping within those waters. Thus, the fact there has been no shipping in the past is an important element in justifying an act that will allow for the regulation of shipping in the future. Moreover, the greater the likelihood of such shipping the less cogent is the argument that Canadian actions will not interfere with interests, albeit nascent, of other states.

As it was “virtually certain” that within the next decade commercial shipping within the Northwest Passage would begin, Canada could rely on Article 234 to protect its interests or move towards the solution of drawing baselines. While the latter would engender controversy given that the world had engaged in prolonged codification on the laws of the ocean regime, to adopt novel approaches would be viewed, especially by the United States, as engaging in unilateral action militating against the successful adoption of UNCLOS and

786 Ibid, at 488, [emphasis added]. As McRae also highlighted, while Canada had never expressly endorsed the right of innocent passage, it could have tacitly done so on the basis of the statement by Trudeau in 1970 that it was “determined to open up the Northwest Passage to safe navigation”.

the spirit of the convention. Ultimately Canada needed to make a choice concerning its policy as time was not now on Canada’s side.

The Move toward Straight Baselines

On December 10, 1982, Canada officially signed onto the UNCLOS.788 Sometime also in December, a secret memo was sent to Cabinet on the topic of Arctic affairs.789 While the contents of the memo remain classified, it would likely have reflected the number of choices to be made if policy were to be altered in the face of economic changes and/or associated legal challenges. Furthermore, it is also possible that the government had become acquainted with a study to emerge from the US Interagency Arctic Policy Group on future American strategy in the region.790 While the thrust of the study would be publicly promulgated by Ronald Reagan in July of 1983, one of its core elements in maintaining American critical interests in relation to national defense, resource and energy development, scientific inquiry and environmental protection, was the need for the “[p]rotection of essential security interests in the Arctic region, including the preservation of the principle of high seas and superjacent airspace.”791

For the Canadian government there was a need beginning in 1983 to think decisively about policy options in the Arctic, and one of those solutions turned on whether the straight baseline argument was valid under international law. As UNCLOS now represented a ten year negotiating process that remained stalled in the politics of all Western governments, Canadian baseline movement would be undoubtedly steeped in controversy and received negatively from the United States given the accommodations made on Article 234.792

788 In signing but not yet ratifying, Canada accepted limited obligations under article 18 of the Vienna Convention on the Law of Treaties, but did not formally bind itself to UNCLOS. Canada would ratify in 2003.
789 See Huebert (1994), Chapter 4, at 240.
792 The reasons for the United States refusal to sign the treaty were perhaps numerous, but primarily turned on the deep sea mining provisions in Part IX which gave greater rights to the community of states for ocean extraction purposes.
Nevertheless, if Canadian Arctic policy change was required, the legal argument would have to be convincing. Fortunately for the Canadian government, Pharand’s research continued to analytically deconstruct the problem in novel legal ways. And Pharand was adamant in getting the Canadian government somehow to draw the baselines. For the Canadian government and international legal scholars, Pharand, now co-authoring with David Vanderzwaag, produced the penultimate piece of legal analysis in the Canadian government’s favor to secure the baseline argument.

Pharand and Vanderzwaag had come now to read the *Fisheries Case* from a range of interpretations reflecting numerous creative angles of legal reasoning. Their primary inquiry focused on how the Inuit’s claim to the ice and land of the Arctic affected the Canadian government’s ability to secure jurisdictionally the areas as internal waters and thus subject these to complete Canadian sovereignty. Getting at this point involved looking first at whether the Canadian Arctic archipelago qualified as a coastal archipelago based upon Article 7(1) of UNCLOS that “there is a fringe of islands along the coast in its immediate vicinity.” The authors’ response was affirmative on the basis of three reasons. First, the Arctic islands now appeared *in toto* to “form a visual unity with the rest of Canada…one’s eyes naturally integrate the islands as a triangular land mass projecting from the torso of mainland Canada.” Second, numerous islands now “linked” the northern and southern portions of the archipelago due to the gateways created by the overlap of territorial waters in the Barrow Strait. Hence, the jurisdictional capacity of the territorial sea appeared to ‘capture’ islands and extend the entire reach of the sea and land area into a broader

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793 That Pharand was of such a disposition was exemplified in a 1982 tour to the Arctic with eighteen ambassadors for the annual 7,000 mile Arctic voyage arranged by Canadian Foreign Affairs and Indian and Northern Affairs for the benefit of newly appointed heads of diplomatic missions in Ottawa. On the trip Pharand acted as an expert authority for all questions of international law. The group witnessed a variety of energy drilling projects throughout the region, leaving Pharand to conclude that the voyagers had to have understood that Canada was exercising successfully sovereignty in the Northwest Passage. His lecture to the group in an area known as Pangnirtung, on Cumberland Sound, Baffin Island, were revealing in him stating that Canada claimed the Arctic waters as internal, and that now that UNCLOS had concluded, Canada was in a position to draw baselines legally. See Lalonde and MacDonald (2007), pp. 89-90.

794 Vanderzwaag and Pharand (1983). Pharand had for over five years now had the time to work on the baseline defence following his tenure at External Affairs in 1978 when he first suggested formally to the government that the policy be adopted.

795 Ibid, at 62.
configuration that reflected territorial continuity. Third, Judge Read, in his dissent in the *Fisheries Case*, had mentioned that there was a similarity between the Norwegian coastline and the Canadian coasts.\(^{796}\) Hence there was precedent to support Canada from a jurist seized of the issue at length decades earlier. Pharand and Vanderzwaag further argued that, on the issue of whether the baselines would follow the general direction of the coast but also remain of reasonable length, the Canadian claim remained valid.

However, even if the legal case failed as a result of these various tests the baselines had to overcome, Canada could still ground its argument on the basis of historic usage by the Inuit of sea ice for the purposes of hunting and trapping. The applicable rule was found in paragraph 6, Article 7 of UNCLOS, which read that “[w]here the method of straight baselines is applicable…account may be taken in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.” Article 7 had a direct lineage with the *Fisheries Case*. Where “economic interests” could be interpreted narrowly to include the idea of economic dependency, such a reading of law was overly restrictive on the basis that the *Fisheries Case* indicated that nutritional and cultural dependence would also fall under this heading: “The survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds…founded on the vital needs of the population and attested by ancient and peaceful usage, may legitimately be taken into account when drawing a line…”\(^{797}\) As the Inuit had populated the Arctic region for hundreds if not thousands of years, and relied upon marine-related harvests for their income and survival, it followed that Canada could justify its extensively long baselines on the basis of “liberal geographic criteria”.\(^{798}\)

Not only did this argument provide for the Canadian government a solution to the baseline issue, but it did so by embedding the legal solution in the broader debate about constitutional

\(^{796}\) Although somewhat oddly, Read’s decision holds that given that Norway’s geography cannot be unique in the world, and that comparable coastal archipelagos do exist such as on the “west coast of Canada.” See *Fisheries Case*, [1951] I.C.J. Rep. 116, pg. 193.

\(^{797}\) Pharand and Vanderzwaag (1983), at 62, their emphasis.

\(^{798}\) Ibid, pp. 65-70. The authors note that the real problem would arise in relation to the baseline on the M’Clure straight due to its length and Inuit non-use. However, they ultimately conclude that it would likely be incorporated into the whole Arctic perimeter.
and minority rights occurring within Canada following the repatriation of the Constitution in 1982. By grounding the defense in Inuit rights claims, Canada was offered an opportunity to seize upon the momentum of indigenous rights movements and tie it directly to the relatively stable regime of international ocean law emerging. In the manner presented by Pharand and Vanderzwaag, the possibility of continuity and accommodation existed between these two bodies of law and the Arctic case could be presented once again as existing within a unique ethical framework. The discourse of fairness that had governed much of UNCLOS negotiations could be intimately linked to a corresponding discourse of equality and equity embedded within Canadian constitutional circles.\textsuperscript{799}

Yet, if the arguments about liberal baselines failed to persuade, Pharand and Vanderzwaag offered a more substantive legal solution for Canada to follow which drew extensively on socially oriented jurisprudence and “flexible” legal interpretation. This involved appealing to the new jurisprudential frameworks that emerged over past decades, making good on the resolution that international law had to be given a purpose for which it was orientated. The targets of their critique were jurists such as Judge McNair in the \textit{Fisheries Case} who wrote that the delimitation of territorial waters was based upon “objective” criteria that ought not to include reasons of economic or social interests, amongst other subjective factors.\textsuperscript{800} By contrast, for Pharand and Vanderzwaag, a source of creative legal approaches lay in the jurisprudence of Judge Alvarez, former member of the International Court, and exemplar of “more open-ended doctrines” and flexible maritime claims. Alvarez was framed as a progressive thinker on the basis that the process of formulating “new” international law was not tied to legal doctrine and “is not exclusively juridical”. Rather, pragmatic jurisprudential trends endorsed “aspects which are political, economic, social, psychological.”\textsuperscript{801} Alvarez’s thinking on the transformative capacity of international law to the policy domains underpinning it counseled lawyers to,


\textsuperscript{801} Alvarez, in the \textit{Fisheries} case, at 149, cited in Pharand and Vanderzwaag (1983) at 71. For an erudite description of how Judge Alvarez’s idealism mediates between positivism and policy jurisprudence, see Koskenniemi (2005), pp. 209-218.
take into account all possible aspects of every case...What are the principles which...the
Court must bring to light...or even create with regard to the maritime domain...Each State
may determine the extent of its territorial sea...provided that it does so in a reasonable
manner."

Alvarez’s reading of law revealed a number of “open-ended concepts” - equity, historical
consolidation of title, vital interests, and cession - that Canada could adopt in order to justify
its baseline policy. All of these were linked to the idea that Inuit ice use could facilitate a
critical role in “anchoring a Canadian claim to greater jurisdiction over Arctic waters.”

Equity, described as a doctrine which takes into account all circumstances of a case, was
explained by Pharand and Vanderzwaag as the “legal touchstone” for Canada’s defense, and
could be nested within other legal terminology such as “reasonableness” and “the balance of
interests”, both of which were borrowed from McDougal’s house of language.802 The idea of
equity in guiding the Arctic policy drew its authority from five sources. First, the court in the
Fisheries Case had “hinted at an elastic doctrine of delimitation”, which in practice stressed
that the rights granted to states in demarcation proceedings could be based upon ‘moderation’
and ‘reasonableness’. The second source stemmed from the series of ICJ cases from 1969-
1982 on continental shelves which determined law extensively on the concept of “equitable
principles”. Third, the Fisheries Jurisdiction Cases (1974) had also relied strongly on the
idea of equitable sharing.803 There, the court concluded that in certain relationships when a
duty of care is owed by one party towards a shared natural resource cooperation must
structure outcomes in achieving optimum utilization of the resource in question. The fourth
source stemmed from a United Nations resolution supported by multiple states on “resource
sharing” in which “equitable utilization” was cited as the guiding principle of resource
allocation. Fifth and critically, many of the guiding principles behind the emerging law of
the sea focused on “equitable solutions” for delimiting continental shelves and economic
zones. By extension, then, as the delimitation of internal waters by the drawing of baselines
was a form of resource allocation based upon “foreign shipping rights…either being granted

802 For Pharand and Vanderzwaag, McDougal’s reliance on the “reasonable test” and “balancing of interests”
were used to show support for how the Fisheries Case should be thought of as elastic. See Pharand and
Vanderzwaag, at 71, and ft. 76.
or denied to the international community”, it followed that Canada ought to be able to draw on this reading of equity in international law and apply measures that reflected both ‘national and international types of equity’ for the Inuit. Canada was afforded this option, and indeed was required to be guided by it, because Canada had “positive obligations” to protect Inuit lifestyles that depended upon sea ice for their survival. On the basis of Article 1(2) of the International Covenant on Civil and political Rights, Canada owed an obligation on the basis that “[i]n no case may a people be deprived of its own means to subsistence.”

These examples of equity in legal proceedings and jurisprudence were however only a partial selection indicating the extent to which equity had become central to judicial reasoning. And nor did these examples of ICJ decisions mark the end of an historical trend. The Gulf of Maine Case had by this point commenced and within its opening deliberations common agreement emerged between Canada and the United States on the basis of determining that a “fundamental norm” existed to guide legal principles. By the interpretation of the parties, “the delimitation is to be effected in accordance with equitable principles, taking account of all relevant circumstances, in order to reach an equitable result.” Hence, there was sufficient precedent and a continuing pattern of juridical activity to allow for parallel legal patterns of argumentation to be drawn out and applied to the Arctic areas.

The second concept outlined by Pharand and Vanderzwaag relating to Inuit claims was the historical consolidation of title. This was a “somewhat unsettled” idea as a basis of law owing to its inexact legal parameters, but a doctrine that could be developed and integrated into a legal defense. The primary contention in its handling turned on there being marginal agreement in international legal debates over the relevant distinctions between the historical consolidation of title and the doctrine of historic waters. For Pharand and Vanderzwaag, the defining feature of historical consolidation was its representation as a “gradual solidification process built on multiple historical piers - discovery, legislative and administrative control, and in particular, peaceful possession by national inhabitants over a long period of time.”

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804 Pharand and Vanderzwaag (1983), at 72.
805 See Legault and Hankey (1985), at 962.
806 Pharand and Vanderzwaag (1983), at 75.
The “seeds of the flexible doctrine” were located in the *Grisbadarna Case* of 1916, a fishing and maritime boundary dispute between Norway and Sweden, in which the court opined that “it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible…” A key finding, “sprouting anew” in the *Fisheries Case*, provided Canada with an analogous precedent outlining the gradual process of title consolidation. For the court, it was

led to conclude that the method of straight lines, established in the Norwegian system...has been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.\(^\text{808}\)

No less than the jurist Charles De Visscher, in his commentary on the court’s reasoning of which he was a member, commented that:

> The Court frankly based the historic title upon the concept of a consolidation in which the fact, its notoriety and its duration play the essential role. It based this consolidation partly on the *public pursuit of an activity*, not on formal notification of a claim, partly on the simple absence of opposition on the part of third states, not on assent properly so called.\(^\text{809}\)

Thus, the court had placed priority on the role of public activity being elevated over marine space as a “guiding principle”. If states could satisfy over a sufficient period relevant practice in the face of silence by other states, the concept of title consolidation could be shown not as applicable *per se*, but more formally, *generatively* at work. Accordingly, Canada could draw upon the broad argument within the *Fisheries Case* linking the historic fishing activities and historic hunting on the sea ice by Canadian Inuit. For Pharand and Vanderzwaag, “[o]ver 4,000 years of Inuit harvesting of offshore resources, together with the piers of British discovery and subsequent Canadian legislative and administrative control, has arguably formed a solid international title.”\(^\text{810}\)

The concept of “vital interests” was also held as a possible supporting analogy for the Canadian case, one brought about through an interesting piece of logic. It was argued that,

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809 De Visscher (1968), at 321, emphasis added by Pharand and Vanderzwaag.
810 Pharand and Vanderzaag (1983), at 76, footnotes omitted.
because the *Fisheries Case* hinted at the validity of the concept of “vital interests” in its point that “the vital needs of the population” was a key determinant in drawing straight baselines, and further, because the Court indicated that the status of internal waters within straight baselines depended on the same criteria for justifying the status of territorial bays, it followed that “one of the frequently used justifications for claiming internal waters status of bays is the concept of vital interests.”

This linkage could be extrapolated to the Canadian example by invoking the vital interests of Inuit survival, self-defence, and environmental protection.

Finally, it was possible for Canada to argue that the Inuit could cede title to the Canadian Crown at some point through a maritime claims settlement agreement. The prospects of success for this transfer were however distant, as Canada by 1983 had not entered into any comprehensive settlement with the Inuit and the latter were unlikely to be granted legal personality under international law, precluding the transference of a right to a quasi-legal entity. Compounding the problem were two adjacent issues. First, for the transfer of title to be valid, the thing being transferred had to be something physically tangible, such as land, and thus in the Arctic this meant that the ice had to be conceptually agreed upon as tantamount to land. However, it was by no means clear, following from intricate historical and legal analysis on the point, that such an analogy could be made.

Second, Canada would also have to establish that the Inuit possessed a historic title to the Arctic waters, which was by no means inevitable given the lack of documentary evidence required to meet the burden of proof in historic claims. Ultimately, for Pharand and Vanderzwaag, these four progressive concepts - equity, historical consolidation of title, vital interests, and cession - were to serve as placeholders, or extra arguments that international lawyers begin to reason with if orthodox positions associated with the application of straight baselines were not agreed upon. By 1983, then, these arguments constituted Canada’s best legal position upon which policy change could have been based.

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811 Ibid, pp. 76-77.
812 Boyd’s research published that year (1983), would attempt to clarify this problem, but leave the issue largely indeterminate.
Legault and Pharand’s Legal Appraisal

During the first half of 1983, Pharand and Legault completed much of their work on a forthcoming book entitled *Northwest Passage Arctic Straits*.\(^{813}\) Although there was little new knowledge conveyed or analysis given, Pharand’s previous arguments were presented with refined detail, and he continued to stress that for Canada “technological sovereignty” was prerequisite for a successful legal claim. By this he meant that “the Arctic has to be won in fact as well as in law” to ensure that sovereignty be maintained and international status for the Northwest Passage avoided. The primary tasks involved with this strategy were to have administrative services, such as those carried out by the Department of Transport, turned into consistent practices which then could crystallize into law-creating activities. Within the Arctic area the following types of conduct could be productive and importantly, legally enhancing: *inter alia*, the deployment of marine navigational aids, the use of enhanced icebreaking capability, development of marine search and rescue, pollution control measures to parallel existing domestic legislation, and use of marine communication technologies. However, the most critical contributions in Canada’s legal claim of technical sovereignty were icebreaking and pilotage. These twin efforts would demonstrate that the territory in question was being patrolled, thus occupied and being used in some sense. At the heart of Pharand’s analysis lay a belief that traversing the Northwest Passage could force by fiat the material practices of law to the surface.

In reference to how Article 234 would relate to the international straits regime, Pharand now held that Canada would benefit from Article 234 even if the Northwest Passage became internationalized. The authority attached to this new claim rested on the commentary of a chief American negotiator at UNCLOS, John Norton Moore, who maintained that the 1982 convention had not altered the existing uncertainty in customary international law as to the definition of straits used for international navigation. Critically for Canada, “the Arctic straits controversy (including the Northwest Passage question) may be diffused by the ice-covered areas understanding embodied in Articles 234, 236, and 296, which would apply

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\(^{813}\) Pharand (1984). As Pharand states in the preface, Legault was not only his collaborator on the book, but also assisted in refining Pharand’s legal knowledge on the Northwest Passage in relation to the “policy implications of its future development”, p. xx.
Pharand interpreted this analysis to conclude that “[Moore] believed that the controversy as to whether or not the Northwest Passage is an international strait lost its importance because of the understanding embodied in the special ice-covered areas provision which continues to apply.” The international straits controversy was thus somewhat moot to the broader practical application of law were a vessel to transit the Northwest Passage, Pharand appeared to suggest. To the question of whether Article 234 had become customary international law by 1984, he responded unsurprisingly in the affirmative given the law creating process that all parties had engaged in provided legal weight for the article, though neither state had ratified UNCLOS. Finally, on the issue of what rights the international community possessed in the Northwest Passage at the time, it was concluded that the right of innocent passage remained in the waters, with exceptions of security and vessel design and construction, because the waters were not internal.

This final point would have come across as controversial, but explainable. Pharand had always maintained that the claim to historic title was weak at best, and in all probability, legally unsupportable. Given the centrality of this legal criteria for Canadian sovereignty, as historic right was the express legal basis Canada had asserted for a decade, Pharand attempted to remove all doubt surrounding the issue and travelled in the early fall of 1983 for three months to the Scott Polar Research Institute in Cambridge, UK. His primary task would be to reference whether British explorers had included the waters when they took possession of the Arctic islands. According to Pharand, the “official instructions” given to the British explorers “were to discover a passage between the Atlantic and Pacific Oceans, and, second, that the takings of possession were confined to land.” As the intent of the voyage was considered paramount in assessing claims to maritime possession, Canada’s historic title argument was accordingly found invalid by Pharand following his return to Canada at the outset of 1984.

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814 Moore (1980), as quoted in Pharand (1984), p. 120.
815 Ibid.
816 See Lalonde and MacDonald (2006) at 84.
817 Lalonde and MacDonald (2006), at 85
By contrast, Legault’s interpretation of the historic title claim was slightly, yet meaningfully in law, distinguished. While he did not quarrel with Pharand’s legal analysis on the whole, Legault was always somewhat skeptical that Canada did not possess through an argument based upon a combination of historical uses some legal basis as afforded by effective occupation. Indeed, Legault always believed that regardless of what judgment was attached to the historic internal waters claim under international law, for him it was one piece which, when coupled with other legal defences such as the administrative scope of Article 234 and Inuit use, would provide Canada a sound legal defense before the ICJ. It therefore need not have mattered to the ultimate detriment of the case that Pharand had concluded that the legal pillar of history could not rest the claim of Arctic sovereignty. Rather, in keeping with the Canadian policy over past years, a legal case based on an aggregate of plausible legal defenses could be constructed, one which placed a reformulated component of historic title at the center in support of buttressing legal claims.

Policy circles and External’s judgments

In the political domain, policy planning through the early months of 1984 was now proceeding with some pace. By February, 1984, the Arctic Waters Panel had met to inform other Departments of their activities in promoting and consolidating Arctic activity. Concurrent with this intergovernmental process, in March the Policy and Planning staff in External Affairs was also conducting an evaluation on “maintaining and consolidating Arctic Sovereignty.” By the end of March, meetings had been focused upon four key tasks: 1) to what degree recent Arctic activities and policy decisions contributed to sovereignty claims; 2) what other Arctic states were doing in the region; 3) how and whether Canada needed to think anew about drawing straight baselines; and 4), any further recommendations. While the results of these meetings remain classified, certain assumptions can be made about what was being analyzed in External Affairs.

818 Huebert (1994), Chapter 4, at 78. These reports were then passed along to then director of Legal operations, Phillipe Kirsch, now lead judge at the International Criminal Court.
819 Huebert (1994), Chapter 4, pp. 78-79.
Principally, the Department would have become seized of a serious problem. On the issue of whether the Northwest Passage was an international strait, the existing international law pointed in favor of Canada’s claim that the waters constituted only a legal strait that could over time become internationalized.820 Hence if enough administrative actions were carried out the legal status of non-international would remain intact. On the other hand, there existed the problem of how customary international and treaty law related to the possibility of Canada legally drawing straight baselines and deepening the internal waters claim. External Affairs had expressly gone on the record in 1983 in response to a citizen’s query of whether Canadian officials understood the legal rules on baselines within UNCLOS, to hold that drawing baselines would not change the status of the waters and allow for innocent passage because the claim to historic title precluded any legal change from taking effect. Once again though, to draw baselines would appear extraneous given Canada’s position and indicate that it was unsure of the Arctic’s legal status. Given that External was now privy to Pharand’s research that the historic title claim was invalid, it would have been clear that if the historic title claim were defeated the status of the Northwest Passage would be subject to the existing demarcation boundaries of the twelve mile territorial sea and Article 234.

The specific problem for Canada now turned on whether states overwhelmingly considered UNCLOS as a codification of customary international law, or more narrowly, whether the rules associated with drawing baselines could be considered of customary status by 1984. Generally speaking, as UNCLOS was understood to be a package deal not permitting of specific exceptions, it would have been hard to argue that certain portions of the treaty were special requiring specific consent from states even though many had not ratified, including powerful Western states. If the baseline articles were customary international law as a result of the treaty being a law-creating exercise, which also in large part codified existing law, it followed that areas considered in the past to be high seas could not then be transformed into internal waters in which innocent passage was entirely prevented. Article 8(2) of UNCLOS was clear:

820 See Pharand (1979).
Where the establishment of a strait baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not been previously considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Article 8(2) was held by External Affairs in 1983 to not have legal application to the Northwest Passage. Canada, on the advice of Pharand, had to argue that neither the 1958 Territorial Sea Convention nor UNCLOS applied to Canada because of non-ratification and the absence of consent. Customary international law on baselines as it applied to Canada had to be predicated on the *Fisheries Case* in other words, rather than being in concert with UNCLOS provisions, and this position had been well developed by Pharand for some time.

In all probability, for the United States the issue of whether the rules concerning straight baselines were customary international law in 1984 could be answered in the affirmative. Lewis Alexander, a major figure in ocean affairs and professor at the Centre for Ocean Management and Studies at Rhode Island, argued in 1983 that “although the articles of the 1982 Convention have received general recognition as having the status of customary international law, certain ambiguities remain in the wording of some provisions.”821 There was, by contrast, no waver in the United State’s belief that all international straits were subject to full transit rights and unimpeded navigation under the customary provisions crystallized within UNCLOS. And this applied irrespective of the United State’s non-signatory status. James L. Malone’s argument, voiced in his capacity as Assistant Secretary of State for Oceans and Environmental and Scientific Affairs in October, 1982, set this point out expressly:

> If the US does not accept the seabed mining provisions, so goes the argument, the rights set forth in other portions of the Convention are forfeited. This is not so. Particularly with respect to navigation rights, the history of the law of the sea has been predominantly a history of customary rules evolving through states practice. In this area, the Convention incorporates existing law, which will continue to apply to all states, not because of the treaty, but because of the customary law underlying the treaty.

821 Alexander (1983), at 504.
822 See Malone, (1984), at 47. By contrast, Elliot Richardson, Head of the US Delegation to the Law of the Sea Conference from 1977-80, dissented from this position on the basis that the United States should not be allowed to “pick and choose” among the parts of the treaty that it wished to claim as rights and obligations. See (1982), *San Diego Law Review*, and Leigh Ratiner (1982) in *Foreign Affairs*. On the divisive nature of the American
To be sure, there was a level of rhetorical opaqueness in many United States’ comments on the issue of customary and conventional law, and in particular at times from President Reagan. Speaking on March 10, 1983, Reagan held that the United States was prepared to act “in accordance” with the non-sea bed provisions of UNCLOS, the “balance of interests relating to traditional uses of the oceans”, so long as there was reciprocal intention from other states. The United States could therefore be seen to be straddling both sides of perhaps the dominant interpretation on the customary/conventional legal divide. In a decisive tone on December 10, 1982, Tommy Koh, then President of UNCLOS proceedings, declared that “[i]t is…legally impermissible to claim rights under the Convention without being willing to assume the corresponding duties.” And yet, the United States picking and choosing the provisions it supported in adducing the status of customary international law could not be squared with Koh’s further understanding of the matter. Because the Convention contained new law in the form of articles on the continental shelf (Art. 76), and transit passage, for example, this implied for Koh that “[t]he argument that, except for Part XI [sea-bed mining] of the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable.”

Writing in his personal capacity in 1983, Luke T. Lee, former US Senior Policy Advisor on the Law of the Sea for the Department of State, wrote that Reagan’s comments could be considered as a conditional acceptance “in writing” of an American obligation towards coastal states’ rights. According to Lee, recent United States legal practice supported the traditional position that a rule could be considered customary for one party and conventional for another depending upon the relationship of the rule to the broader codification effort entailed in treaty construction. The Vienna Convention provided a salient example as in

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823 See Treves (1987) at 94.
824 Ibid.
825 Lee (1983), at 552.
many American legal circles it was considered a codification of customary law and thus binding on the United States, even though the United States had failed to ratify the treaty. On the matter of UNCLOS, Lee believed that

> [t]hose provisions of the Convention that codify existing customary international law must be regarded as *ipso facto* binding upon all states, whether or not parties to the Convention; those that represent the progressive development of international law, on the other hand, unless incorporated in the body of customary international law, will bind only states parties, but not third states.\(^{826}\)

For Canada, then, it appeared as though the United States would view baseline rules as existing law by 1984, even though the requirement of consent to bind was also a factor for many other international lawyers for a party to become obligated under UNCLOS provisions. But even beyond the challenge of customary international law being applicable, if Canada could argue convincingly that Article 8(2) was not customary, whether the Canadian Arctic archipelago fit with the baseline criteria due largely to problems of geographic length was very much an unsettled position. Canada’s reasoning used to buttress this claim would likely have to be based upon considerations of equity and fairness unfolding in jurisprudential law of the sea processes. And within External Affairs there was obviously a growing realization that the use of the principle of equity could be used as a legal tool in achieving pragmatic legal solutions as evidenced by the *Gulf of Maine Case*.\(^{827}\)

And yet while this trend was positive for Canada and possibly of assistance to the baseline defense for the Northwest Passage, it was by not apparent that reliance on arguments of equity before the court would bring about a knockdown argument to secure the fit of straight baselines to Canadian geography. In his dissenting opinion in the *Gulf of Maine*, Judge Oda was pointed in explicating that the “principle of non-principle” (equity) has reigned in this case, generating legal imprecision and the reliance by jurists on external legal norms. Compounding Oda’s position was the vigorous dissent of Judge Gross. The trend of equity varied from case to case, Gross argued, “in accordance with whatever the judge may choose

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826 Ibid, at 554. For general commentary on other state’s views of the custom/conventional relationship, see Caminos and Molitor (1985).

827 The judgment was not read until on October 12, 1984, wherein the court held that the law of maritime boundaries was structured by the matter of applying “equitable criteria” of an opened ended character. On various international juristic responses, see Willis (1986).
to dub an equitable result...I doubt that international justice can long survive an equity measured by the judge’s eye."\(^{828}\) Nevertheless, for Legault the use of equity as a judicial trend was unmistakable and of consequence for similar circumstances. Commenting that the bi-lateral approach to the *Gulf of Maine* resting on the “fundamental norm” should be seen as progressive, equity moreover gave rise “in some instances [beyond the particularity of the case to] a more general validity.”\(^{829}\) Hence, the guiding idea entrenched in the *Gulf of Maine* had allowed the parties to resort to the judgment that geographical *and* non-geographical factors as these related to economic dependence of coastal communities reliance upon fishing resources constituted a basis for international law. As such, there were parallels to the Arctic case. For as Pharand and Vanderzwaag had argued two years earlier, socio-economic requirements on behalf of the Inuit to Arctic resources were more gravey and perhaps contained a greater claim of justice when evaluating ocean demarcations.

However, Legault well understood that the United States would entertain no such understanding in the application of equity to other cases or through the use of historic title to secure claims to internal waters. As Legault wrote in 1984, the Canadian arguments in the *Gulf of Maine* were described by the United States as “based not on law but on appeals to ‘distributive justice’ *ex aqua et bono*...”\(^{830}\) To Canada’s further detriment, the Court’s judgment explained that the parties could not rely on claims to historic title or historic rights as evidence of “decisive weight” for the purposes of carrying out the delimitation. Hence, there was good reason flowing from the direction of the Court for the Americans to believe that Canadian claims rested on weak legal foundations. Indeed, United States’ policy had recently reflected such stridency in not accepting arguments for historic title and being extraordinarily particular in baseline formulations.\(^{831}\)

\(^{828}\) *Gulf of Maine* case (Canada v. United States), [1984] I.C.J. Rep. 246, at 383, para 4. Nor could this dissent have not affected a judge *ad hoc* of the unique chambers, Canadian national, Maxwell Cohen.
\(^{829}\) See Legault and Hankey (1985), at 962.
\(^{830}\) See Legault (1984-5), at 466.
\(^{831}\) See Roach and Smith (1994), at 118. Baseline protests from the United States amounted to the majority of oceans protests from 1982-85. For explanations as to why the United States did not itself draw baselines, based largely upon reasons associated with federal government revenues, see Burke (1987), at 81.
That the United States perhaps sensed what might emerge in Canadian policy thinking on the baseline issue was reflected in an exchange of views from May through June 1983. The Canadian Hydrographic service had published a chart identified as “7000 Arctic Archipelago, 1:5,000,000, March 5, 1982”, implying Canada’s claim to the entire archipelago. On May 2, 1983, the US Department of State made direct comment to it in a letter to the Canadian embassy. Noting that the use by Canada of the term “archipelago” had no legal significance within Canadian geography as it related to UNCLOS, and that baselines could only apply to mid-ocean archipelagos, the note added that there is “no basis in international law for a claim of archipelagic status for any Canadian island or their offshore waters.” In response, the Canadian rebuttal of June 3, 1983 was dismissive, reserving Canada’s “right to attach any meaning to the term ‘archipelago’ that may be consistent with the ordinary usage, geography or international law.” But even beyond American skepticism, Canada’s calculations were further compromised by many in the international legal college with significant weight. For example, D.P.O’Connell had raised similar concerns about the emerging legal trends in Canada’s use of baselines. In his words, “[c]ertainly there are areas of the Canadian Coast, where the system has been used, which can be regarded as analogous to the Norwegian Coast, but the system is being progressively applied to the whole Canadian coastline, and not only to those parts which are geographically acceptable.”

By late 1984 Canada was in a legal predicament on what ought to occur to consolidate the legal claim to Arctic waters if required to do so. Legault was forced to hedge his bets on the legal status of UNCLOS at the time. Writing in ambiguous terms, he held that, “[a]lthough the new Convention had not yet come into force, many of its provisions relating to the maritime zone delimited in the recent cases are considered to express the new customary international law of the sea that has emerged over the past decade.” For Legault, there was sufficient defense in an aggregation of legal claims if Canada were pressed to do something rather than let its existing efforts crystallize into a stronger legal defense. In

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833 LeGault and Hankey (1985) *AJIL*, at 962. In personal correspondence, Legault has recently commented that External Affairs at the time considered much of UNCLOS to be customary, but not prejudicial in any way to Canada’s possible baseline claim.
contradistinction, there was not a reasonable legal defense currently available from Pharand’s perspective. As a result, in unanimous concert with several academics of international law at a Conference at Queens University, Ontario, in June, 1984, Pharand concluded that “[t]o reinforce its claim that the waters of the Arctic Archipelago are internal waters, Canada should draw straight baselines around the archipelago, and publish such baselines on official maps and charts.” 834

Two sides to the problem of Arctic sovereignty were therefore now positioned to engage with the politics of international law. Pharand chose to use international law as a wedge from which to structure and drive Canada’s policy decisions. The possibilities of legal success, in other words, gave rise to Pharand thinking that Canada possessed a winning claim at the ICJ. But even short of this conclusion, Canada could eventually receive what it sought in the Arctic through the Court or negotiations threatening litigation. Legault, as Canada’s leading legal official, was acutely aware of the sensitivities of the Americans on UNCLOS issues and baselines in particular, and chose to stay his hand until required.

The Polar Sea Incident (1985-1986)

On January 15, 1985, the USSR adopted a decree establishing a series of straight baselines around its territory, including the north coast and several archipelagos, thereby demarcating its North East Passage. The Soviets had enacted enabling legislation for straight baselines in 1983, and went a step further in 1984 by extending this reach to Northern waters under a Council of Minister’s Decree on February 4, 1984.835 While Canada was unaware of the Soviet policy change, it is unclear if United States’ officials were as well. In the spring of 1985, the US Coast Guard made a decision to send an ice-breaker, the Polar Sea, then located in Seattle, Washington, through the Northwest Passage, in order to provide supplies

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834 See Pharand (1985), at 162.
Various points of contact were made between United States and Canadian Coastguard officials as to the nature of the voyage, and there was considerable effort on behalf of officials at the State Department to ensure that Canadian sensitivities to American vessel traffic in the Arctic did not become inflamed, akin to what had occurred when the SS Manhattan traversed in 1970.837

What did the United States intend by this voyage? Was a motive relating to or concerning international law guiding the act? Based upon significant evidence and interviews, it has been argued that the American voyage was not intended to challenge the Canadian legal position of internal waters but conducted for administrative measures. This assessment rests on two propositions: 1) the United States was not making a challenge under international law expressly known, which would be a required to give legal effect to an act of protest; 2) the interactions between officials in both states occurred at a relatively low level with few members of the United States government even aware of the voyage.838 While there is no probative evidence pointing toward a contrary interpretation, several points merit note.

The United States was certainly interested in maintaining its position that freedom of navigation on the high seas was a right claimed by all states and one through which the American position reflected the world’s general interests. The United States was also testing and challenging the resolve of the USSR during the early 1980s through its freedom of navigation program in an effort to establish political and legal opposition to extensive maritime claims. Indeed, from 1983 onwards the program was prosecuted vigorously in all areas.839 Given the increased knowledge of USSR submarine action in the 1980s in the Arctic, the US Department of Defense was actively seeking to know more about the Arctic security perimeter and where it was being breached.840

836 The voyage was eventually conducted from Thule, Greenland, moving westerly from Lancaster Sound and Barrow Strait, through to the Beaufort Sea and Chukcki Sea, following the Polar Sea arriving on the east coast after transiting the Panama Canal.

837 For analysis of the pre-voyage positions of both governments, see Huebert (1994) Chapter 4, and Huebert (1995).

838 Huebert (Chapter 4). McDorman (1986) has similarly commented that the Polar Sea “was expressly not intended to raise a problem over jurisdictional issues”, at 253.

839 See Burke (1987), at 78.

become a central area of strategic significance within which Cold War security practices included sharp increases in submarine posturing. Any nuclear war would be fought largely through the Arctic given that all Soviet and American submarines possessed sufficient range to attack their major cities without leaving Arctic patrol stations. Indeed, the early 1980s represented for many the “age of the arctic” due to the introduction of military affairs in the region and the marked move of industrial extraction and economic projects being undertaken.  

Moreover, given the increasingly rapid development of resource extraction and asset relocation in oil pipelines and marine terminals within the Arctic region, this raises the question of whether the *Polar Sea* voyage could have been carried out in order to repudiate in soft fashion the Canadian claim of internal waters. United States oceans expert William Burke’s comments in 1987 at a panel gathering of the American Society of International Law are probative. For Burke, the Polar Sea “was undertaken specifically for the purpose of exercising rights claimed by the United States to pass through these waters”.  

In response to this charge at the gathering, David Colson, Assistant Legal Advisor, US Department of State, disagreed vehemently, to which Burke responded, while “I cannot claim firsthand knowledge. I have sufficient confidence in my information not to withdraw the assertion, however.” Whether or not legal effect was intended by the act of the *Polar Sea*, it is certain that United States’ Arctic policy suffered at that point from bureaucratic and policy fragmentation, leading to the plausible assumption that the voyage could have been planned but unknown to adjacent departments.  

Nevertheless, when Canada, and External Affairs in particular eventually became focused on the voyage’s implications, a policy process guided by the politics of international law became set in motion, placing Canada’s policy trajectory once again on a path dependent sequence.

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841 See Oran Young (1985) “The Age of the Arctic”; see also Critchley (1986-87) for an assessment of Canada’s arctic defense policy and thinking. 

842 See Burke (1987), in *ASIL*, at 78, and 103. 

843 On the state of bureaucratic disorder in this area, see, for example, Friedheim (1986), commenting in relation to the Arctic issue.
Legal evaluations

By May 1985, External Affairs began to conduct meetings to discuss how Canadian responses to the American voyage would be carried out. The United States had made overtures that the Canadian Coast Guard was welcome to accompany the vessel and made explicit its belief that the voyage was a welcome moment to increase cooperation and place to one side each state’s disagreement over the appropriate juridical regimes. To in part carry out Canada’s policy mandate, the Arctic Waters Panel was reconvened on May 29 to discuss matters further. As Huebert notes, the various departments attending the Panel generally concurred that External Affairs ought to be seized of the issue. On June 11, a diplomatic note from External Affairs from within the Legal Operations Bureau was sent to American officials conveying that Canada asserted again its claim of internal waters to the Northwest Passage. But Canada now also welcomed the United States’ offer to proceed with the voyage on a cooperative basis though no request by the United States to request permission for the voyage had been forthcoming.844 External Affairs was at this point debating a strategy that had roots in the Manhattan voyage in 1969. Using a proactive stance which carried with it possible embarrassment, the policy strategy was to grant consent for the voyage but never ask for it explicitly. In this way, Canada would not be placed in a defensive position if its request were rebuffed, though in granting something that was not requested, Canada on the one hand was attempting to assert publicly the validity of its legal claim, but also do something that in legal terms was not required if its legal case were considered sound.

On June 13, the Minister of External Affairs was briefed once again on the circumstances unfolding, and it was decided that the United States position was acceptable provided that the specifications and route plan were congruent with environmentally safe passage. This perspective was to be publically promulgated if questions were to arise in the House of Commons, and especially so in response to a polemical article recently written in the Globe and Mail by Franklyn Griffiths from the University of Toronto. Griffith’s tone was both

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844 Huebert (Chapter 4, at 216.)
stark and alarmist, as conveyed in the title, “Arctic Authority at Stake.” The voyage was framed as a “move …certain to rekindle a heated debate on Canada’s sovereignty over its arctic waters” by allowing the Polar Sea to re-supply the “ballistic missile early warning station” in Thule and then proceed further “on a mission whose purpose is unclear.” One question remained for the public: “Ottawa’s view is that this trip is on as far as Washington is concerned. The question is what the Canadian response will be….permission to make the voyage has not, however, been requested.” From the perspective of international law, if the United States were successful in securing the claim that the Northwest Passage was an international strait, Canada could expect volumes of American and Soviet vessel and submarine traffic to flow. Noting that in Canada there existed a growing awareness that the United States was through economic advantage and the power of bi-lateral trade usurping elements of Canadian sovereignty, Griffiths argued that “[t]hose who would diminish Canada’s arctic presence by challenging our legal position in the Passage would take away our self-regard and distinctiveness.” The United States was orchestrating a “carefully calibrated move” in conducting the voyage.

This rhetorical intervention into the public sphere generated a flurry of comments in the House of Commons on June 20. John Chretien, then only a House member but with intimate knowledge of the Manhattan incident from his former position of Minister of Indian Affairs, asked whether Canada would require the Americans to seek permission as the act represented a move intended “to take our sovereignty away from us.” Joe Clark, Minister of Foreign Affairs under the Conservative Government of Prime Minister Brian Mulroney, responded with the point that “we will do better than that. We will have Canadians on board to guide them through the waters which we consider to be ours.” In a diplomatic note of response to the Canadian Government on June 24, the United States conveyed its appreciation for Canada’s positive response, stating unequivocally that both sides had agreed that the voyage in no way prejudiced either state’s existing legal position: “although the United States is

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845 Franklyn Griffiths, ‘Arctic Authority at Stake (June 13, 1985), Globe and Mail. This was the Canadian public’s first information on the matter of the voyage.
846 See House of Commons Debates, June 20, 1985, at 6043.
847 Ibid.
pleased to invite Canadian participation in the transit, it has not sought the permission of the Government of Canada, nor has it given Canada notification of the fact of the transit.”848 Over the course of the next two weeks, positive exchanges between External Affairs and both Canadian and US Coast Guard officials added to the perspective that the matter had been solved.

However, policy change and a shift in strategy within the Mulroney government was also underway. External Affairs now sent instructions to the embassy in Washington informing of the need to postpone a meeting with American counterparts concerning the details of the voyage on grounds that Canada was dealing with other issues and had “not reached [an] interdepartmentally agreed approach on [a] course of action to be proposed to [the] Ministers.”849 Nevertheless, by July 5, it appeared as though both positions were placated. Legault conducted a series of positive meetings with American officials, and the Coast Guards of both states, by June 26, had deepened with cooperative results their discussions and planning on the specifics of the voyage. In contrast, the overall Canadian public discourse on the forthcoming Polar Sea voyage had by the end of the month taken a decidedly different turn.

On July 16, Pharand delivered a sharp response on the Government’s handling of the issue to The Gazette in Montreal.850 It was written that the United States was not “respecting” Canada’s claim, and most importantly, quoted Pharand,

[i]f we don’t do anything now, come 10 or 15 years we’ll be in a very poor position to say to the United States or to any other country that those waters are Canadian…Canada should take the bull by the horns, draw the lines on the map and say to the world those waters are internal waters of Canada…and if they [the Americans] want to challenge (Canada) that’s fine we’ll go to the International Court in the Hague.

848 United States, Diplomatic Note No. 222 (June 24, 1985), reprinted in Office of Ocean Affairs, supra note 118, at 73-74.
849 From Huebert, (Chapter 4), pp. 217-218, quoting from a Legal Affairs memo. As Huebert rightly notes, this language conveyed that although it was not clear at what level the interdepartmental disagreement was occurring, the Ministers had not yet been briefed.
850 The Gazette, Montreal, Quebec, July 17, 1985, “US arctic voyage stirs debate; Canadian sovereignty undermined, critics say”.
External Affairs was quoted as saying that the dispute “is not a governmental priority at this time…the Polar Sea trip doesn’t undermine Canadian claims to the Northwest Passage because the two governments have exchanged diplomatic notes acknowledging their disagreement about the voyage.” On July 30, the argument became more calamitous. In a piece written by the Globe and Mail, it was reported that Griffiths and Pharand let it be known from a panel discussion at the University of Ottawa the day prior that Canada’s approach to the sovereignty question placed it in a position now to either “use it or lose it”.851 Griffiths maintained that Canada’s response to the voyage, only days away, was “inadequate, ineffective, and unworthy of a country trying to maintain its security.” The somnambulistic attitude of Clark would eventually result in shared jurisdiction in the area, Griffith’s maintained. Pharand concurred with this position.

While the effects of this final news article ought to have been moderate, at least in the short term, by July 30 something had changed within the Canadian government’s approach to Arctic policy. As Huebert notes in conversations with Canadian officials, the Conservative government began to think that a “tougher” position was now warranted, a conclusion triggered on the basis of panic.852 The government’s new objective was carried out on July 30th in the form of meeting between Canadian ambassador to the United States, Alan Gotlieb, and several officials from the US Coast Guard and Navy. Canadian strategy now was to get the United States to submit request for the voyage. However, the attempt failed, leaving Canada to issue the next day the following statement:

The Government of Canada has noted with deep regret that the United States remains unwilling, as it has been for many years, to accept that the waters of the Arctic archipelago, including the Northwest Passage, are internal waters of Canada and fall within Canadian sovereignty. The Government of Canada must accordingly reaffirm its determination to maintain the status of these waters as an integral part of Canadian territory, which has never been and never can be assimilated to the regime of high seas or regime of international straits.853

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851 Globe and Mail, July 30, 1985, “Use it or Lose It”. “If we believe that we are an independent country, and we do have complete sovereignty over those waters, well then I think we should exercise whatever control is necessary”, Pharand, July 29, 1985, University of Ottawa.
852 Huebert (Chapter 4), at 219.
Of greater importance beyond the note’s somber tone was its point that Canada expressly granted the United States permission to undertake the voyage though the latter it had never requested Canadian consent. As a result, US Secretary of State Shultz, among many, was surprised and angered by the reversal of the Canadian position. Canada was adopting an alternative legal strategy through the requirement of consent, but the motive behind the move accommodating a position of prevarication was unclear.

Huebert’s response to this conundrum of policy reversal correctly turns on Canada’s broader reputation and the particular reputations of government figures. As a result of public pressure being driven upwards through media reports, Canadian officials were concerned about being charged with “doing nothing” and appearing to be ‘subservient’ to the United States.854 Outside of External Affairs, Canadian officials consistently argued that the approach was too “legalistic” and that public reaction would prove to be overwhelmingly negative towards an accommodating policy. Such sentiments were echoed in the Globe and Mail on August 2, the day the Polar Sea departed on its twelve day voyage.855 Gerald Morris, former member of External Affairs, propounded that the government’s passivity with respect to the route planned…may have damaged Canada’s case for sovereignty beyond repair….We have come to look like a bunch of clowns, frankly…I think the way this has been handled has been a farce, a fiasco.

Ronald St. J. Macdonald, former dean of law at Dalhousie University, commented that “Canada must simply get its act together or see itself lose a part of its national heritage and domain.” By August 3, Cabinet was reconsidering the voyage, and Joe Clark announced publicly that Canada was now undertaking to rethink policy in light of a previously planned Cabinet review. Canada was now playing, once again, for time.

As a result of the United States expressly refusing to ask for permission for the voyage several Canadian Departments were now scrambling to construct an adequate response for the public domain. For even if the voyage had been intended as one of innocence in refueling the station in Thule, the issue of consent had officially turned the voyage into a

854 Huebert (1994), (Chapter 4), at 73.
legal matter. Canada’s Privy Council Office (PCO) was tasked with providing policies demonstrating that the Government was doing something and to respond to controversy. A variety of agencies were to construct lists of projects for public consumption reflecting ‘sovereignty protection’. To consolidate these efforts, on August 21-23, the Priorities and Planning Committee met in Vancouver to deliberate upon the final policy. Len Legault ultimately steered the process given the extent of his knowledge on the topic.

The 1985 Arctic Policy

On September 10, 1985, Joe Clark outlined his policy proposals to the House of Commons, noting how the Arctic policy was merely one more set of directives designed to insulate Canada from American interference in particular, but also from the USSR, Germany and Japan. The United States, by Clark’s suggestion, had not prejudiced the Canadian case for sovereignty through the Polar Sea voyage, and by its own admission confirmed this. Yet measures were required to bring greater validity to the sovereignty claim in domestic policy and international legal circles. Demonstrating foreign policy resolve required relatively bold action. Clark announced that Canada was adopting six policy initiatives. None, however, were in any sense novel, for each had been gradually forming for years prior.

First, it was decided that the Canadian reservation to the ICJ would now be dropped, allowing cases to proceed to the Court. This position, for Legault, was easily chosen on the basis of his and Pharand’s belief that international law had “caught up” with Canadian action. By this Legault referred in public rhetoric that Canada would likely not face problems in customary or conventional international law by drawing straight baselines. Further, Article 234 was a sufficient replacement to the legal scope of the AWPPA, which was the basis of reserving the Court’s judgment from applying originally in 1970. Canada had a sound legal case beyond the original terms of the reservation which applied only to the issue of environmental protection in waters extending outward to 100 miles. Article 234 effectively

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856 Huebert (1994) (Chapter 4), at 83.
857 This is one of Huebert’s main conclusions, that the prior construction and thinking of all of the policies enacted in September, 1985, had each lengthy policy histories. The baseline issue is the central policy plank and is of concern here. For deeper explanations of the other five policies, see Huebert (1994), (Chapters 4, 5, and 6).
doubled this range, and the EEZ served as a functional legal rule that similarly indicated a
trend towards accepting coastal state jurisdictional extensions.

Critically, it would have appeared to Canadian officials that there was little to fear from
potential American action before the ICJ. The United States in 1985 had withdrawn its
ability for the ICJ to hear the Nicaragua Case following an earlier negative verdict on a
United States’ intervention to have jurisdiction declined.858 In other words, there was during
the Reagan era little sympathy for the Court, and certainly no incentive to embark upon
lengthy litigation in what would have appeared to be a hostile juridical domain. To a large
extent, this point would have tipped the balance for Canada to draw the baselines and drop
the reservation, even though it has been admitted that Canada actually never considered
engaging in litigation and was bluffing throughout the entire episode.859

In thinking about whether to draw baselines, beyond the numerous factors weighed in
balance of a favorable decision, one central point of information had recently been added to
the Canadian calculus. On June 3, 1985, the ICJ handed down its decision in Libya v. Malta,
a case largely concerning coastal state opposition to the length of continental shelves for
coastal and island states.860 Of relevance to Canada was the Court’s commentary focusing
on ocean processes as they related to baseline demarcation. The Court argued that it would
not be bound to the decisions made by states on what was purported to pass as lawful
interpretations on the drawing of baselines. In other words, the Court was not going to use
states’ measurements uncritically in outlining how, for example, the continental shelf ought
to be measured, and would ignore such claims when it saw fit. This argument had sharp
implications for Canada. The upshot of the Court’s reasoning implied that the system of
drawing straight baselines had become somewhat chaotic and fallen beyond what

858 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), Merits, 1986
I.C.J., p. 14-17. Letter of 18, January, 1985. This led to complete withdrawal by the United States from the
therefore have had to consent to a case before the ICJ if the United States were to have initiated proceedings
under the special proceedings clause.

859 See Kirkey (1994-95), at 423, ft. 59, who cites Legault among others. It has also been acknowledged by
leading American legal sources that the United States did not at any time during the Polar Sea incident consider
taking Canada before the Court. Ibid, at 424.

860 Case Concerning the Continental Shelf, Libyan Arab Jamahiriya v. Malta, ICJ Reports 1985.
international law would countenance. As a result, Canada was faced with uncertainty that the Court was now focused on the fact that international law was being unduly stretched, and consequently, new litigation on similar positions of law or fact would likely generate rules bent towards bringing coastal state expansion under control. The Canadian case, once again, could quickly be placed in the firing lines of a hostile and in some sense ‘conservative’ court, parallel to the situation faced in 1970 over the AWPPA. And while there was a small probability the United States would initiate a case before the ICJ, it was by no means certain that another powerful state, such as Japan or the UK, would not, or do so on behalf of the United States.

The second decision taken by Clark in the September policy was to build a Polar class 8 icebreaker. This was the most controversial domestic policy Canada undertook given its expense of over US$500 million. Legault favored the decision, which he and Pharand had advanced as a necessary step in consolidating sovereignty, and Legault’s support of the idea led to its inclusion. The use of the icebreaker was part of the Arctic initiative devoted to demonstrating “technical sovereignty”, a material condition of law which would strengthen the occupational and administrative elements in need of proof. Thirdly, Canada adopted the Canadian Law Offshore Application Act, and order that provided legal extension of jurisdiction beyond the territorial sea to continental shelf areas. The new writ applied in particular to Canadian criminal law, but also made a plenary extension of provincial and federal laws into offshore areas. Fourth, the Canadian military was tasked with increased surveillance by enlarging the numbers of flights by Canadian Forces aircraft via ‘Northern Patrol over flights’. Such maneuvers were thought to be demonstrable acts of sovereignty highlighting the broader objective of sovereignty protection. In Eastern Arctic waters, Canadian naval activity was increased even though Navy vessels had not traversed the area since 1982 due to ice hazards. The fifth decision was to enter into dialogue with the United States on matters of Arctic cooperation, a process which would move forward in a rolling fashion for the next three years. Finally, the sixth component was the intention to draw straight baselines on the basis of an Order-in Council. Legal effect of the baselines would be given on January 1, 1986. In the words of Clark:
These baselines define the outer limit of Canada’s historic internal waters. Canada’s territorial waters extend 12 miles seaward off the baselines. The policy of the government is also to encourage the development of the navigation in Canadian Arctic waters. Our goal is to make the Northwest Passage a reality for Canadians and foreign shipping as a Canadian waterway. The United States has been made aware that Canada wishes to open talks on this matter in the near future. Any cooperation with the United States or with other Arctic nations shall only be on the basis of full respect for Canada’s sovereignty.

After posturing for well over a decade that the baselines would perhaps be drawn if Canada was required, Legault finally carried out this promise to the overwhelming delight of domestic political audiences and the majority of Canada’s international legal college.

**International and Domestic Reactions**

In the months following the policy speech, Canadian officials would learn several points about the status of the Arctic legal case. First, many pivotal lawyers in the United States did not understand the legal basis for which Canada was drawing the baselines and the role that Article 234 played in this strategy and formulation. From the American perspective, Canada was stating that there was no right of innocent passage in the Northwest Passage, and therefore no vessels could transit the waters without permission. But why then, American lawyers asked, was Article 234 constructed, and what was the legal purpose of its provisions? Indeed, Article 234 made no sense in American eyes unless it allowed vessels to transit Arctic waters with substantial coastal state regulation given the express nature of geographic interpretation and distance requirements embedded in the rule. As one American lawyer recently stated in reflecting on the Canadian baseline policy of 1986, what was the functional purpose of Article 234 in these circumstances beyond that of merely allowing people to take a pleasure cruise above the circumference of the Arctic baselines?

The United States government filed with Canada a note of protest, although its contents have never been made available publicly. However, portions of this claim have been revealed. In February 26, 1986, a letter from James W. Dyer, Acting Assistant Secretary of State for

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861 House of Commons Debates, Sept. 10, 1985, at 6462-64. Of interest, the Soviet legislation establishing straight baselines, officially promulgated in July 1985, held in a final paragraph that the areas of water were considered as the “internal waters of the USSR, historically belonging to the USSR.”

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Legislative and Intergovernmental Affairs, to Senator Charles Mathias Jr., a Maryland Republican, summarized the U.S. position:

On September 10, 1985, the Government of Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines around its Arctic islands to establish its claim. The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate U.S. navigation rights through the Passage under international law. 862

Other international authorities, including notable geographers, were similarly arguing against Canada’s position. Victor Prescott, in a move presaging the issue, would declare in a paper submitted to the 19th Annual Conference of the Law of the Sea Institute, on July 25, 1985, that a “liberal interpretation” of the UNLCOS rules on straight baselines was “a blatant breach of the spirit of the article.” Further damaging, Canadian international lawyers were noting problems with the claim’s validity. McDorman, in 1986, cast several complications over the 1985 policy changes. First, the legal claim of internal waters was once again not inconsistent with the existence of a right of innocent passage of navigation for foreign vessels. 863 This critique was straightforward and stemmed from a Canadian Memorandum issued in 1980 on the status of the waters. It read:

Canada continues to maintain the position that the Northwest Passage is not an international strait; that the waters making up the passage are internal; and that any navigation in the Passage will be subject to Canadian control and regulation for safety and environmental purposes.864

To be sure, this statement reflects the postulate that, by virtue of the waters being internal and thus legally under complete control, Canada automatically reserves the right to regulate and administer the area in accordance with domestic law. However, McDorman’s point highlighted that making mention of the right to control passage did not preclude the right of innocent passage being present, even though the claim to internal waters would have such effect generally speaking. Canada, however, had maintained cryptically throughout the years  

863 McDorman (1986), at 249.
its intentions to have the waterways open for passage which it would, in turn, regulate. Second, “[s]hould Canada vigorously voice its international position based on Inuit historic use it could create significant problems for the government in its negotiations with the Inuit over outstanding land claims. This is one of the reasons for a reticence to detail an historic claim or one where historic use is a substantial component.” And third, a court seized of the issue in 1985 would have reached a verdict that Canada’s historic waters claim was “indifferently pursued and inconsistently expressed.”

This final point was again of consequence, and was picked up on July 9, 1986 in a protest note from the EU, delivered on behalf the British High Commission. Canada had argued that “these baselines define the outer limit of Canada’s historic internal waters. Canada’s territorial waters extend 12 miles seaward off the baselines.” To this explanation, the EU note was damaging:

The validity of the baselines with regard to other states depends upon the relevant principles of international law applicable in this case, including the principle that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.

The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.

Two implications could be drawn from this protest. First, it was directed towards the baseline claim and the historic title claim in particular. Second, the language implies that the claim for historic title either in some sense drove (gave rise to), or facilitated, the legal possibility of the baselines. Though this interpretation did not reflect expressly what Canada had formally argued, whether or not the baselines defined the outer limit rather than drove the policy choice, the EU note struck at the heart of what Canada was indeed suggesting.

865 Ibid, at 250.
866 Ibid.
867 British High Commission Note no. 90/86 of July 9, 1986, quoted in U.S. Department of State, Limits in the Seas, United States Responses to Excessive National Maritime Claims, no. 112, at 29 (Mar. 9, 1992), at 29-30. [Emphasis added.] The 12 members of the European Community in 1986 were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, the Netherlands, and the United Kingdom.
Canadian officials were consciously arguing in the Arctic policy that the baselines demarcated what were already historic internal waters. The language reflected the idea that the Canadian claim rested not strictly on the legal situation to arise following the enactment of the baseline policy, but that the baselines were used to protect the historic claim. Canada’s actions were intended not to create sovereignty, but to “define it”, as its primary authors explain, and specifically to show geographically where the outer limit to Canada’s territorial waters existed. Ultimately, the policy provided clarity to an existing uncertain marker of territorial limits.

This negative rejoinder to Canada’s Arctic policy was not only explicated from existing allies however, but also formerly sympathetic international lawyers. Speaking at the American Society of International Law on April 9, 1987, William Burke, in discussing the hypocrisy of the United States in picking and choosing customary law of the sea to its advantage, leveled a resolute charge at Canada:

The recent Canadian claim in the Arctic to employ straight baselines to enclose the Arctic archipelago causes some disquiet because it so obviously does not appear to meet the supposedly prevailing principles. Article 7 of UNCLOS (and article 4 of the 1958 agreement) refers to a fringe of islands; the Arctic archipelago hardly fits that category. At the same time, these islands do not qualify under the archipelagic articles of the 1982 convention. Furthermore, it seems impossible to find the necessary supporting conditions for claims to “historic waters” or to “historic title.” Over the years Canadian officials have made too many statements inconsistent with this concept for it to have much credibility today.869

Burke went on to add however, that the “prevailing principles” perhaps were not applicable to the problem of the Arctic. He asked:

[m]ust all succeeding baseline claims in the Arctic conform to the precise geographical criteria as were used to generalize the Fisheries case?... If it was reasonable for Norway to use a straight baseline system for its coast above the Arctic circle, where the islands fringe a coast that is sometime deeply indented, must it follow that it is unreasonable for Canada to use such a system just because the islands do not fringe the coast but nonetheless abut the coast in great profusion? 870

For Burke, it was uncertain and had to be queried whether all baseline rules in both conventional and customary international admitted of only one interpretation even when

869 Burke (1987), at 82.
870 Ibid, pp. 82-83.
geographical and social contexts were “dramatically different.” Jurists should consider the point that “[a]s overworked as it may be, ‘unique’ may be the appropriate description of this Arctic problem.” After all, baseline law had evolved out of customary international law as set in motion by the *Fisheries Case*, rather than through codification efforts of the Geneva Conventions or at UNCLOS. As such, Burke and Pharand agreed stridently on this point. But Burke went one step further to argue that a question must be raised on the grounds that the new codification of baseline law captured enough of the complexity associated with baseline demarcations used in all states’ geographies. Indeed, evidence of contemporary practice indicated that states were not deferring to the new laws codified in treaties concerning baselines, nor “deferring to the interpretations placed on it by the United States.”

And this was in part materializing because baseline law could not be considered as unambiguous as the American position indicated.

But what was striking is that even lawyers such as Burke were not arguing from a legal basis that the Canadian claim was not structured around the baselines having legal effects normally intended. Canada was arguing that their legal effect was in fact moot, and only optical for mapping and measurement purposes. In terms of what law would apply to the Canadian case if the baseline enactment were to be given legal effect, American legal opinion now pointed to a relatively clear conclusion. Speaking to the American Society, Colson posited that “since the early sixties the United States and Canada have had numerous squabbles about fishing rights, baselines, the breadth of the territorial sea, etc., and none has been governed by a conventional law relationship.” But this past history meant little as to the current legal status and composition of baseline law for Colson. To his mind,

The baseline rules of the 1958 and 1982 conventions are virtually the same. In large measure they reflect law laid down by the International Court of Justice in 1951 in the Anglo-Norwegian Fisheries Case. As to the international law of baselines, one would be hard pressed to identify a difference between conventional and customary international law. We would all agree that straight baselines may be used when the coastline is deeply indented or cut into, or

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871 Burke (1987), at 82.
872 Colson (1987), at 89.
is a fringe of islands. But what are the criteria for making those judgments? The conventions give no guidance.873

From prominent continental international lawyers a similarly negative verdict was reached on Canadian historical waters claim specifically874, and from a caste of others, in relation to the baselines.875

To perhaps put to rest any ambiguity surrounding the interpretation behind the policy language used in 1985, one month after Burke’s comments at the American Society Meeting, Canada issued a further policy statement on May 21, 1987:

Canada is determined to exercise full sovereignty over the historic internal waters of the Arctic archipelago, and is prepared to uphold its position before the International Court of Justice if necessary. These Canadian internal waters have now been delimited by straight baselines that became effective on January 1, 1986.876

This statement, as Pharand has written, indicates “that the only purpose of the straight baselines was to delineate the outer limits of the internal waters and not to serve as a supporting or second legal basis.”877 Nevertheless, by 1988 more than a dozen countries, including traditional allies of Canada, and Norway, the original beneficiary of the straight baseline system, had submitted formal protests in relation to Canada’s Arctic claims.878

Mitchell Sharp’s words on April 17, 1970, had thus come back to haunt Canadian policy: “since obviously we claim these to be Canadian internal waters we would not draw such lines.” Even if the argument for the clarity of demarcation was to possess credibility with foreign audiences, a thorough legal defence of the Canadian position was required which would resolve all of the fault lines in Canadian legal reasoning to date. Two processes were underway to solve this dilemma, one political, and one legal.

873 Colson (1987), at 90.
876 Reproduced in 25 Canadian Yearbook of International Law (1987), at 406. [emphasis in original].
877 Pharand (2007), at 12.

Following the decision promulgated by Clarke in September, 1985 to enter into dialogue with the United States on matters of Arctic cooperation, bi-lateral meetings commenced in late 1985 and early 1986 in an attempt to regularize relations and provide consistency to future Arctic transits by American vessels. Phase one moved from late 1985 through to spring 1986, in which Len Legault and Barry Mawhinney from Canada’s External Affairs engaged Richard Smith and David Colson from the US State Department. Underpinning the Canadian approach was a strategic belief that it was well placed to extract further gains from the United States, and in particular, push American officials to agree to “negotiate a co-operative agreement that recognizes Canadian sovereignty” given that “the United States may be prepared to enter into such an arrangement with Canada.”879 Canada put forth the offer to allow American vessels to transit Arctic waters in order to meet security and commercial necessities. The US Departments of State and Defense were however split on how to react, with the former inclined towards a posture of accommodation, and the latter, in keeping with its position over the dangers of the ocean enclosure movement, remaining vehemently opposed on grounds that an American act of acquiescence would set a precedent for other critical maritime choke points and international straits.880 The initial negotiating position by Canada was somewhat surprising and grounded in an idea, as Mawhinney put it, of “legal practitioners trying to address the problem from a legal standpoint.”881 In order to achieve the Canadian goal of a claim to sovereignty which, parenthetically, George Schultz, US Secretary of State, had stated publicly, but not directly, to be the case on October 28, 1985, Canada began by arguing that Article 234 granted a broad right of control over the Northwest Passage. The United States countered by holding that Article 234 had to be read in concert with Article 236, the ‘Sovereignty Immunity Clause’, which implied that government vessels such as the Polar Sea did not need permission under international law to transit ice-covered areas.

879 The quote is taken from an “alleged” Cabinet memorandum dated October 10, 1985, that was never proven authentic, but by all accounts of policy insiders represented Canadian thinking at the time. See Huebert (1994), Chapter 6, pp. 423-424. These deliberations were also policy orientated as well in being partially intended to strip away incentives of future litigation and discussions on formal matters of international law.

880 Huebert (1994), Ibid.

881 The quote is drawn from Kirkey (1994-95), at 408, whose interviews of the period remain unique.
It is perplexing why Canada chose to pursue this route of legal argumentation even if it
believed that Article 234 represented its strongest argument from the law of the sea. This is
especially so given that both sides had agreed on the legal construction of Article 234. That
Canadian officials did not rely on the historic waters claim was indicative of the possible
weakness of the argument, as Pharand had articulated, but also the attendant problems
surrounding how Inuit claims of historic use could be incorporated into negotiations with
Canada over future land claims settlements. Legault presumably did not want to engage
Canada in possibly contentious legal deliberations, calculating that Article 234 would not be
sufficient to persuade the United States and thus leave the talks stalled in deadlock but
potentially advantageous to Canada’s position as sovereignty continued to be consolidated
through practice over time. Either way, Canada was not in a position to reasonably press its
claim. Most interestingly from a jurisprudential standpoint, American lawyers now
frequently pitched their legal case as being in concert with the interests of the world
community. In an abrupt role reversal, the United States adopted a McDouglian legal policy
of “inclusion” while Canada served its parochial interests through the use of “exclusive”
international law.\(^{882}\) Hence, the United States now claimed its legal position to be
representative of the “world’s general interest”, one in which, as Freidheim would explain,
gave the State Department “moral comfort” to espouse.\(^{883}\)

Canada now dug in its heels and became obstinate in negotiating, according to US lawyer
Dwight Mason, with the Canadian position bent on the conclusion that “it’s our waters
period.”\(^{884}\) Though Canada was offering navigational rights for all US vessels in the
archipelago, Colson maintained that

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\text{we were very clear from the outset, however, that there was no chance that this was going to be a recognition situation... We wanted to work it out in political terms. If there was nothing else going on, sure we might be quite happy to give Canada their position, but we couldn’t do that because that’s not the way the world works, and we couldn’t be seen doing something for}
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\(^{882}\) Freidheim (1986: 362) notes this trend from 1984-1986 when observing in close quarters Canadian and American officials outlining their perspectives on the Arctic.

\(^{883}\) Ibid, at 363.

\(^{884}\) Kirkey (1994-95), at 409.
our friend and neighbor that we would not be prepared to do elsewhere in the world…The Law of the Sea is about not paying political prices to navigate the world’s oceans.885

As a result, it became apparent to both parties that the law of the sea would not settle the claim in this format, and accordingly, in February, 1986, the United States officially deposited its note of protest with Canada on the illegality of the baselines.

Phase two of the negotiations commenced following a personal meeting between Reagan and Mulroney in March, 1986. On this occasion, greater friendship between the two leaders was built and Reagan promised to deal with the Arctic problem more seriously and not act without Canadian permission. Ed Derwinski, under-secretary of State, was selected by George Shultz, on the advice of Reagan to solve the problem. Derek Burney, Mulroney’s chief of Staff, was his Canadian counterpart. The duo engaged in series of exercises in which lengthy legal drafts dealing with numerous contingencies were strategized but no compromises arrived at. This process remained stultified until a third phase began following a meeting when Reagan visited Ottawa in April, 1987. Burney describes how the politics of international law played out in the Prime Minister’s office that day:

When they [Mulroney and Reagan] met in the Prime Minister’s office, the PM had a globe and when they started talking about the issue, the Prime Minister said, ‘Now Mr. President, I want to show you what we are talking about.’ He [Mulroney] showed him [Reagan] where it was…and the President said something to the effect that “that looks a little different than the maps they showed me on the plane coming to Ottawa.” From that we went to lunch at 24 Sussex [the official residence of the Prime Minister] and towards the end of lunch, the President said, “I want to do something more for the Prime Minister here, both on acid rain and the Northwest Passage…” The American delegation adjourned for lunch and they busily tried to cobble together some additions to the President’s speech [which he was to deliver before Parliament that afternoon].886

When negotiations resumed, the Canadian strategic position was now to get the United States to ask for consent before any surface vessel entered into the archipelago. Canada’s position stemmed from the rationalization that Reagan on his Ottawa trip had stated emphatically that “we won’t do anything, Brian, without your consent”, and accordingly, Canadian officials played upon this language to drive home the point of having Reagan’s intentions become central to a new political initiative.

886 Ibid, pp. 412-413.
In the course of simplifying a document that removed much of the tangled and incommensurable legal issues from negotiations, thirty-seven arrangements in total, the Americans were still hesitant about agreeing to a position of consent given that this might have the tacit effect of strengthening Canada’s jurisdictional claim even if its language reflected “permission” rather than making a direct reference to consent. Ultimately, consent was worked into the agreement, but only in relation to the transit of ice breakers with a specific scientific research mission. Canada would receive consent for these particular voyages, and the United States could rest its position in legal precedent on Article 245 of the UNCLOS:

Coastal states, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set by the coastal state.

On January 11, 1988, the Arctic co-operation agreement was signed in Ottawa. It states that “the Government of the United States pledges that all navigation by US icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.” The agreement also holds that “[n]othing in this agreement of cooperative endeavor between Arctic neighbors and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.”

According to Alan Gotlieb, then ambassador to the United States, Canada achieved “important control over the territory concerned…Canada’s sovereignty was significantly enhanced…[and] obtained a major concession, with little or no quid pro quo.” Burney believed that Canada had ultimately achieved its primary objective of getting the United States “to recognize that we had a measure of effective control over the movement of vessels

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887 Kirkey (1994-95), at 414.
through the waters.\textsuperscript{890} While both parties received what they had intended, which became minimal as negotiations extended themselves over time, the final product was a political compromise devoid of legal implications or precedent. Canada’s legal position therefore existed in its current form, one based at points on inconsistency, as argued from international and domestic jurists. As a result, the Canadian government required a comprehensive legal defence to silence its critics. Into the fold once again stepped Donat Pharand to provide authority to the Canadian position.

\textbf{Canada’s/Pharand’s International Legal Defence}

Donat Pharand’s seminal work on the Arctic was published in 1988 under the title \textit{Canada’s Arctic Waters in International Law}.\textsuperscript{891} It stood as a monumental achievement for many reasons. First, it was the culmination of decades of legal analysis on international law as it related to the Arctic region, stemming from his original thinking in the 1950’s. Second, it provided Canada at the time with a formidable legal defense against charges of legal inconsistency. And finally, it served as a blueprint for Canadian policymakers to learn how to preserve the legal case through the enactment of specific policy responses to ensure the non-internationalization of the Northwest Passage. Indeed, Pharand’s 1988 analysis continues to serve as a guide to current Canadian policy on the Arctic. While the aim here is not to canvass Pharand’s entire legal defense, it bears noting what Canada would have learned through Pharand’s evolving thought about how Canada could rest the Arctic case upon certain legal interpretations and novel legal doctrines.

There were two pivotal elements to Pharand’s argument. The first turned on how Canada’s claims for historic title, and the drawing of baselines, could be understood in relation to one another in international law. The second addressed the problem of whether the Northwest Passage was an international strait, and if not, whether this status could be preserved indefinitely. In relation to the first problem, Pharand framed the issue in the following manner, within his explanations for the specific points surrounding conclusions on Canada’s

\textsuperscript{890} Kirley (1994-95), at 419.
\textsuperscript{891} Pharand (1988).
claim to internal waters. Noting that the Canadian claim in 1985 held that the baselines defined the “outer limit of Canada’s historic internal waters”, it followed that:

Accordingly, the status of internal waters would result from historic title rather than the enclosure of the Archipelago by straight baselines. However, if no historic title can be proved [which Pharand goes on to argue is true], the status of internal waters must result from the drawing of straight baselines. The enclosed waters would then be subject to the right of innocent passage if the lines are drawn under the Territorial Sea Convention of 1958, but would not be if they are drawn under customary law by virtue of the Fisheries Case decision of 1951. Since Canada is not a party to the 1958 Convention, it may rely on the Fisheries Case.892

Two points are noteworthy in relation to this logic. First, that the 1958 Conventions were now not customary international law had been a consistent theme of Pharand’s for several years, but was a contrary position to that found by him in his research of 1968.893 Second, Pharand was making an argumentative move the effect of which inferred that a state can claim a right even though unaware of the right, and may do so even having expressly rejected the application of the right in the first instance. For essentially, Pharand was arguing that Canada had not understood the law properly when making its claims about historic title and how the law of baselines related to the standards of internal waters. For Pharand, legal rights and legal effects flowed from the baselines even if Canada had either, under one interpretation, rejected the application of new law extending from the rights of baselines, or alternatively, but far less convincingly, not understood how the law of historic title and straight baselines interacted in the Arctic context. Either way, the argument was framed such that Canada could still, having made an error on historical title, preserve the validity of the case.

Pharand then went on to demonstrate how Canada’s baselines could be accommodated by a new reading of the Fisheries judgment. Though the baseline argument was extensive, Pharand’s novel interpretation was an extension of his 1983 analysis on the liberal nature of baselines. The Arctic archipelago was to be understood not as a “simple ‘fringe of islands’ in the strict sense”, but now a “single unit bordering the Northern coast of Canada and forming

893 See infra, chapter three.
Canada’s baselines accommodated the “general direction” criteria of the outer fringe of islands, fit within the “close link” requirements associated with the ratio of the sea to land within the archipelago, and met the criteria for overall length which under international law was assumed to be unknown. Most importantly, and in consistent legal fashion, the validity of the baselines was grounded in the claim that the Inuit, and by extension now Canada, had “economic interests” in the area associated with hunting, fishing, and trapping since “time immemorial.”

Pharand then made two subsequent moves to justify Canada’s claim beyond the technicalities of the baseline criteria required to meet the standards of international law. The first turned on the right of innocent passage in the archipelago, whether a right existed prior to the enactment of the baselines in 1985, and if a right was preserved thereafter. All of these judgments turned on the state of customary international law on the use of baselines at the time of the Canadian enactment.

Building on his previous thinking since 1970, Pharand held that the straits of the Northwest Passage consisted of territorial waters and high seas, and these waters had to be subject to the right of innocent passage. Such a right applied to any territorial waters, and when Canada in 1970 had extended its territorial sea to twelve miles, thereby creating the two ‘gateways’ at the east and western ends of the Northwest Passage, this had the effect of Canada tacitly admitting that prior to this extension the waters of the Arctic were high seas and therefore not internal historic waters. In this plain logic, Canada’s historic title claim was shot-through with problems, along with other fatal elements of proof required to make a successful historic waters claim. Aside from this implication however, it was to be concluded that, even in relation to warships, there was a right of innocent passage existing in the Northwest Passage prior to the enclosure by the baselines in 1985. The question then became whether the international law of baselines changed this designation. Canada could rely on the Fisheries Case, which negated the right of innocent passage from applying following the baselines, whereas international law within the 1958 Convention and the 1982 UNCLOS was express in that waters previously considered high seas could not through their enclosure remove the

895 Ibid, at 178.
right of innocent passage. Thus, it was only the case that Canada could use *Fisheries* law, considered customary international law, if UNCLOS did not yet apply to Canada, or the 1958 Convention had modified customary law of the *Fisheries Case* to essentially mirror the provisions on baselines in UNCLOS. The entire legality of Canada’s claim turned on this point of customary international law. Pharand explained:

The 1958 Convention came into force in 1964, with 22 ratifications. Since then, the number of ratifications, accessions and successions has raised the membership to 45. These 45 States, however, include only 21 of the 60 States which have used the straight baseline system and only two of the additional 12 which have adopted enabling legislation. In other words, there are 49 States that have actually used straight baselines or have adopted enabling legislation but have not become Parties to the Convention.

In the circumstances, it seems impossible to conclude that the acceptance of the 1958 provision for innocent passage in newly enclosed internal waters has been so general as to become legally binding on all States. The International Court made it clear, in the *Gulf of Maine Case* of 1984, that more was required before reaching an affirmative conclusion as to the existence of customary law. It held, in that case, that the equidistance method of the continental shelf delimitation had not become a rule of customary law and neither had it been adopted into such law as a method to be given preference over others. The Court so held in spite of the fact that the 1958 Continental Shelf Convention, which provided for such rule, had been in force since 1964 and some 54 States were Parties to it. In addition, the great majority of at least 80 delimitation agreements, concluded since 1958, had been based on the equidistance method, either strict or modified. Consequently, it is highly unlikely that the Court would hold that Article 5 of the Territorial Sea Convention has become binding on all States on the basis of a newly created customary law. This is all the more unlikely that the provision represented an important departure from existing customary law.

Having proven the validity of the baselines, Pharand made a second unique legal move to further strengthen the Canadian claim were it to be weakened in some form.

In demonstrating that the baselines were valid through the vital rights and interests acquired and exercised by the Canadian Inuit, it was argued that Canada could also rely upon the “consolidation of title doctrine” as it applied to Lancaster Sound, Barrow Strait and Amundsen Gulf. In essence, three vital rights had been in practice for such an extended period that these might have resulted in a consolidation of title parallel to how the waters of the Lopphavet basin in Norway had become similarly characterized in the *Fisheries Case*. According to Pharand, historical consolidation involves proving the same elements as that of historic title, but in so doing the standards are “not as stringent, since the historical

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896 Pharand (1988), at 229, footnote and table omitted.
consolidation merely supports or confirms title to a maritime area acquired by the establishment of straight baselines. Those elements are: (1) exercise of State authority; (2) long usage or passage of time; (3) general toleration; and (4) vital interests of Canada as a coastal State.\textsuperscript{897} Canada met all of these criteria, Pharand argued, and in relation to the general toleration criteria, did so on the basis that with “one exception in 1970...there appears to be no recorded case of protest to the various manifestations of State authority by Canada over the waters of the Archipelago.”\textsuperscript{898} It followed that Canada could therefore rely upon the consolidation doctrine to further buttress the baseline claim.

The second major addition to the Canadian legal case was the problem of the Northwest Passage being or becoming an international strait. Building on his analysis of previous decades, Pharand repeated that the \textit{Corfu Channel Case} of 1949 represented the existing international law on the matter beyond the codification efforts prior to and at UNCLOS. The criteria to meet the threshold of an international strait pertained to geography and to the use or function of the strait. The Northwest Passage clearly met the geographic requirement as it linked two sections of the high seas and was therefore a ‘legal strait’, but the functional requirement was much more difficult to calculate. Pharand’s analysis was extensive on the latter point, and turned on proof being found that an area “has a history as a useful route for international maritime traffic.”\textsuperscript{899} The argument for “potential use”, long adopted by American officials was dismissed once again as a poor reading of law, as the \textit{Fisheries Case} had outlined that “substantial use” was the proper legal position. In evaluating the sum total of voyages through the Northwest Passage, their purpose, and the high degree of Canadian involvement in the form of technical capacity, it followed that the Northwest Passage had not had a history as a useful route for international maritime traffic. Though the Polar Sea voyage of 1985 went forward without American requests for consent, this did not alter its legal status.\textsuperscript{900}

\textsuperscript{897} Pharand (1988), at 167, [emphasis added].
\textsuperscript{898} Ibid, at 174. The omission of not mentioning the “drawer of protests” External Affairs received following the 1970 AWPPA was thus glaring.
\textsuperscript{899} Pharand (1988), at 220.
\textsuperscript{900} Ibid, pp. 203-229.
The final question turned on whether the Northwest Passage could become internationalized and what Canada could do to prevent this characterization, specifically in light of the increased shipments of minerals and oil expected to materialize in the 1990s. Pharand held that a considerably lower threshold of “use” would be sufficient in relation to the criteria advanced in the *Corfu Channel Case* due to the remoteness of the region, absence of alternative routes, and difficulties of navigation. The key point for Canada, however, was that though it had achieved “sovereignty” over the Arctic archipelago through the enactment of the baselines, it could lose this designation and thus administrative control unless it maintained a practice reflecting the “exercise of effective control.” This inferred that “practical measures must be taken”, because if sovereignty were lost, the rights owed to the international community in relation to international straits were extensive. All ships would possess the rights of transit passage as confirmed in UNCLOS, concentrated upon free navigation subject only to the general caveats of avoiding the use of force and states’ accepting international regulations relating to safety at sea and pollution control. Specifically, coastal states could adopt laws concerning "the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations", but even these laws "shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined.”

In order to preserve its sovereignty, Canada had to strengthen its degree of control along with securing prior legislative enactments, including the AWPPA and its attendant regulations, through the following policy changes. To make the NORDREG system compulsory for all vessels entering into the Arctic archipelago rather than voluntary; ensure that a Class 10 icebreaker was built, in addition to the Class 8 icebreaker which had been proposed by the Mulroney government in 1985; require foreign shippers to retain the services of specially trained pilots in certain areas or zones in the Northwest Passage; have the Canadian Department of Transportation provide a series of services, including, maritime navigational

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aids, icebreaking and escorting, marine search and rescue, marine mobile communications, ports, harbors and terminals, and marine supply services; and finally, adopt submarine detection capability to prove definitively that the Soviets were sailing the Northwest Passage at their leisure, and that other maritime states either were also or could do so as well, which had the effect of turning Canada’s Arctic waters into a Cold War “training ground.”

Ultimately, through Pharand’s analysis Canada now had a legal defense to push back against any future charges levied at the sovereignty claim. Having applied what appeared prima facie to be an authoritative interpretation of the baseline issue, Pharand was able also to persuasively argue that the Northwest Passage remained non-international. And this point was critical in a further sense as international straits cannot be closed off as internal waters from the drawing of straight baselines from an area subject to either conventional or customary international law. Canada could thus rest on the politics of the Arctic being relatively secure as governed by the 1988 Cooperation Agreement, and that the legal component could serve as a placeholder until Canada was once again faced with a sovereignty threat. As importantly, Canada now understood what policy steps needed to be deployed in order to maintain the legal case and the time frames associated with bringing these policy inputs into practice. Much like in the 1990’s where Canadian politics were described as an era in which Prime Minister Chretien governed in a mode of “cruise control”, so the Arctic policy could drift as well, its legal foundations now well shored up for the time being.

**How were the Arctic Baselines made Possible? What Role for International Law?**

How can the period of policy change and consolidation from 1977-1989 be accounted for theoretically? A variety of tools from critical theory, constructivism, rationalism, and interactionalism can clarify many events from this era. The most vexing issue is that of Canada’s decision to draw straight baselines around the archipelago in order to demarcate what was considered by the government an area of internal waters. Three questions are associated with this policy enactment, all of which are interrelated. First, how was the

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straight baseline policy made possible in 1985? Second, what role did international law play in Canada’s calculation and policy thought? Third, if the law did play a role in Canada’s choice, did Canada comply with international law at the time? There are good grounds to believe that the politics of international law drove the entire process forward in the move towards straight baselines, and that international law played a myriad of roles within this process.

Such a conclusion, again, cuts against general thinking in the law’s relationship to Canada’s baseline enactment. The most convincing argument has been outlined by Huebert, who asks, in accounting for the baselines at that particular time, if the voyage of the *Polar Sea* had not occurred, when then would the baselines have been drawn? Because Canada had spent over twenty-five years marking the baseline demarcations so that if required their implementation and legal effect could be carried out quickly, and given that relatively parallel legal rules for drawing baselines were included within UNCLOS and the 1958 Conventions, it follows that “the fact that international law was more accepting of the establishment of straight baselines was not as important as the fact that the leading political decision-makers wished to appear as “actively” protecting Canadian claims in the Arctic.”904 Huebert adds that the “change in international law was necessary but not sufficient to lead to this policy action.”905

There is a great deal of truth to this statement. It implies that the politics of international law was strongly governing Canada’s policy decision not to implement the baselines on grounds that not only would the United States have been opposed, but also that domestic political advantage caused the baselines to be drawn. But the implicit premise in this argument is equally as central. It assumes that drawing baselines around the Arctic perimeter was legally valid prior to the *Polar Sea* voyage. And by all accounts, as Pharand and McRae had confirmed, this was the case. However, before turning to this particular issue, a more nuanced interpretation bears mentioning. While it would appear to be accurate that the baseline policy was conducted for political gain and the sake of expediency, it was in fact patterned on two axes of fear: from a hostile American response that would deteriorate the

904 Huebert (Chapter 5), at 326.
905 Ibid, at 348.
renewed process of productive bilateralism recently resurrected; and a fear that the legal analysis of Pharand might collapse under scrutiny. Political gain was thus both caused by, and achieved in so doing, by both political fear and the historical fear that accompanies political legacies when policy failure is at stake. Indeed, beyond considerations of international law by Canadian authorities, the possibility of having to rationalize the legal case publicly once again and construct a credible argument appeared to have weighed heavily against a potential American reprisal.

For Huebert, the change in international law from baseline rules from the Geneva Conventions to UNCLOS was central to understanding the process, but more importantly, the validation through this change in the eyes of states and international lawyers over the permissibility of drawing valid baselines was necessary for policy change. Domestic politics ultimately drove the process following the Polar Sea striking fear into officials’ beliefs about the case. Yet, in addition to this, it was also the type of politics and the type of threat produced in the policy sequence that caused the policy decision. Indeed, since the early 1980’s Canadian officials had been grappling with several points of fact and law, politics and timing, in weighing out how to carry out a major Arctic policy shift. Canada was simply waiting to draw the baselines in the early 1980’s when the opportunity was ideal. But this act had to be the central foci of reinforcing events. Canada required first, a reasonable case that international law supported its position on the application of baseline rules, which then could accompany the legitimacy and now formal legality of Article 234. Although Article 234 expressly made no mention of sovereignty, Canadian officials considered it nevertheless as an important component to the success of the broader legal case. Furthermore, it mattered, so officials thought, to be enacting the baselines under certain political conditions, and the ideal setting turned on Canada framing the event as one in which it was backed into a corner, faced with little choice against a form of ‘aggression.’ While aggression need not, and clearly could not have meant formal threats of force from the United States or international actors, a challenge to the Arctic legal case could be pitched to domestic audiences as a circumstance of such an instantiation. In Canadian public circles, the idea of Arctic sovereignty entailed that external threats of territorial encroachment could be perceived within such a frame.
When calculating policy change, if Canada could be seen once again as acting in a defensive fashion parallel to 1970, officials believed that international support would be more readily forthcoming. To recall, Canada had notified the United States on many occasions for years prior that it would at some point draw straight baselines. But what triggered their enactment was not external politics per se, but the interchange of effects caught up in the politics of international law.906

There are also several adjacent problems that accompany an evaluation of whether Canada intended to or actually did comply with international law on baselines in 1985. The first issue turned on what the law was for Canada specifically at the time. Pharand had done extensive research and concluded publicly that the case could withstand scrutiny and meet with successful litigation at the ICJ if required. However, Pharand’s argument was certainly not orthodox in assessing how Canada could use economic and normative considerations in compartmentalizing difficult points of geography within the Canadian perimeter.

Complicating this picture, though the United States had made clear that the Arctic archipelago could not be made subject to baselines, how treaty law and customary international law fit together for the United States and the broader world of lawyers was also uncertain. In other words, within the Arctic policy there was therefore a great deal of formal legal deliberation and strategic legal calculation caught up with evaluating, as James Crawford has written, what international law was for Canada on a “given day”, and what the law said at a particular historical moment.907 The United States wanted their legal position on the ocean regime to be covered in all ways and circumstances, and argued that the law of baselines collapsed customary and conventional law under the UNCLOS codification effort. This was the core of Colson’s proposition to the international legal community. And so, if the politics of the United State’s position resonated across leading states, Canada’s use of the

906 And to this can be added the politics of literature. At the final meeting in Washington prior to the September policy announcement, where senior US State Department and Coast Guard officials met with the senior Canadian delegation, Legault warned the American team that on this issue they ought to heed the advice of William Butler Yeats: “Tread softly because you tread on my dreams.” From Yeats, “He Wishes for the Cloths of Heaven.”

*Fisheries Case* to support its straight baseline claim would be placed in jeopardy, and ultimately, rendered unpersuasive within legal circles.

On the point of baseline law, then, the entangled nature of custom and treaty in the 1980’s could not have more clearly represented the politics of international law in practice. The ICJ in *Nicaragua* (1985), following from the trend established in the *North Sea Continental Shelf Cases* (1969), had recently promulgated that customary international law and treaty law on the same topic could coincide and exist alongside one another in parallel tracts. Such congruent legal processes gave rise to the possibility of different legal consequences arising, *qua* treaty rules and customary rules, complicating both whether and/or how UNCLOS was to have legal effects in its then transitory status in the early 1980’s. Whether the law of straight baselines was declaratory of pre-existing customary law, had crystallized customary law in the process of formation, or had found to have generated new customary law subsequent to its adoption, remained undetermined for Canada. As Oscar Schachter (1989) put the point crisply, treaty and custom were not only sources of international law but competed with each other and captured the spirit of international lawyers. Liberal lawyers saw within textual sources the virtues in clarity and precision, while conservatives stressed the need for order and justice to be brought about in a case by a method of gradualism reflecting “particular needs in concrete situations.”908 Hence, the Canadian and American arguments reflected at different historical points both of these orientations, with Canada now claiming a more liberal reading of law and the United States tilting towards order within the law of the sea beyond the requirements of giving privilege to special circumstances.

How UNCLOS related to the existing development of baseline law in relation to these jurisprudential orientations added further complications to Canada’s calculations. In practice, many states, international lawyers and courts tended to take codification efforts as embodying customary law, or as Virally argued, “any attempt at codification of a customary rule involves inevitably an attempt also to improve, supplement and generally re-formulate

908 Schachter (1989b), at 721.
the rule in the light of contemporary conditions. Canada, then, was not only caught on the horns of an interpretive legal dilemma, but also in relation to how *opinio juris* could be formulated for baseline law given a range of divergent state practice. Was the United States bound under international law to UNCLOS, or the specific rules of Article 234? This was uncertain. Colson had argued that the jurisdictional reach of the AWPPA went beyond what was considered acceptable coastal state jurisdiction at the time, even though Article 234 was considered as a legitimate extension, or replication of the AWPPA. And thus, the parallel problems of the customary status of Article 234, along with its correspondence to the detailed parts of the AWPPA placed Canada in exceedingly difficult position of having to evaluate how customary international law, treaty law, and domestic interpretation were to be squared in enacting the provisions on straight baselines.

If Leagult was to be taken at his word that ‘time had caught up’ with the baseline law for Canada, and thus their Arctic application would be seen as valid, why then did Canada not immediately draw them when the *Polar Sea* crisis arose, or more minimally, when Canada became certain of the voyage? Presumably, as rationalist theorists would indicate, the costs of enacting such a policy were too high at the time, and on a variety of bases. First, American opposition was likely to be significant, serving to spoil what in Ottawa was perceived as a period of rapprochement with Washington. Moreover, as UNCLOS began to draw to a close in the early 1980’s, the politics of international law continued to guide the ocean relationship from its successful series of negotiations. Again, Canada switched to support the American position on international straits as a *quid pro quo* for Article 234. This grand bargain, but also the political fallout from Canada’s pre-existing alignment with maritime states, structured its bi-lateral and legal interchanges. Second, Canada could let its legal position ‘harden’ through Article 234, perhaps by making overtures as to what legal interpretation was to apply to the rule in relation to the straits regime. And an extended time-frame would also assist in finding material evidence to support the historic waters claim, specifically by allowing Inuit claims to have legal effect on the rights of Canadian occupation and territorial transfer. Further, it was assumed, and later discussed in July by both parties

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that the voyage would have a non-prejudicial legal effect. It was only in the window of uncertainty of late July, 1985 when public opinion began to be inflamed, that Canada’s strategic policy and legal calculations began to change and officials began in earnest to insist from the United States an express declaration of consent be the norm of conduct in any transit.

Canadian officials quickly understood that their political reputations were at stake in both historical and legal terms. Both the Canadian reputation as ‘defender of the North’, and the governments as ‘standing firm to American pressure’, were at stake. And both of these, as rationalists would contend, affected the compliance decision. The driving force behind this change of events was the international law of politics, however. As presented to the public domain in a series of articles in late July, Pharand and Griffiths used international law not only as an ethical template from which to view Canadian actions, but also as a policy imperative upon which Canada’s obligations of statehood rested. Canada was counseled to “take the bull by the horns” and make a policy change even in light of American opposition. In other words, the time had come for action, and members of the Canadian and international legal community drove the process forward on the basis of the authority of international law and the success of the Canadian case. Put simply, the Canadian legal college believed that the government should draw the baselines, just “do it already”, as lawyers reflecting on the process recall. In order to prod the government, international law was used as a normative guide for carrying out the progress in Canada’s foreign policy. Several in Canada’s legal college, all critically authoritative voices, tried emphatically moreover to embarrass the government into action in public comments that Canada was making a ‘fool of itself’ and looking like an ‘amateur’ nation in not doing ‘something in law’. With a reasonable legal case at hand, or so most jurists believed, there were no reasons to delay, and certainly none that ought to have important effects in political circles. In short, to ignore Canadian legal authority would have made officials at External Affairs look foolish in hindsight given that baseline defense was intact and the Americans were threatening the Canadian legal position. Canada’s international lawyers, therefore, drove the policy process forward when the opportunity for the politics of international law to commence appeared readily at hand.
As constructivist theory has articulated, and the above empirical narrative reveals, law and its primary actors have at time powerful effects on forcing their credibility into political deliberations. In many instances, it is the law that structures political rhetoric in particular, but also in cases, the type of policy choices that appear to be required in preserving a state’s sovereign entitlements. Governments are thus able to use legal rules and express their contents and meanings publicly in order to justify policy decisions. Indeed, the straight baseline policy process in the Arctic took on such a corresponding reality. Canada’s international lawyers became the guardians of the state, using legal and political vocabularies to infuse policy debates with legitimacy, authority, and legality through arguments grounded in the idea of ‘right conduct’ on behalf of the government. This use of legal language and alteration in vocabularies highlights the malleability of international law as critical legal theorists maintain. For Koskenniemi, harnessing the discourse of law is tantamount to deploying hegemonized forms of power into political debates and policy practices. International lawyers are furnished with a relatively wide range of possibilities when doing so, for “[j]udgment is located in the institutional act of applying the law in one way rather than another, choosing one among many alternative meanings offered by the available vocabulary.”910 And this possibility was open for lawyers with the government and also in the Canadian legal college. In invoking the jurisprudential approach of judge Alvarez to make the baseline argument appear valid, Pharand was exercising his own interpretive discretion within the structural effects of international legal grammar. In his political role, Pharand was merely taking up the responsibility of international lawyers to “soothe anxious souls, to give rise to frustration and anger.”911

And yet, Canadian lawyers did not give entire shape to the Arctic baseline policy. Legault canvassed all international legal opinion at the time, setting Canada’s legal judgments within the broader political contexts of foreign policy. His conclusions pointed towards a minimal legal approach in the Arctic. This involved explaining to the world that Canada only was demarcating the area where the internal waters claim already applied. But why then did

910 Koskenneimi (2009), at 414.
911 Ibid, at 415.
Legault not clarify to bemused American legal officials the actual position of the Canadian claim? Why was this legal exercise carried out at such length given that Canada was now reneging on the terms of Article 234 and subjecting all vessels to subjective scrutiny? Legault did not state Canada’s position in an overtly concise manner because he did not have to, and more importantly, neither could he do so. It was enough to let the Arctic policy rest on its existing language and legal basis, allowing Canada to adopt a minimalist approach.

Reasons of consistency and pragmatism counseled this strategy and policy choice. Legault believed firmly that a successful argument for history broadly conceived, one that mixed a variety of Canadian policy activities and treaty commitments, could be made when required. Hence the issue of innocent passage need not have dealt the case a fatal blow. But as importantly, Canada had to hedge its bets. Having made the case for twelve years expressly by this point that historic title was Canada’s legal defense, to have shifted the argument would have smacked of inconsistency and begged the question of why Canada was, on the one hand, ‘reinforcing’ its case, while on the other, bringing to light a further contradiction in law. If the argument for history was sufficient, then it had to be allowed to stand if the legitimacy of the policy was to remain intact. Canada found itself ‘locked-in’ to the historic title claim, highlighting how its strategy in preserving the legitimacy of the Arctic policy became a structural effect preventing significant changes. Achieving the benefits of baseline law due to the historic title argument being invalid, as Pharand had argued, could not tip the balance of being both prudent and consistent with the claim for history. In Legault’s thought, we may assume, it was of foremost importance to accomplish the principal task of lawyers: keeping a client out of court at all costs in unpredictable cases.

We may also look at Canada’s broader compliance decision and relationship to international law through the theoretical lens of interactionalism. The central component of interactionalism suggests that, “to the extent that international law is created without adhering to congruence with shared understandings and Fuller’s criteria of legality, fidelity to law – the sense of obligation – amongst states will not be generated.”912 This idea places

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912 Toope and Brunnee (2009), at 26.
reciprocity between actors at the heart of legal decision-making. Norms attain the status of law as they move through the process of attaining legal legitimacy as a “sustained practice.” Norms potentially become cast as obligatory rules, which are then complied with as a modality of law. This process, yielding in an agent a fidelity to law, rests on the reciprocal fulfillment of duties. Accordingly, two positions stand out in the interactionalist perspective. First the law in substantive terms must be seen as legitimate, in addition to the process of its development. Second, there is required a reciprocal relationship between extended community members with similar social identities in an issue area for ‘adherence’, fidelity towards obligations, and thus compliance, to emerge.

Can Canada’s motives and behavior be shown to reflect a manifest lack of obligation towards the law, or one that suggests partial allegiance? While Canada was a participant in the law making constitutions of Geneva in 1958 and UNCLOS, but never bound itself to the treaties, part of this decision was driven by the need not to avoid submission to the baseline rules, but more so on the basis of fishing rights Canada wished to preserve beyond 1958 treaty restrictions. At UNCLOS, Canada probably did not get what it sought under baseline rules, but was not in a position to argue about removing the right of innocent passage through the demarcation of baselines or fight for the ability of off-shore archipelagos to be equivalent in legal terms to that of ocean archipelagos. Hence, Canada was a contributor to a series of international laws which it probably did not want to be associated with but became forced to be bound by. The interactionalist point about a state becoming obligated through sustained practice is critical in the Canadian case. Canada and the United States historically had nothing short of a sharply confrontational relationship with baselines for well over twenty-five years by the point of the Arctic enactment. This involved threats from Washington on numerous occasions, and hostile domestic opposition from public interest groups within Canada when the government had withdrawn from enclosing Canadian waters as internal. Essentially, Canada had become a legal renegade in American eyes through its drawing of baselines on the East and West coasts over the years, and Canadian resolve had increased since the first occasions in the mid 1960’s when the baseline policies of Lester Pearson were scotched. In broader international practices, any sustained practice of baseline law by
American officials was also found wanting. The United States was one of the few states to resolutely oppose the use of baselines as a method of delimitation unless carried out in rigorous and orthodox legal ways. Given that Canada was not formally bound to either treaty on conventional baseline law, but could use an authoritative body of law produced from an international court to guide its conduct, such action along the legal analysis of Pharand would have seemed appropriate and thus obligatory.

But Legault did not follow this route, which suggests that either the historical title argument had to remain given its structural features, that history could be used in some aggregated way, or Legault felt an obligation to the international legal system not to use law in a creative and possibly inconsistent manner. Canada need not have appeared as an overt law breaker if not required to do so, and given the wealth of arguments that could be deployed to assist the Canadian position, Legault’s obligations towards international law and the emergence of UNCLOS likely motivated to some extent his decision-making. In sum, evaluating Canada’s calculus on the timing of the baseline enactment requires understanding that politics and law became deeply intertwined with external political pressures in shaping Canada’s process of legal choice. However, this process cannot be categorized as a purely legal decision-making sequence of foreign policy. The politics of timing a legal response blurred into evaluations of how to frame the argument in international law in order to retain the legitimacy of the Arctic policy’s precedential consistency over time. Hence, international law mattered to the Canadian calculus with as much force as that of domestic politics. Indeed, it was the pressure of law that drove Canada’s Arctic policy change once it was understood that Canada’s reputation/s were likely to be undercut and there were marginal domestic political benefits to be accrued in standing up to the Americans.

**Conclusion**

Canada’s Arctic policy of 1985 had numerous political and legal antecedents. The most fundamental was the uncertainty of the legal case for sovereignty itself. With the construction of Article 234 there came a unique moment to allow existing domestic law to dictate the terms of the Arctic legal case in the short term. But as Canadian officials learned
of the interpretive problems surrounding Article 234 this knowledge caused a sense of unease over how the case should be developed. Once again, the Arctic policy began to move down a path in which Canadian officials learned how to re-consolidate the sovereignty claim within the legal parameters of interpretive possibility. To their benefit, Pharand had for years been constructing what he and other lawyers felt was a sound legal argument. Specifically, these recommendations turned on Canada relying on the customary status of the *Fisheries Case*, the rejection of the 1958 Geneva Convention and the UNCLOS treaty on baseline law, and the right of innocent passage associated with new legal rules. In addition, the use of flexible international jurisprudence to harness the growing reliance on equity in international legal processes marked a skillful move which granted Canada significant policy scope to attach secondary norms to the legal case. Equity was framed as allowing the rights of indigenous peoples to be integrated with what baseline law would allow, conceptually aligning historical livelihoods to rights associated with the sustainability of land, ocean, and ice. The Inuit could therefore be used as the foundational component to Canada’s sovereignty claim, even thought their constitutional rights remained the subject of significant contestation within Canadian government circles.

With the possibility of an American challenge hanging over the legal case, many Canadian lawyers became politically active and politicized international law. Pharand and numerous others placed international law into a framework that defended its authority, pegging it with a discourse of certainty from which law became a policy option that could be cast aside only through ignorance. Arguments of law became the templates from which government conduct and the responsibility of the Canadian state were measured. The politics of international law thus moved into the policy arena with full force and trumped singularly political choice in favor of arguments from legal principle. And yet Pharand and many of his associates did not receive what they sought in this process of politicization, revealing once again a further aspect of the law becoming muted for political ends. Canadian officials took care to preserve the legitimacy of past policy choices. Historic title as a legal response was a broad tent, as Legualt understood, and many of Canada’s most foundational arguments to support it forced
officials to avoid the gamble of changing course and be perceived as presiding over another instance of legal inconsistency.

Politics and international law would, however, come together in Canada’s defense by the end of the decade. The 1988 Cooperation Agreement cemented what was a tightly wound political friendship between the two states leaders, ending *for the time being* any further chance of dispute or misunderstanding on what was and was not contentious in the region. In legal terms, Pharand in his masterwork set out to dispel all claims of Canada’s legal weakness, having had to make arguments to get around the problem of the baselines perhaps changing nothing in relation to standards of international legal validity. If the Northwest Passage could be prevented from being internationalized this was a major step in proving the American position misplaced. Such an achievement would provide legal and political space to set out in detail how the baseline policy contributed not directly to the claim of internal waters, but indirectly to this end by the act of demarcation further solidifying the rule under international law of historical consolidation to title. Within this broader set of arguments the Canadian case became more tightly protected and provided a blueprint to both guide and pressure the Government to claim sovereignty on the basis of effective occupation over the Arctic archipelago.
Chapter Nine: Conclusions

This thesis has argued that when engaging with the question of how international law both matters and works in international politics, theory attempting to account for various dynamics associated with these factors must expand beyond issues of legal compliance. At root, interdisciplinary work needs to continue to explore the myriad ways that law has effects in political life. And as the thesis has demonstrated, these relationships and phenomena come in many forms, all of which come together to highlight the spatial domain and interactive component where the discourses and practices of the law’s engagement with politics meet: the politics of international law. Describing and explaining this interlocking area and mode of action is critical in understanding what I have termed extended foreign policy sequences, interactions within a particular issue area unfolding over time in the policy process that involve a substantial international legal component. Foreign policy sequences of this nature are governed by the politics of international law, and policy construction and eventual policy change are both structured and caused by the dynamic relationship between politics and law. I have argued that we can capture central elements of the politics of international law by thinking about a range of effects that international law has on political thought and policy formation. While these elements are intended to highlight the effects of law in many issue areas and over historical circumstances, in acknowledging that international law facilitates many further roles in political affairs, they have been focused upon explaining the dynamics occurring within extended foreign policy sequences. As the thesis has illustrated, several key components associated with the functions of international law are derivative of classical jurisprudence, while others stem from novel and recent forms of theoretical engagement. These primary functions of international law can be understood as the law’s ability to both constrain and enable states’ policies and conduct; the role of international jurisprudence in facilitating and bounding legal argument and policy choice; international law’s function as a mechanism of communication and discursive technique by which states learn the contents of legal validity; and the use of law as a strategic policy tool that allows states to handle difficult foreign policy positions.
In light of these conclusions, this final chapter addresses four questions: 1) how have the primary functions of international law explained the foreign policy sequence of Canada’s Arctic policy?; 2) in what ways has the theoretical basis for analytical eclecticism been successfully utilized to account for international law’s political effects?; 3) what generalizable lessons can be drawn to illuminate the conditions supporting creative legal arguments and whether the Canadian case is unique to all states with similar governance structures and international legal commitments?; 4) what does the history of the politics of international law reveal about future Canadian Arctic policy?

**The Application of the Primary Functions of International Law to the Arctic**

How can Canada’s engagement with the politics of international law be summarized? Answering this question involves returning to the central theory about the primary functions of international law in extended foreign policy sequences. The first among the primary functions of international law stems from the work of Hart, who explained law as both a constraint on conduct but also an enabler of social purposes. In many cases, law has the ability to impede power from being deployed, acts as a deterrent against self-interested action, and prevents local and international norms from being violated. Conversely however, law also grants agents the ability to carve out claims and make reasonable arguments about what the limits of social contracts are. For Hart, law confers legal powers “to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.”


In the case study of the Northwest Passage, international law’s constraining effects have been apparent at many stages in the thinking and calculations of Canadian officials. Canada felt itself obligated under international law in 1969 to comply with its existing duties on straight
baseline law. Canadian lawyers insisted that in Canada being bound under international law, if it were to draw baselines around the Arctic, in the process of constructing an agreement with the United States the right of innocent passage had to prevail in some form. These obligations foreclosed policy options at the time and ultimately meant that Canada had to continue to adhere to its status quo Arctic policy with the United States. In a similar vein, as Canada was hesitant to commit to an express legal claim on historic title to Arctic waters having made contradictory claims for decades, international law again revealed its ability to constrain conduct. Canada’s lawyers noted in their deliberations the repeated degree to which the historic title claim had been voiced with inconsistency and associated with a disparate variety of legal defenses. And the relatively stringent requirement required in making a claim to internal waters based upon historic title removed it as a legal policy option at many historical junctures when such a claim could possibly have been used. While this ability for law to constrain would appear counterintuitive to many realists in light of the stakes at hand concerning ‘sovereignty’, it seems to be empirically well-documented in this case.

Similarly, the decision by Canada not to take advantage of the condition of legal uncertainty surrounding baseline law as it stood in 1985 further flags international law’s ability to restrain. Canadian officials had what would have been perceived by many international lawyers as a powerful argument to remove the right of innocent passage from prevailing following the drawing of the straight baselines. As chronicled, this was crucial if Canada’s historic title claim was found inconsistent, and the legal authority to claim sovereignty maintained. And yet, Canada took a relatively safe route in legal terms, not largely out of fear of possible American policy recriminations, but because Canada’s legal reputation as it related to the Arctic legal defense required officials to continue to defend the historic waters claim. This was the precedential effect of a policy made thirteen years prior that had become path-dependent and upon which the legitimacy of Canada’s broader legal claim rested. Hence, Canada’s existing position under international law had to be maintained for legal and legitimacy purposes, thereby foreclosing the possible option of using baselines to not only delimit the historic claim but also remove the right of innocent passage altogether.
More interesting than the empirical demonstration of the law’s restraining capacity is the concomitant function in this case of the law’s enabling power. In the Arctic policy case, the constraints imposed on Canadian lawmakers with respect to historic title themselves became enablers of legal creation in the realm of Arctic policy. Because the international law on baselines was seen in the eyes of many Canadian officials as binding, other Canadian policymakers and international lawyers found themselves forced to ‘remake’ international law in a difficult circumstance. In other words, the AWPPA should be understood as a creative legal argument that allowed Canada in many ways to change the subject on the nature of its objectives contained within the legislation. For it was clear that while a claim to sovereignty was denied by many Canadian legal authorities as this related to the contents and scope of the AWPPA, all those seized of the issue understood the legislation as contributing in some form to Canada’s Arctic legal claim. Canada’s motives in constructing the AWPPA were therefore mixed. For on the one hand, there was no question that the measures were a way to consolidate sovereignty and legal capacity, while on the other, Canada was also concerned about ecological preservation in the North in an increasingly mechanized world governed by the monopolistic control of flag states with marginal interest in protecting ocean life. The varieties of legal effects and aspects of international law associated with creative legal arguments were therefore largely constructed not despite the law’s restrictive power, but as a direct result of the restrictive rules imposed on Canadian conduct. It was precisely the real constraints of the prevailing baseline law that led Canadian lawmakers to the correspondent recognition that defense of historic title existed outside legal boundaries, as understood at that time.

Thus, the facilitative element of law, as juxtaposed against its constraining effect on policy, was witnessed in many ways. The AWPPA was a creative legal argument in that the existing state of international environmental and pollution law in 1969 was framed by Canada as a hazard to what ought to be considered a reasonable level of protection afforded to unique areas of the oceans and more broadly as a measure against the increasing threat of coastal state contamination. Once Canada could make a case that the existing law on ‘sovereignty’ as this related to Arctic claims was not being misused for self-interested purposes in relation
to the AWPPA, Canada was able to argue that it was working outside of these boundaries in new areas which remained fertile for the development of social conduct within the international community. Canada could draw upon functionalist terminology to incorporate its new identity as international trustee in order to protect social values caught up with scientific understandings and ecological principles. In short, Canada could use a newly emerging understanding of legitimacy to move into areas beyond those considered strictly legal by international law in terms of sovereignty.

In relation to the second primary function of international law, both the restraining and enabling effects of international law are also constituted within the features associated with international jurisprudence. There are a variety of functions jurisprudence undertakes in legal evaluation and policy decisions, all of which stem from legal philosophy as a communicative medium through which the law’s contents and purposes are conveyed. Legal theory functions first as a structural constraint on legal orientations and the broader questions of whether law is formulated around distinct purposes, how legal sources are referenced, and through what methods legal appraisal should be carried out. In practical terms, lawyers become anchored in particular jurisprudential discourses, and are at times either unable to acknowledge their allegiance to a particular theory or unwilling to be removed from what is seen as the correct way to look at or evaluate international law. This structural constraint provided by legal jurisprudence adds another dimension to limits placed on legislators as theory often effectively selects the appropriate and valid sets of norms and rules applicable to particular cases. Thus norms and rules are imposed on lawmakers, not evaluated and chosen a-contextually, as is often assumed. As Raz notes, jurisprudential theories are concordant in many cases with theories of legal systems, which gives rise to the selection of legal sources and correct bodies of law for cases based upon what a jurisprudence insists are the fundamental features of law.914 For Beckett, it is debates within jurisprudence concerning the law’s purpose, what the law does, and how it is found, that in turn give rise to lawyers being informed about the proper norms for existing cases.915 This is the structural-

914 Raz (1979).
ontological function of international law, in which jurisprudence narrows the range of choices associated with finding law and the reasons to support legal arguments. These reasons are grounded in the larger substantive debates reflected in jurisprudence, and allow jurisprudence to have transformative effects on policy choice and policy argument, whether in reference to why and how the law relates to morality and ethical conduct, or how the law provides standards with which to evaluate action in both legal and ethical terms. Jurisprudence, therefore, serves to provide lawyers with their generative grammar in their attempts to sway opinion toward a particular position.

In the Arctic case, it seems that international jurisprudence served a range of these functions. For many of Canada’s venerable and senior lawyers in 1969, British positivism functioned as a structural constraint in detailing where the thresholds of international law existed in relation to moral judgments. These referred to claims made either on the basis of sovereign entitlement to territory and extension into coastal waters, or ethical arguments constructed on the necessity of preserving the oceans from oil spills. Most specifically, positivism outlined the sources of international law beyond dispute, while also bringing a degree of clarity to legal proceedings and allowing reciprocity to unfold between states on the basis of equity and the requirement of consent. Positivism infused order into the legal realm by framing law as a formal category operating in a binary fashion. An act was legal or illegal, punishable or not. And this feature of positivism removed extraneous normative arguments from legal proceedings. Legal order brought stability to international relations, even though this type of order was also a form of justice structured by the capabilities and capacities of powerful states.

For many in External Affairs in 1969-70, positivist international law was a restraint against creative legal solutions such as the AWPPA, the latter of which were bound up with normative ideals and social principles existing beyond boundaries of legality. For other Canadian lawyers, creative legal appraisals based upon the rights and duties owed to the international community in its ever expanding membership was the default condition for jurisprudence. For this expanding group, the Yale policy school was the progressive future towards which the new international law was pointed. Policy jurisprudence was suited to be
embedded within general Canadian practices, and especially in areas where international law remained undeveloped and in need of teleological re-orientation. In Canada’s Arctic deliberations then, ‘international law’ constrained policy by not allowing Canada to retain a positivist position and marginalize its claims to sovereignty. Because policy school jurisprudence provided an alternative view of what types of facts and norms were deemed authoritative by a range of expanding legal sources, a restrictive reading of law was not only a bad reading of law but an entirely unproductive exercise in the pursuit of broader, ‘inclusive’ community aims. In this example, the facilitative elements of jurisprudence mixed with its restraining effect in marginalizing what was once Canada’s dominant legal identity and preferred jurisprudential orientation in international law. Ultimately, policy school frameworks, and McDougal and Burke’s reading of international law of the sea under this heading, provided the template of norms for Canada to select from in dealing with the Arctic case. The right of innocent passage was of sufficient interpretive flexibility to permit security provisions based upon preventative action to be read into the rules. The contiguous zone was an area structured around an arbitrary distance to assist states in acts of sovereignty and coastal area protection. Because the security threat referred to was in this case viscous (oil) and did not adhere to territorial boundaries, it followed that the rule of protection grounding the idea of the contiguous zone had ceased to retain the function and purpose for which it was created. It could therefore be circumscribed in order to make new international law given that authority was shifting on the matter within states and global discourses. In short, the policy school selected for Canada the relevant norms of the Arctic case and also the preferred language of justifying legal policy on the grounds that the purposes of international law had to be reflected in the obligatory nature of the rules being considered.

In relation to the third primary function of international law, as communicative discourse and argumentative interchange, in this guise law acts as a dialogical tool in allowing states to learn its contents and thresholds of validity. This is but one of many components associated with the law’s relationship to communication. Learning the law means to understand what it requires, where gaps exist, and specifically, where the boundaries of good arguments exist in relation to those that cannot meet the criteria of legality. In social terms, the act of learning
the law in particular cases involves updating one’s information on how law relates to fact patterns, what types of arguments can be invoked to support positions, and under what circumstances these may prevail. Learning international law on the Arctic for Canadian officials required being involved directly in the dialectical exchanges occurring within the international legal college over a period of years. And this was a rather tightly knit group. It is worth recalling that the international legal college at the time, and particularly in the late 1960s, was a relatively small and homogenous cadre of officials in the West, most of whom knew one another well in professional terms and engaged with each others’ work as academics and representatives of states’ legal departments. Many carried great authority in public international law and the law of the sea, and these few shaped the range of arguments and the contours of the legal debates that Canadian officials could rely upon to construct and reconstruct the Arctic legal case over time.

Canada had to learn where the fault lines and points of significant contention in its case existed, why, and on what basis this was so, in order to craft a credible rebuttal and have this critiqued by international political audiences and jurists. Pharand’s interchanges with the world’s most eminent jurists were largely the basis upon which Canada learned how to assemble a valid legal case in an aggregate manner. In most instances, when Pharand’s analysis made clear that a reasonable case could be made to support Arctic sovereignty, and the right institutional and political circumstances prevailed, Canada embarked upon policy change to provide authority to its case. Hence, this process of claim and counterclaim allowed Canadian officials to distill what had to be proven in front of an international court if sovereignty were to be preserved. Learning the law through its communicative interchanges proved definitive in the evolution of Canada’s policy over the entire forty year period.

Fourth, and by extension, international law functions as a form of strategic resource to assist states facing difficult foreign policy predicaments. States can use international law through rhetorical forms as creative legal arguments. The primary constitutive features of creative legal arguments involve the act of blending the requirements of legality with elements of existing legitimacy discourses that exist within international society at a given moment. In so doing, states employ legitimacy as ‘political space’ to mediate between the requirements
of legality, the demands of constitutionality in the international sphere, and contemporary moral discourses. The end result of this dialectical interchange compromises formal readings of legal validity, as normative expressions and ideas condition what the law informs in cases. Creative legal arguments also rely upon the power of constitutive and interstitial norms to modify or fill gaps in legal spaces where lacunae may emerge. Such norms give supplementary purpose to legal rules and at times facilitate change within existing legal interpretations by allowing competing principles to be reconciled. This power to bring harmony, or legal completeness to complex cases, serves as a means to develop international legal arguments towards preferred ends. Much the same technique is afforded states when they rely also on the ability of overlapping legal regimes to delimit the scope of international law in particular cases. Because the international legal system is increasingly pulled apart and fragmented between its specialized international regimes, states are afforded the possibility to draw on a variety of legal regimes as these relate to factual circumstances. Hence, states can manipulate legal regimes to suit their preferred interests by placing emphasis upon a certain regime.

Pursuant to a state’s legal strategy, particular elements of law are argued to be the primary legal architecture through which a legal argument must be viewed and legally appraised. Indeed, states go one step further and ‘blend’ legal regimes, noting that although one regime applies to many of the broader contours of a case, several secondary regimes do as well. This intermixture provides states with a critical argumentative weapon: that of being able to destabilize or problematize the assumed basis of their particular case. For in circumstances in which a legal problem has legitimate elements of multiple regimes, how, and to what degree these regimes relate will be a matter of contemporary legal authority and political judgment. Finally, states can reinforce their claims under international law by invoking progressive jurisprudence to buttress their cause. Because creative legal arguments are strategic communicative techniques that push against the limits of international legal validity, states by necessity require a progressive jurisprudence to unsettle what the terms of validity are in relation to their legal claims. Specifically, states need to rely upon arguments situated in ideas surrounding the law’s purpose. If international law is created to serve the interests of
justice, peace, welfare, or equity, a jurisprudence that points in these directions, one that limits political discourse and policy change to the purposes for which law is created, is essential for states’ argumentative success.

Canada drew on all of these criteria in assembling its creative legal argument in 1969-70. Most importantly, it allowed legitimacy discourses to mediate the requirements for legality in the Arctic. The emerging progressive discourse on ecology was seized upon to argue that an increased awareness of ecosystems led to greater obligations owed by states presiding over unique areas of the global commons. The oceans, including the Arctic, connected the natural world to the human world, carrying with them the possibilities of human development and prosperity for previously colonized peoples. To recall, in the late 1960s the moral purpose of the state was changing. Sovereignty was seen as an absolute right all states possessed, and the administrative capacity over land and resources carried with it the possibility to reverse development patterns harmed by empire. As sovereignty over resources became a well entrenched right under international law, the moral purpose of the state became partially altered to reflect the right to collect resources beyond borders within waters adjacent to land. Indeed, it was clear to Western states that if the development problems were not addressed, the possibility of order being brought to the oceans was marginal. President Nixon’s comments to Kissinger in 1971, following a lengthy disagreement over fishing rights with Brazil that threatened to derail movement towards a new law of the sea conference, reflected this tradeoff. On whether the United States should negotiate a settlement with Brazil or hold as the Department of Defense insisted, a show-down over jurisdictional fishing rights, which might bring all Latin American states to oppose a new oceans conference, Nixon held:

Nixon: I don’t give a damn about the fisheries anyway. Let everybody have 200 miles to fish. They’re all poverty-stricken down there anyway.

Kissinger: If we dig in on the fisheries, we’ll lose on navigation?

Nixon: Navigation we want. Let them fish if they want. That’s my view.

Kissinger: Well, that’s my recommendation, Mr. President.916

http://www.state.gov/r/pa/ho/frus/nixon/e1/53090.htm
Canada built on this emerging narrative about the moral purpose of the state as it related to resources and development. Limits had to be placed on states which saw the oceans as solely areas facilitating commerce and military strategy, and this structured Canadian motives as they related to vital United States interests. In a private memo from State Department lawyer Robert Neuman to legal advisor John Stevenson, Neuman recalled that

With regard to transit through international straits, DOD insists that unrestricted free passage for warships as well as merchant vessels be guaranteed as the price for USG agreement to a territorial sea wider than three miles... DOD argues that the USG must enthusiastically oppose broad special-purpose jurisdictional limits, even if such limits come about as the result of multilateral agreement. Thus, for example, DOD opposes a treaty provision giving coastal states special jurisdiction for pollution purposes beyond the territorial sea. Defense also opposes special coastal state resource jurisdiction beyond territorial waters. 917

In direct contrast to the United States’ position, Canada presented the case that the world’s ontological understandings of the oceans required expansion to reflect the range of challenges a growing society of states generated. These debates about the relationship between morality, constitutionality, and legality produced a basis for claims of legitimacy to be voiced about how the Arctic related to existing international law. As Canada stressed, the preservation of Arctic ecology was linked to a state’s right to self-protection given the risk of injury to coastal peoples. The existing law of the sea could not be made the primary legal regime to adjudicate the case, but only serve as supplementary material from which pollution prevention norms structured Canada’s burden of proof in meeting thresholds of legality.

**Theory Building**

These elements that in part constitute the four primary functions of international law are an attempt at theory building in the interdisciplinary exercise. In merging classical legal theory and ideas in contemporary international relations and international law from the perspectives of constructivism and critical legal theory, the aim has been to consolidate part of this growing understanding on how the law works in world politics. More narrowly, these categories of legal function have been intended to have specific application to situations of

917 See US Department of State, Oceans Policy in the Nixon-Ford era: Memorandum from the Assistant Legal Adviser for Politico-Military and Ocean Affairs (Neuman) to the Legal Adviser of the Department of State (Stevenson), Washington, October 20, 1970. http://www.state.gov/r/pa/ho/frus/nixon/e1/53215.htm
extended foreign policy episodes that involve a variety of legal interactions. Creative legal arguments made with the intent of solving awkward compliance problems serve as a conceptual innovation for theorizing both how and when states will engage in particular types of rhetorical strategies. To be sure, states quite consistently espouse legal commitments which are tenuous and non-committal, leading commentators and pundits to question the efficacy of international law on a broader scale. However, these particular types of creative legal arguments are always in some sense possible, but made all the more available in situations where the fundamental institutions of international society are the subject of contestation. These international architectures refer to the moral purposes of the state, the regimes of international law, and the core elements of public international law more generally. All of these institutions were the subject of strain and in a position of flux in 1969-70 when Canada was forced by events to construct a legal case for the Arctic. Hence, there was considerable latitude for Canada to make a successful plea to both domestic and international audiences.

With that acknowledgement, scholars argue quite rightly that norms are always the subject of contestation with such debate constantly being carried out in a dialectical fashion over the dominant interpretations of normative content.\textsuperscript{918} Moreover, understanding rules requires acknowledging that the real debate over law begins after rules have been invoked, not as a result of their being rhetorically relied upon in the first instance. Rules, therefore, are only the starting point of discussion, and legal fracture and contestation are the inherent features of the international legal system and states’ engagements within it.\textsuperscript{919} Such positions are undoubtedly accurate, and find common cause with Koskenniemi’s contention that the international system is constantly subject to political and ethical manipulation. However, as I have tried to describe, there are times in which the core of international law specifically is both fractured and divided pluralistically over what the institutional features of international law are. To be sure, elements of this type of dispute over the inner consistency of international law presumably exist in all eras of international legal history. The nature of

\textsuperscript{918} Perhaps the best expression of this argument is Weiner (2004).

\textsuperscript{919} See Klabbers (2006)
international law, its basis in social life, and its interactive component in guiding states conduct, is constantly evolving. International jurisprudence develops in concert with these adjustments. Yet there are moments in history when levels of contestation within international law and its jurisprudential frames become deeply controversial and largely irreconcilable. And the policy-school approach, as set against the traditions of British positivism, was one such period in the late 1960s. Positivism had become discredited in the eyes of many western scholars, and the upsurge and consolidation of jurisprudential alternatives forming around progressive readings of law provided a rich array of ideas to think about international law in new ways. In relation to legal regimes, the law of the sea was considered by its principal interlocutors, both states and international lawyers, as decidedly contested in that compliance was widely fraying, legal breaches were common, and moral basis of its rules cast in question by a substantial section of the society of states.

From a theoretical standpoint, creative legal arguments are examples of international law being deployed within the co-constitution of agents and structures. This feature allows critical legal theory and constructivism to be brought closer together in a more productive union. To this end, constructivists have been heavily engaged with theorizing the concept of legitimacy, while critical legalists have been setting limits to this engagement and in particular the role of international law as it relates to claims of legitimacy. Yet both sides see the benefit of viewing the history of international law, its development and generative processes, as explained through the perceptions and structural effects within which lawyers are situated over time.

In particular, one primary question the thesis attempts to draw attention to concerns the relationship of legitimacy and legality, and how states negotiate this terrain in their communications and international practices. In staking out new ground I have attempted to contribute to Coleman’s recent suggestion of research which probes “how states learn what measures are necessary to ensure international legitimacy of technically illegal activities.”920

As suggested here, states navigate this terrain by learning through interactions not only where

920 Coleman (2008), at 286.
the thresholds of legal validity lie, but how competing discourses surrounding legitimacy can complicate and complement existing international legal appraisals. In explaining creative legal arguments as a novel form of dynamic law-construction and the use of rules in legal exchanges, the further aim has been to apply Koskenniemi’s insights to constructivism’s focus on the supplementary and constitutive functions of norms.

Several other conclusions can also be drawn out in relation to the comparison of critical theory and constructivism when thinking about the range of politics in law. As a concept, the politics of international law is a debate about the central focal point of the law’s ontology, or, in other words, its relative autonomy. Indeed, this is the primary area of contention which analytical eclecticism provides an opportunity to explore in theoretical and empirical terms. Arguments from constructivists that policy-makers move from political to legal domains when handling issues of international law infer that a relatively autonomous political domain does exist. But even these claims are more nuanced than would first appear in that it is the type of politics that differs within legal realms when law is being deliberated. For some constructivists, there is, in effect, a ‘purer politics’ when law is absent in an explicit form, and a legalized politics that moderates political discourse and demands. Legal autonomy remains relative but stronger or weaker depending upon what role law plays in foreign policy. However, though this insight is essential in providing a set of possible ways to theorize the politics of international law, constructivists have not empirically operationalized the concept to an entirely coherent degree. Indeed, they continue to struggle with the problem of how to explain when one might know that the law is “present” in a situation or “matters”, therefore, in political debate. Constructivists fall back upon the idea that law is known through its “use”, that is, through its rhetorical deployment as evidenced through certain types of argumentative and discursive forms. These are outlined as the use of analogy and rhetoric, both of which constitute the distinctive nature of legal discourse. Hence, the legal component of norms and rules is present when these are used in argumentative ways. And this engagement by actors denotes, in turn, an autonomous institutional realm for law. For Reus Smit, “actors enter into the realm of international law when they feel impelled not only to place reasoned argument ahead of coercion but also to engage in a distinctive type of
argument in which principles and actions must be justified in terms of established, socially sanctioned, normative principles.\footnote{Reus-Smit (2004), pp. 40-41.} But why or how this type of rhetorical reasoning differs from general ethical and political judgment is never fully explained in the constructivist contribution. This leads to the question of how autonomous the institutional realm of law is in the first place if one cannot squarely know whether law is being deployed either meaningfully or rhetorically.

Such critique, however, is hardly fatal to the constructivist project with international law, for it amounts only to saying that proof of the law’s existence must exist in something beyond the law’s use in language. And this, as Beckett has explained, is difficult to prove in that there is sharp disagreement over whether the effects of law can ever become manifest or evident in behavior or thought.\footnote{Beckett (2005), at 216.} At root, then, the politics of international law rests on an epistemological conundrum. How would one know when law is being deployed in some pure form? If interpretation between lawyers leads to the charge of the politicization of law, or the overlap of ethics and legal principles, there then is no way of declaring an essential autonomy for international law even if one falls back upon positivist categories such as the centrality of sources doctrines and state consent, for example. Thus, we are but one step away from the charge that the politics of international law is a relatively structurally determinate phenomenon which leads to legal indeterminacy, as critical legalists argue. Given such uncertainty, I have suggested here that rather than take one or the other side in this debate, progress can be made by allowing the central insights of both approaches to illuminate certain features of the politics of international law. In short, the interdisciplinary project can benefit from adopting, when appropriate, the theoretical approach of analytical eclecticism.

However, several issues need to be unpacked in order to draw out conclusions about the utility of analytical eclecticism for international law, and in particular its use within existing theory. As noted in chapter two, the intent in deploying eclecticism is to capitalize on existing theoretical knowledge, unhinging elements from existing domains, in order to re-
combine ideas with more comprehensive theoretical utility. The fault lines for this move were to be pragmatically orientated but focused on the implications of theoretical re-combinations. This suggestion cuts two ways for the work presented here. First I have argued that the three major theories of international law (realism, rationalism, and interactionalism) all suffer in some form from inconsistency in that none can make an absolute claim to holism and explain the entire role of law in political affairs. They are thus inconsistent in this minimal sense, but certainly not in any larger understanding. All approaches do explain many areas of legal interactions with great accuracy and depth. Hence, my aim here is congruent with the comments of Jackson and Nexon in being concerned with the implications of being eclectic with these theories rather than focusing more broadly on their claims to internal consistency. To recall, if any of the holistic theories could make a reasonable claim to being comprehensive across legal and political domains, there would be little need to construct new theory to challenge these on a complementary theoretical plane. Hence, the second issue turns on what the implications are for adopting various components of the major theories in understanding compliance: the realist variable of power/self-interest, rationalist’s use of reputation, and the role of obligation in the interactionalist account.

What has been attempted here is a minimalist form of analytical eclecticism. There has, in other words, been no attempt to deeply integrate the variables of power, reputation, and obligation into the broader theoretical strands focused on the primary functions of international law. Yet this type of theoretical orientation is occurring with the interdisciplinary debate. For example, Guzman’s development of the concept of reputation has taken this task some way in bringing elements of realism into rationalist debates. Interactionalist theory rests many of its assumptions on constructivist aspects of collective identities and the use of shared understandings in producing normative outcomes. By slight contrast, the aim of this thesis has been to let the variables from holistic theories become

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923 Jackson and Nexon (2009), at 926.
924 Guzman (2008).
workable in order to complement the existing theory developed on the primary functions of law. For example, realists insist that most compliance decisions, and particularly those in matters of high politics in which sovereignty and territory are at stake, are often taken in disregard of existing international law. And indeed, this is largely what guided Canada in its decision-making in 1969-70. But even on this point it has been shown that Canada did view many aspects of international law as binding, implying that Canada did not reflexively disregard its legal obligations. Rather, it reasoned that a more strategic form of legal appraisal and policy response was warranted. Hence, power and self interest played a role in structuring the major component of the first Arctic compliance decision, but Canada’s existing legal obligations, along with the contested structures of international law and international society, also gave rise to the creation of Canada’s creative legal argument.

From the position of legal reputation, rationalist explanations point to how Canada was attempting to cultivate several international reputations that could diminish or mitigate its ‘blow’ to international law, broadly understood, rather than Canada be viewed as acting unilaterally. Reputations mattered for Canada, but which reputation was at stake in its move of non-compliance was uncertain. That Canada did ‘formally’ breach international law and suffered a reputational sanction as a result reflected Canadian judgments about the integrity of its position and what on balance would be lost or damaged in relations with the United States. Rationalist theory thus neatly captures this element of Canada’s thought. However, rationalism also focuses on how Canada’s creative legal argument entailed shifting its legal identity and relying upon different legal regimes and jurisprudential arguments to make its case. In destabilizing the framework of the Arctic and drawing on interstitial norms to demonstrate the complexity of the problem, Canada simultaneously shifted the discourse about reputation. Was Canada breaching the international law of the sea, or more precisely international law on ocean pollution? For most lawyers Canada was impinging upon both, but the creative legal argument allowed Canada to re-constitute its reputational loss and reflect it as a providential gain for the world’s underdeveloped and coastal states. Ultimately, the ways in which Canada deliberated upon how its reputation would be damaged were captured in the contents of its creative engagement with law.
Can the case of the Northwest Passage inform additional types of cases in international relations? If so, for what types of states may the politics of international law and the various functions of international law matter more or have greater effect? Or was the ‘Canadian’ element within the case a fairly unique feature which explains much of the legal process surrounding the politics of international law in the Arctic? In relation to the first question of how the case may fit within broader international contexts, one position deserving further evaluation turns on when we may expect creative legal arguments to unfold in future given the current states of the international system. To be sure, there are many ways to extrapolate from the Northwest Passage case, but the issue of the conditions under which strategic legal arguments are made is critical for building knowledge about states’ interactions with law and the legal system. In short, I suggest that we may expect the opportunities for creative legal arguments to diminish in the near future, but historical windows will be present for states to suggest that interstitial norms must inform the legality of foreign policy decisions. This conclusion derives from the current dynamics associated with the international legal system, and specifically its competing pull between the forces of fragmentation, legalization, and regime specialization.

It is undisputable that the international system is passing through a historical phase in which the density of legalization, the range of legal mechanisms, actors who have access to international law, and the types of issues which have reference to international law are increasing. There is, in short, a ‘thickening’ of international law in all areas of world politics as states have increased the scope and their international legal obligations and the international system has become interwoven with a proliferation of international courts and dispute settlers. This emergence of international judicial bodies has led to beliefs that the international legal system is facing a period of fragmentation due to the lack of formal hierarchy between these bodies, in addition to an overlap of jurisdictional competencies and subject matters. International law as derived from these courts is increasingly forcing its norms into domestic legal debates and national courts, structuring in some instances national dialogues about foreign and domestic policy. At the same time, international regimes are
hardening and becoming relatively specialized areas of international law. To be sure, as the International Law Commission suggested, international regimes have always been linked juridically to the core elements of public international law, but the Commission’s authors also strongly perceive regimes becoming increasingly insulated and autonomous.\footnote{‘Fragmentation of International Law. Problems caused by the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission. Finalised by Marti Koskenniemi, UN Doc A/CN4/L.682 (13 April, 2006).} This phenomenon contributes to the fragmentation of international law through the mechanism of regime specialization. For example, as the law of the sea hardens over time its norms are being consolidated by states in numerous areas and through its dispute settlement mechanisms. As international economic law continues to inform world trade on the basis of law, this domain will increasingly be self-contained by economic legal practices. And as international criminal and humanitarian law through new institutions become greater integrated and systemized, we may expect this area to grow from its core norms and ideas about how international crimes can be understood across states and circumstances. However, this is not to say these areas are capable of being sealed from regime interactions and competing norms. Presumably, issues of economy will in some cases guide law of the sea efforts that in are in force in order to arrive at conclusions about how equity must be understood. Continental shelf boundaries will be conditioned in relation to claims concerning security or types of ‘territorial formations’ (islands, rocks, or man-made items) in the ocean. We may expect human rights law to continue to interact and inform international humanitarian and criminal law in types of armed conflict, and domestic social values to clash and have effects within trade disputes within states. In other words, normative interaction between regimes can also be expected.

But with regime specialization and relative autonomy will arrive opportunities for states to make claims that interstitial norms must fill gaps within cases. This is inevitable due largely to a separate process unfolding in international organization and international regime complexity. While regimes are becoming specialized and specifically in relation to their
legal boundaries, concurrently many areas of international affairs are the subject of overlapping, nested, and layered international regimes. In these domains, a regime can be the subject of competing authority from a variety of international institutions, or embedded within a series of competitive regimes focused on several areas of state conduct. The broader effect of this increasing complexity has specific ramifications for international legal arguments and in particular for states attempting to formalize special rules to their benefit in the process of implementing a regime’s rules. While international cooperation is critical in evaluating how states will perceive their legal commitments, the manner in which policy implementation is carried out matters equally in providing opportunities for states to be creative with international legal rules. As Alter and Meunier note, regime complexity adds a novel dimension to thinking about the limits and possibilities of legal interpretation in that complexity “reduces the clarity of legal obligation by introducing overlapping sets of legal rules and jurisdictions governing an issue.”926 The upshot of this feature is that states may be inclined if possessing common preferences to resolve conflicts across legal regimes by paying specific attention to cross-cutting areas of legal application. Where differences of opinion prevail and state preferences diverge, however, such a gap opens up the possibility for states to block rules intentionally and allow legal ambiguity to persist. The international legal system becomes further fragmented as a result. These circumstances apply not only to states being able to ‘shop’ for preferred venues of arbitration and thus select in some sense their preferred rules, but alternate legal venues also allow for different types of actors to be part of the political process and increasingly so in international trade law. Accordingly, there are opportunities for states to exploit the overlapping structures of regimes and allow interstitial norms to guide and at times become central elements informing legal cases.

This conclusion adds further depth to thinking about the conditions under which creative legal arguments may emerge. To recall, states have windows of opportunities to deploy creative forms of legal rhetoric when in some combination the institutions of international society are the subject of contestation. Generally, the circumstances reveal that the moral

926 Alter and Meunier (2009), at 16.
purposes of the state is under pressure to be recast in new directions, international law and its jurisprudential bases are challenged, and international regimes have become sites of normative conflict. These various elements may materialize in weak or strong forms, and through a variety of combinations for states to seize strategic opportunities to advance international law, but essential to this is that the core regime informing a case is contested. Hence, a competition between two forces is likely to guide the possibility of creative legal arguments. As international law consolidates its regimes, there ought to be fewer instances of substantial regime contestation in future and less ability to argue that a legal regime has ceased to provide authority and bind legal subjects. But as jurisprudence flowing from international courts contributes in some form towards fragmentation and states exploit regime complexity by reasoning within overlapping sets of legal rules, we may expect legal obligations to become strained and creative legal arguments used when necessary. Much will turn on whether the pace of a regime’s development contributes toward a regime being hardened and autonomous, but also in relation to the broader institutional framework it is nested within.

If the circumstances of creative legal arguments remain likely to diminish, what can be said about the types of states willing to deploy them? In other words, how do broader issues of compliance and judicial creativity relate to certain types of states? In some direct sense, the strength of a state’s legal department will allow it greater possibility to construct arguments drawing on legitimacy and competing normative concerns given that when international lawyers understand the intricacies of argumentative techniques states are broadly speaking afforded greater types of power in their legal relations. However, data on compliance rates is only a partial indicator of the possibility of creative legal arguments being used, particularly because these arguments are assembled to push against the limits of international law rather than be perceived as direct legal breaches. In other words, knowing about the frequency of compliance only partially assists understanding the types of conditions that produce creative legal arguments within political regime types. Given the strength of Western legal departments, should liberal states be expected to be likely candidates to most often use law in strategic fashion? There are reasonable grounds to think affirmatively, given that powerful
liberal states are the authors of most changes in customary international law and possess extensive legal resources and expertise. These states should be inclined to ‘behave better’ than non-liberal states in carrying out their international legal obligations. And indeed liberal international relations theory and international legal theory posits that states such as Canada, EU member states, and the United States will behave with greater consistency with international law due largely to the centrality of the domestic rule of law within government.\textsuperscript{927} Liberal states are expected to act in a more cooperative fashion with similar types in their diplomatic and foreign relations. However, as Alvarez has shown, there is marginal consistency to this claim given that the United States appears not to distinguish between liberal and non-liberal states when engaging in forms of dispute settlement possibly requiring a creative legal response.\textsuperscript{928} Further, it has become equally problematic to make the case that the European Union meets higher standards of compliance than the United States and thinks about international legal obligations in radically different ways. Authors recently engaged with this debate have concluded that legal exceptionalism – a nation applying or seeking to apply a legal rule for itself that differs from a uniform existing or emerging international norm reflected in a treaty – does not comport with United States’ actions as is commonly assumed.\textsuperscript{929} The rule of thumb rather is that legal exceptionalism and the ability for states to disregard some legal obligations some of the time is rather unexceptional in states conduct, European or elsewhere. Goldsmith and Posner echo this view in demonstrating that not only is there inconsistency in most states international legal commitments, but that the European Union has on many occasions violated the UN Charter, world trade law and environmental law, and gone so far as to pronounce that that EC law has precedent over international legal obligations flowing from the UN Security Council.\textsuperscript{930} Hence, with only rudimentary evidence that developing states appear to have greater compulsions towards international legal compliance than developed states,\textsuperscript{931} it is

\textsuperscript{927} See Slaughter (1995).
\textsuperscript{928} Alvarez (2001).
\textsuperscript{929} Safrin (2008).
\textsuperscript{931} See Downs and Jones (2005).
difficult to predict with certainty which types of political regimes will be more disposed towards engaging opportunistically in legal creativity.

As such, this begs the question of what role or effect ‘Canada’ played in this type of historical instance involving the politics of international law, and how developments may proceed in Canadian diplomacy, foreign policy, and legal reasoning in future. Presently in the post Canadian Charter era, while Canadian courts draw favorably on international human rights law and are increasingly moved to incorporate the views of customary international law into decisions in what has been called Canada’s “adoptionist” format, Canadian courts operate with greater caution and act in a confused fashion towards how the sources of international law relate to Canada’s domestic legal order. Ultimately, it is Canada’s domestic constitutional framework that determines the degree to which Canada’s international legal obligations are given force and meaning. Things were, however, somewhat different in 1969-70. Again, the argument presented in this thesis maintains that Canadian officials were presented with an opportunity to adopt in some fashion a new international legal identity if the opportunity arose, and the Northwest Passage incident facilitated this transformation rather than Trudeau’s vision of a new progressive foreign policy. For our purposes here however, the direct question is not distinctly whether another state could have done what Canada did in 1969-70 in making an equivalent compliance calculation, but whether there was something uniquely ‘Canadian’ that gave rise to this historical possibility. And that Canada was placed to adopt a new progressive legal orientation does demonstrate Canada’s uniqueness to carry out a creative argument. But apart from the ability for Canadian legal officials to persuade states and jurists that this move was not strictly opportunistic, officials were also in a relatively privileged position to create an aura of legitimacy around the idea that environmental norms needed to be factored into the law of the sea and more broadly into foreign policy strategies. The environmental and scientific discourses of the 1960s resonated heavily with North American audiences and Canadians in particular. As Canada was attempting to distinguish itself from the United

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932 See Brunnee et al (2006), at 184-185. While Canada’s approach to custom is seen in this direction, its approach to treaty law is considered ‘transformationist’ in treaties requiring domestic enactment by Parliament to incorporate direct effect.
States in areas such as economic ideology, social distribution, armed conflict, the necessity of alliances, and an expanded set of obligations owed to the developing world, adopting a novel stance on the environment as it applied to Canada’s ‘mystic’ Arctic frontiers was a plausible and somewhat straightforward move. Because the moral purpose of the state was changing towards a more complete right to resource exploitation in territorial areas under sovereignty, and Canada was championing a shift towards more equitable dealings with the developing world, it was able to be perceived as an honest broker in being given greater discretion to break, and thus change, international law. In many ways, the Arctic policy and creative legal argument had aspects within each that rang parallel to arguments being made in the developing world. While Canada’s international legal position provided it a unique opportunity to advance a creative legal argument, its position on the necessary shift on the moral conditions of sovereignty globally, and an ‘enlightened’ domestic support for environmental protections, allowed the politics of international law from 1969-70 to move forward.

The Future Politics of International Law in the Arctic

Finally, what of future possibilities? Is a policy trajectory driven by the politics of international law likely to continue in future? How may power, obligation, and international law interact over time in Arctic affairs? Legal realists have weighed in on this specific question in recent years in relation to Canadian and American legal history and the role of geopolitics unfolding in the Arctic region. Writing in 2007, Eric Posner argued that

[p]ower, not international law, will settle the issue. Indeed, international law recognizes this fact by making title dependent on a nation's ability to exert control over an area. That is why Russia is sending ships into the Arctic, and why Canada is saying that it will patrol the Northwest Passage. As long as such expressions of power are credible, other nations, disadvantaged by distance, will generally acquiesce and sovereignty will be extended accordingly. Russia's expression of power is credible; Canada's is not. Canada cannot prevent other countries from sending ships up the Northwest Passage, as the U.S. has demonstrated from time to time for just this purpose … Control over the seas is determined by two things: power and propinquity. With respect to the Arctic, Russia has both. The U.S. has power but not, for the most part, propinquity; Canada has propinquity but not power. As long as the U.S.
As the subjugation of law to politics (power) is overwhelming for Posner, it comes as no surprise that he believes the issue will be settled on the basis of material power and in large part because the Russian element in the Arctic provides a useful background to think about tangible legal occupation. Canada’s natural geographic advantage in the Arctic, or “propinquity”, will be insufficient to allow it to control the international and domestic rule structures and ultimately ships which may attempt to navigate Northern waters. Canada possesses little material capacity to enforce its sovereignty, so the argument goes, even though Canada’s capabilities (or political will) might be sufficient if requisite military and surveillance equipment were present. Moreover, because international legal title in this case requires military ‘power’, international law, its rules, norms, principles, and precedents, will play no meaningful role in a final outcome.

Though there is an obvious truth to this line of reasoning in Canada being unable and unwilling to engage in any material effort with the United States over Arctic matters, Posner’s argument is difficult to square on two grounds, that of the historical processes driving interactions in the region to date, and the probable justifications likely to be put forth by both states’ negotiators if a settlement were required. At root, the history of the Northwest Passage is one of diplomatic engagement between two of the world’s closest allies. If it were not for Canada’s weak legal standing on this issue over most of the last forty years the debate would have been carried out largely, if not directly, on grounds of international law. Yet the fragility of the legal case prevented its authoritative deployment by Canadian policy-makers, and instead their focus became that of repairing the case towards a position of legal validity. As a result, the terms of the debate have been forever shifting, moving from environmental concerns, functional zones, protections of special geographies, and obligations towards unique peoples. All the while however, the legal case for sovereignty has been at the forefront of Canadian minds. Hence, power and material conditions have shaped and guided the law, but not superseded it in determining the current

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Canadian position. Canada continues to rely upon the doctrine of effective occupation to demonstrate sovereign capacity in the region in large part because this is what international law requires, not as a precursor to some power-based confrontation. Its reliance on demonstrating policies that consolidate occupation also has the effect of reducing the possibility of the Northwest Passage becoming internationalized and thus categorized as international waters. Indeed, Canada is relying on both international law and by extension, material power, to guide and control its claim.

But if power refers to the ability to settle the argument over the Northwest Passage this will only materialize after legal options and political negotiations based upon the politics of international law have been exhausted. And to be charitable, Posner’s argument may be read in these terms to some degree. Canadian officials have what they believe to be a credible claim to sovereignty over the Northwest Passage under international law. This is based largely on Pharand’s reasoning concerning the legality of the straight baselines and the non-internationalization of the waters. But Canada’s other leading international legal authority on the matter, Don McRae, has similarly argued that the Canadian claim for the internal status of the waters has a strong legal basis. Given that these two leading figures in international law have been seized of the case for decades, their view on this complex case carries great authority. Hence, we should expect that, should policy accommodations fail between the two countries, Canada would respond to the United States on grounds of law given its belief that a valid case can be constructed. As the thesis has described, Canada’s foreign policy position has been driven primarily by learning what the boundaries of validity are, how these could be coherently shifted in light of new and different arguments, circumstances, and legal developments. Quite predictably, it is unlikely that Canada would turn away from legal reasoning and argumentation in any future policy regarding the Arctic. Such possibilities are further reinforced by the reality that Canada, today and in the foreseeable future, is in a marginal position to turn ships around in the Arctic (except in the rarest of cases). By necessity then, and on the grounds of legal authority, Canada would, in

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934 Pharand (2007).
most all serious challenges, take recourse with international law rather than force. Whether it chose to litigate in some international forum is another matter, but would depend upon the circumstances of the legal confrontation.936

The United States continues to make known its opposition to Canadian arguments under international law. In late 2006, the United States wrote expressly in a diplomatic note from then Ambassador Wilkins that, not only is there no basis in international law for Canada’s internal waters claim given the already internationalized nature of the Northwest Passage - it being an international strait used for international navigation - but the scope of American consent in transiting Arctic waters is limited. This argument would have appeared somewhat new to Canadian officials given that the 1988 Cooperation Agreement was intended, so Canada thought, to provide a requirement of Canadian consent to all Arctic voyages involving ice-breakers. The Agreement stipulates:

The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada

However, reflections by Mason and Colson, American negotiators to the Agreement, indicate that they were pressing for consent only to be sought in the context of voyages by ice-breakers carrying out scientific research in the region.937 The interpretation is reflected in the diplomatic note of 2006 from the United States that “the Agreement does not affect the U.S. view that our icebreakers, in the absence of maritime scientific research, would not be required to seek consent before transiting the Northwest Passage.”938 Importantly, and in contrast to Posner, the United States clearly continues to see the Northwest Passage issue as grounded in law, not in power. All American demonstrations of power, ie., their controversial transits and other demonstrations of capability in the Arctic ocean space, are directed at challenging Canada’s legal claim and reinforce the United States’ interpretation of prevailing law, not at seizing, occupying or controlling the physical space.

936 In reference to how these circumstances could unfold empirically, see Byers (2009).
If the dispute is primarily about law and legal discourse, American views of the strength or weakness of their legal claim will be the predominant factor in determining the future direction of United States’ policy on this file. That is to say, policy will in all probability not be guided by capabilities or balance-of-power calculations with respect to the Arctic, and thus we may take Posner’s claim with a degree of skepticism, especially given the type of special relationship which has been forged for decades. More specifically, assessing current American legal opinion reveals substantially the probable policy outcomes likely to play out. Prominent American international lawyers weigh in on the legality of Canada’s claim from a variety of different angles. Some of those most familiar with the case hold that under no conditions will it be acceptable for Canada to claim sovereignty over the area and regulate the passage of warships, submarines, or Coast Guard Cutters (considered warships under Article 29 of UNCLOS). Not only has the United States expressly rejected Canada’s internal waters claims at all historical junctures, but United States’ lawyers maintain that Canada already has what it requires in terms of regulatory power over the Arctic for environmental purposes, even without full sovereignty rights. It is outrageous, they assert, that Canada continues to claim a need to regulate a unique area of the world when at UNCLOS Canada received the greatest extension of coastal state jurisdiction ever granted to a single country through the terms of Article 234. Canada has been given special dispensation on issues of pollution in a unique ocean area, and accordingly, in both political and legal terms Canada already has everything it could possibly need and more in order to govern, protect, and prevent harm within the domain of Arctic waters. Furthermore, in relation to the matter of oil discharge standards, even if Article 234 did not exist, protective provisions are built into the IMO dealing with the construction, manning, and physical design of vessels. IMO procedure would not, therefore, greatly differ from Canada’s to any great extent. Given the legal protection already afforded Canada in environmental terms, this line of American argumentation seeks to lay bare Canada’s jurisdictional claims as pure nationalism masquerading as environmental concern. It is sheer irony, so the argument continues, that Canada’s approach to territorial sea claims (an UNCLOS member), for all of its rhetorical flashes of nationalism and anti-Americanism, echoes the ideological invectives
circulating in the United States (a non-UNCLOS state) when oppositional arguments to ratify
UNCLOS surface in the United States Congress or elsewhere.

From a position of law, Canada requires acquiescence from the United States for any claim to
historic title to have legal effect. And it seems clear that this support will not be
forthcoming, other American lawyers believe. If the United States fails to convince Canada
about the contents of its internal waters claim on bilateral terms, Washington will take a
different approach. It will join the EU, Japan, and by that point China, to argue that the
Northwest Passage is an international strait guided by free transit and perhaps the rights and
obligations contained in Article 234. When this materializes, Canada will quickly learn that
it can get agreement with the United States on the requirements for technical components on
vessels, but will have to use American influence to garner Japanese and Chinese support in
order to receive more favorable terms at the IMO. Recognizing this likely pattern of
‘solution sets’ to the bilateral problem, the United States has a hard time understanding why
this is an important issue. In the American view, Canada is clearly on the wrong side of
international law, whether customary or in relation to the provisions of UNCLOS, and has no
possible interest in pressing the point with Washington toward multilateralizing the dispute
over the status of the Northwest Passage to its own disadvantage.

There is, therefore, good reason to think that if both party’s beliefs in the strength of their
legal case is relatively fixed any direct challenge to Canada’s internal waters claim will
trigger a process leading to arbitration either at the ICJ, or more likely, an arbitration panel at
UNCLOS. Accordingly, the ability for raw power to regulate this dispute remains a distant
possibility, as recourse to law will always be the location of choice for debate and resolution
of the problem. Without doubt, within the legal arena political considerations, both domestic
and international, will interface with legal arguments and particular points of international
law. As a case in point, in order to structure this process, we may expect that Canada will
need to find support from the Inuit occupying the high Arctic and that Ottawa will be
required to accommodate their existence within Canada’s colonial history with the
requirements of effective occupation. Any Canadian government will be placed in a difficult
position and fearful of what might materialize in relation to this significant challenge. For on
the one hand, even if the ice melts in the region, this will represent for most resident citizens
an opportunity to further integrate the region into the broader Canadian framework through
socio-economic, constitutional, and political accommodation. But on the other hand, quite
fundamentally for Canadians, the Arctic symbolically is an indivisible whole. Its
fragmentation, regulatory or literal, creates conceptual difficulties for the Canadian psyche.
And this reveals the fact that Canadian officials have for decades been caught in a legal and
political trap. The North is part of Canadian myth and consciousness, and like all areas of
symbolic folklore and importance, imagined and real communities become both the subjects
and objects of security when threatened by outsiders. Canadians therefore continue to cleave
to an idea of sovereignty whose roots lie in thought now centuries old. As Kennedy has
written, “by the end of the [Nineteenth] Century, sovereignty described a relation to territory
parallel to the contemporaneous understanding of the relationship between individuals and
their property”.939 As the North is both land and ice, it is tangible property that must be
defended. On what grounds, towards what ends, and on what basis, however, will forever
remain subject not only to Canadian passions, but more centrally, to the politics of
international law.

939 David Kennedy (1996), at 408.
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