

of this authority, but I am afraid that the SEC has a tighter rein on us than you appreciate.

BRUCE L. ROCKWOOD\*  
*Reporter*

## LEGAL REGIMES OF THE ARCTIC

The panel was convened at 8:30 a.m., April 22, 1988, by its Chair, Elliot L. Richardson.\*\*

### REMARKS BY MR. RICHARDSON

The central map on the wall behind me corrects the gross distortions that Mercator projections place in our minds with respect to the Arctic as a sort of continual strip as wide as the equator. But, of course, we actually are dealing with the frozen seas surrounding the pole and the land mass that is the perimeter of those seas—a land mass that is interrelated to the sea by continuous ice in many places—and with problems common to that whole surrounding area: problems that concern boundaries, the environment, the jurisdiction over fisheries, and navigation. Indeed, when you also add the fact that the native peoples and the fragile ecology call for responsible and humane treatment on the part of the littoral states, you see concentrated in the Arctic a focus of virtually all the kinds of problems that are presented by the legal regimes of the oceans anywhere in the world, in some respects in a very intense form. And so it is to address these questions that we have the opportunity this morning to hear the distinguished people who will be addressing us.

### REMARKS BY ANOTOLI L. KOLODKIN\*\*\*

My first remark concerns what Professor Tunkin mentioned yesterday about the changing of thinking, the new thinking in the U.S.S.R., and perestroika.<sup>1</sup> This is evidenced by the fact that I am in front of you today. I can't remember the time or the session when a Soviet scholar in the field of international law shared his views with some American and Canadian and other scholars with regard to the Arctic. So this is evidence of the changing of our policies.

So, what is the main goal now? I thought about this yesterday, and I came to the conclusion that the main goal is to bridge two very important factors: first, the sovereignty of Arctic states over islands and some territory, except of course of water: sovereignty, that is, jurisdiction and the rights of coastal states with regard to the Arctic with their common interests in environmental and scientific research; and, secondly, in the strengthening of peace in this region.

The Secretary General of our Communist Party, Mikhail Gorbachev, in his speech in Murmansk on October 1, 1987, said: "The Arctic is not only the Arctic ocean. It is the northern outlying districts of three continents: Europe, Asia and America. It is the juncture point of Euro-Asian, North-American, and Asian-Pacific regions, here join the state boundaries, intersect the interests of the states both belonging to the opposite military blocs and outside them."

\*Associate Professor of Business Law, Bloomsburg University.

\*\*Of the District of Columbia Bar; United Nations Association.

\*\*\*Maritime Law Association, Union of Soviet Socialist Republics.

<sup>1</sup>*Supra*, p. 142.

The Arctic states have here the deepest economic and strategic interests and in the adjacent areas bear special responsibilities from which their special rights issue. The Arctic states exercise sovereignty with respect to the lands and the islands. Canada declared its rights in 1925 when it adopted the law on the status of Arctic spaces adjoining its seacoast. The U.S.S.R. declared its rights in 1926 when the Presidium of the U.S.S.R. Central Executive Committee issued a decree, On Declaring Lands and Islands Located in the Arctic Ocean as a Territory of the Union of Soviet Socialist Republics.

When one considers the Arctic status, one cannot help noting that particularly the whole of the Arctic area is covered by the sovereignty or jurisdiction of the Arctic states. There is no room here for third countries' claims.

The history of the establishment of the Russian states' special rights on coastal Arctic spaces or areas is deeply rooted in the past. There have been agreements dating as far back as the 11th, 14th and 16th centuries, and some other agreements and unilateral acts. More important was the notification of the Russian Ministry of Foreign Affairs in 1916 regarding the property on the lands and islands discovered by Vilkitsky in 1913 and 1914. Then the notification stated that the above-mentioned lands and islands constituted no more than an extension of Siberian continental spaces and that they are covered by Russian sovereignty. In 1924, these rights were reaffirmed by the Memorandum of the People's Commissar of the U.S.S.R. Ministry of Foreign Affairs.

The Arctic sea areas adjacent to the U.S.S.R. coastline are covered by the generally accepted legal classification: the internal sea waters, the territorial sea, the exclusive economic zone, and the continental shelf. One cannot disregard, however, the fact that the major part of the vast Arctic areas is subject to the sovereignty and jurisdiction of the Arctic coastal states.

While speaking on the regime of the Soviet Arctic areas, the Northern Sea Route, (NSR) should be taken into consideration. The major lines of the NSR are not permanent. They pass within the territorial waters and at some points within the internal sea waters and the economic zone of the U.S.S.R.—within the area subject to the entire sovereignty or to the jurisdiction of the U.S.S.R. This fact—along with well-known historical and geographical factors, such as a long-term operation here by the Russian and the Soviet state as well as the close interconnection of the NSR with the continent and islands of our country—this fact, first, gives the grounds for considering this a national transport and communication route similar to the Norwegian Interleja and the Canadian Northwest Passage. Second, the fact empowers the U.S.S.R. with the right to establish the operating regime for foreign ships and military vessels within the NSR, as well as to take measures providing for the security of its Arctic boundaries.

This position was repeatedly stated to the U.S. Embassy in Moscow in 1964, 1965, and 1967. The position of the U.S.S.R. refers to all straits leading to the Kara Sea from the west and the east: to the Kara gate, Yugorsky Shar, Matochkin Shar, the Red Army Strait, Dmitry Laptev Strait, as well as Vilkitsky, Shokalsky and Sannikov Straits. It can be asserted that the status of these straits—I would like to stress straits, not all waters—is the status of internal waters of the U.S.S.R. to which neither the right of transit passage, nor the right of innocent passage, are extended. Foreign navigation has never been exercised in these straits.

In his Murmansk speech, Mikhail Gorbachev noted that the shortest sea route from Europe to the Far East and the Pacific Ocean passes through the Arctic. Depending

on the further improvement of international relations, the U.S.S.R. might open the Northern Sea Route "for foreign vessels with the escort of Soviet icebreakers."

Touching on the issues of shipping along the NSR, it should be noted that the Soviet Government has granted the right of their solution to a special competent state body, namely the Administration of the Northern Sea Route. It was established within the Ministry of the Merchant Marine of the U.S.S.R. in accordance with the Decree of the U.S.S.R. Council of Ministers dated September 16, 1971.<sup>1</sup> That administration acts on the basis of the Statute on the Administration of the Northern Sea Route. Inquiries concerning the passage along the route are considered by the administration on the basis of the forecast and current navigation conditions, and with the ability at the given period of ice-patrol aviation assistance, the escorting icebreakers, and pilot service. Icebreaking and pilot services are binding on all vessels in the Straits of Vilkitsky, Dmitry Laptev, and Sannikov. In case of unfavorable ice, sea, and weather conditions, or a serious threat of pollution of the marine environment or the Soviet coastline, the administration of the NSR enjoys the right to halt the navigation of vessels and other floating facilities in certain areas or throughout the NSR.

In view of the importance of the protection of the Arctic environment, the following clause was included in article 234 of the 1982 U.N. Convention on the Law of the Sea.<sup>2</sup> Allow me to remind you of this text:

Coastal states have the right to adopt and enforce nondiscriminatory 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 . . . 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.

The Edict of the Presidium of the Supreme Soviet of the U.S.S.R., 1984, On the Economic Zone of the U.S.S.R., included the right of the competent Soviet authorities to establish special measures against pollution from vessels in the areas in question and also to exercise appropriate control actions, to file suit and detain vessels violating this Soviet legislation or applicable international rules. The 1984 Edict On Strengthening the Protection of Nature in the Areas of the Far North and the Sea Areas Adjoining the Northern Coasts of the U.S.S.R. stipulated that navigational vessels and other floating facilities within the sea reserves and other specially protected territories, may operate only via the sea lanes established by the competent Soviet authorities, the appropriate information being provided in the proper order. Any call or passage of ships and other transport facilities within the defined areas outside the sea lanes and routes may be carried out only in cases specified by Soviet legislation, in particular in cases of disaster to ensure the safety of life and security of ships and other vehicles. The administration of the nearest Soviet seaport shall be notified of each case of such emergency called or passage, and the vessel shall follow strictly the instructions of the competent Soviet authorities.

It is worth mentioning that scientific research in the Arctic is of global importance for mankind as a whole. A great number of studies are being carried out in the U.S.S.R., the United States, Canada and other Arctic states. Mikhail Gorbachev has

<sup>1</sup>11 ILM 645 (1972).

<sup>2</sup>21 ILM 1261 (1982).

suggested that a conference of the Arctic states on the coordination of the scientific research of this area should be held in the U.S.S.R. in 1988. The cooperation of scientists of the Arctic countries in the field of research has become well known. The scholars of the Soviet Institute of the Arctic and the Antarctic, Leningrad, fruitfully cooperate with the experts of the Institute of North America, Canada, as well as the scientists of Norway and the United States. Meanwhile, the establishment of a special scientific body, the Scientific Council of the Arctic Countries, as it was proposed by Mr. Gorbachev, would be of great importance for further coordination of the scientific research.

It seems significant, indeed, to promote and coordinate research, not only in the field of natural sciences, but also in the field of international law. Considering the participation of the law experts at the present meeting of the Society, it is worth mentioning the advisability of their participation in studying legal problems of the Arctic and working out the basic legal principles of the above cooperation.

Mr. Gorbachev, having paid attention to the military aspect of the Arctic issues, stated that the militarization of this part of the world has acquired a grave nature. That is why he made the proposal with regard to a transformation of the Arctic in the zone of peace.

It seems quite reasonable to extend further the cooperation among the Arctic states in the field of peaceful use of and research in the Arctic, including exploration of its natural resources, which means to draw up and to conclude, jointly and severally: first, a treaty or convention among the Arctic states concerning the cooperative protection of the Arctic environment, preservation of its ecological balance, and the protection of its flora and fauna. I would like to remind you of the Treaty on Protection of White Bears of 1973, signed by Denmark, Canada, Norway, the U.S.S.R. and the United States.<sup>3</sup> This treaty may serve as an example.

Second, in my opinion, bilateral and other agreements among the U.S.S.R., the United States, Canada, Norway, and Denmark on marine environment and protection pertaining to the following regions could be elaborated and concluded: the Barents Sea region, the Bering Sea region, and the like.

Third, regional as well as bilateral agreements on the scientific research of the Arctic could be concluded.

The discussion of different aspects of this subject, the legal regime of the Arctic, at the present meeting of the Society, with the participation of Soviet scholars as well as those from other countries, seems rather significant in the light of the meeting between Messrs. Gorbachev and Reagan in Washington in December 1987, and the adoption of the joint Soviet-American statement.<sup>4</sup> The statement stipulates the possibility of ways to broaden contact and cooperation on Arctic matters, especially in the field of environmental protection and the scientific research of the region. There is no doubt that these issues directly require international law scholars to consider it their first and foremost duty to render every support and necessary assistance to the Arctic states in the development of their cooperation and in their efforts to strengthen the peace and security in this region.

<sup>3</sup>13 ILM 13 (1974).

<sup>4</sup>27 ILM 255 (1988).

## REMARKS BY JON JACOBSON\*

I approach this topic with some trepidation, especially with such experts on the Arctic on the panel and in the audience. I approach it as, at best, a law-of-the-sea generalist looking at one of the areas of the world ocean and, of course, a very interesting one.

Approaching the topic from that point of view, I believe that any analysis of the Arctic Ocean's legal nature should take account of two very basic facts: first, as indicated by Elliot Richardson, the Arctic Ocean is a mediterranean sea or ocean. This is true despite our usual association of warmth and sunshine with that term, and despite Gerhardus Mercator's success in convincing many of us that the Arctic Ocean is a long thin waterway across the top of the world. The Mercator projection, probably the most familiar view of the earth's topography, does strange things, not only to the shape of the planet, but also, naturally enough, to our perception of it. This is especially true for the polar regions that are subject to the greatest exaggeration from Mercator's method of placing all surfaces of a sphere on a flat plane. As one of my geography colleagues at the University of Oregon tells his university students in introducing the Mercator projection: "Greenland is not a piece of pie; it is a banana." Maybe that's borne out by the map behind me.

In any case, a North-Pole-centered projection, such as the one behind me, or better yet a spherical representation of the ocean is indeed mediterranean; that is, enclosed or nearly enclosed by land. This reality is sometimes overlooked or deemphasized by those who pursue the issue of the northern ocean's legal status.

Second, the surface of the Arctic ocean is—more and less, depending on the season—covered with ice. This second reality, unlike the first, is almost never overlooked by analysts. In fact, as we shall see, it perhaps has been overemphasized by some. And it is actually this ice factor—or the even more basic fact that the top of the world is considerably colder than most of the planet, but not all of it—that has presented a legal dilemma for the Arctic ocean. I suggest that recent developments in the law of the sea, together with the mediterranean factor, may go some way toward providing responses to the dilemma.

Except for the polar regions, of course, most of the planet's surface is either wet or dry, and for the past three centuries or so we have become used to the international law notion that the vast majority of the wet parts, the world ocean, are beyond the sovereignty and jurisdiction of states, but that the dry parts, the land, are not. Of course, it long has been known that a large portion of the polar regions' waters are ice covered and therefore neither wet nor dry, but since hardly any human activity occurred there, it really did not matter much whether the ice was assimilated to the ocean rule or the land rule, and perhaps it still doesn't matter all that much.

Nevertheless, modern technology and the consequent increase in human-sponsored polar activities have in recent decades caused a growing number of observers to wonder whether sea ice is more like land or more like ocean. On the one hand, it has been noted that the ice supports travel by dogsled, snowmobile, as well as by just plain walking, and that scientific research is carried out from semipermanent villages built on the ice, that true vessel navigation cannot occur over ice-covered seas, and thus, that sea ice is more like land, and territorial jurisdiction of the coastal state ought to be recognized all the way to the Pole. On the other hand, other commentators have pointed out that Arctic Ocean ice is not permanent, that most of the ice moves with

\*Professor of Law and Director of the Ocean and Coastal Law Center, the University of Oregon.

the vast currents and winds that swirl around the North Pole, that submarines and aircraft navigate below and above the ice, and that seasonal surface vessel navigation and icebreaker passage now occur, and thus that sea-ice areas are more like ocean, where freedom of the sea ought to reign. Still others have sought to distinguish between the various types of sea ice—pack ice, ice shelves, landfast ice, icebergs, and so forth—to identify those types that are more like either land or ocean for the purposes of applying the supposedly appropriate rules.

The truth, as in the case of so many conceptual debates, lies somewhere between or maybe just elsewhere. Sea ice is like sea ice and not much like anything else. The basic issue, restated somewhat, nevertheless remains: who is or ought to be entitled, under international law, to regulate and control the various human activities that are increasingly occurring on, under, and over Arctic sea ice? The best answer might be that it depends. The coastal state might be a better governor of some events, while some might be better regulated through flag-state or nationality jurisdiction.

Part of the conceptual difficulty that faced many previous analysts undoubtedly arose from the idea that I've already noted, that every area of the planet's surface either had to be subject nearly completely to national jurisdiction (dry land), or exist nearly completely beyond national jurisdiction (wet ocean). And thus we see the still prevalent tendency to classify sea ice, or types of sea ice, as one of the other. The recent and ongoing revolution in the law of the sea, however, has shattered the old dichotomous structure for good. We now have taught ourselves to think in terms of vertical columns and horizontal layers and jurisdictional mixtures based on functional divisions. The ocean border of the national sovereignty is now a ragged edge, not a fine line. Within broad offshore areas, classification of activities and events has begun to replace geographical classifications.

This relatively new way of thinking was reflected in the 1982 U.N. Convention on the Law of the Sea. The division of national authority and international commons sanctioned by that document for the offshore ocean is a complex weave of strands from both formerly separated spaces. Nowhere is this more evident than in the exclusive economic zone (EEZ) described in the treaty and, most analysts seem to agree, now part of customary international law. As a very general proposition, the international community has or retains freedoms of vessel and air navigation under, on, and over the waters (and of the laying of some undersea cables and pipelines) within a coastal state's EEZ, which has a maximum outer boundary of 200 nautical miles from the territorial sea baseline—should, of course, the state choose to claim it—but the coastal state effectively controls (with some important limitations) most of the other activities that occur there.

The 1982 treaty devotes just one provision, article 234, specifically to polar seas, or to ice-covered areas, and that provision addresses jurisdiction only for purposes of environmental protection. So major questions, therefore, still remain: does the treaty's jurisdictional web apply equally to the Arctic Ocean as to the rest of the world ocean? If so, to what extent does this new order resolve the special problems raised by the sea-ice dilemma?

Five states border the Arctic Ocean, and these are the United States, the U.S.S.R., Norway, Denmark, and Canada. Over the years, representatives or purported representatives of these states have taken varying positions concerning the legal status of the Arctic Ocean. The so-called "sector theory"—by which the top of the world would be divided into huge pie slices by the five surrounding states—has been attributed to the Soviet Union and, less certainly, to Canada, the two states with by far the largest Arctic Ocean coastlines. This approach depends upon a characterization of

the Arctic Ocean as exceptional and deserving treatment different from that applied to the rest of the world ocean. The remaining three states have rather consistently contended that the Arctic Ocean is not legally distinguishable from the other oceans and seas of the planet, and thus that the same general rules of the international law of the sea also should control the status and uses of the Arctic Ocean. I should say that recent actions by Canada and the U.S.S.R. have indicated to some, at least, that each now subscribes to that view. I'm not so sure after listening to Professor Kolodkin, but perhaps we can talk more about that later.

In light of the failure or refusal of the 1982 treaty to provide special rules for the polar regions, other than the single article already mentioned, it can be asserted that the international community, by way of deliberations in the conference leading to the adoption of the treaty, has expressed its agreement with the position that general international law-of-the-sea rules apply to the Arctic as well as to other oceans. But, of course, that treaty provided us with the exclusive economic zone, and my job is to try to figure out whether the EEZ and rules concerning semienclosed or enclosed seas would provide us with any help in resolving some of the sea-ice activity problems. The way I choose to look at the problem is to select six types of activities, or representative samplings of activities, by which to test the proposition. I will list the six activities and then talk specifically about only one or two of them. The six that I have selected, starting from the simpler to the more difficult, are, first, normal surface navigation by ships in ice-free or relatively ice-free areas of the Arctic Ocean; second, submerged navigation, whether in ice-free or ice-covered areas; third, overflight, again whether or not over ice-covered seas; fourth, surface navigation by or with the necessary assistance of icebreaking vessels; fifth, hunting and fishing on sea ice while on foot, by dogsled, or by snowmobile, and so forth; and, sixth and finally, scientific research conducted from installations placed on sea ice. The assumption that I have made is that each of these activities, for purposes of analysis, would be thought of as occurring in locations beyond the outer boundaries of an Arctic Ocean coastal state's territorial sea and within a line drawn 200 nautical miles seaward of that state's territorial sea baseline, the baseline itself drawn in accordance with relevant international law rules.

I'm not going to talk specifically about the first four of the topics or activities. I will summarize the last two types of activities, hunting and fishing from sea ice not using vessels, and scientific research.

Hunting and fishing relate very much to the rules of the new treaty that allow coastal countries, at least to within 200 miles of their coasts, to exercise considerable control and regulation over the exploitation of living resources within that area, and, therefore, naturally enough I would conclude that coastal states in the Arctic have the right to regulate and control that activity, whether it occurs from vessels or otherwise on the basis of travel on the sea ice.

The more interesting question concerns general civil and criminal jurisdiction over activities that are not connected directly with, in this case, hunting or fishing, or more importantly in the next activity, scientific research on the ice—that is, activities that are not specifically hunting, fishing, or research but that occur because human beings are associating with each other (as they do when pursuing any kinds of activities) and, therefore, give rise to questions that might be classified, in our normal law school curriculums, as questions of torts or crimes or contracts, even. In addressing the issue of hunting and fishing activity I would make an argument for the proposition that the coastal state, within 200 miles at least, might have general civil and criminal jurisdiction over activities that are associated with hunting and fishing from sea ice. I reject,

at least for argument's sake, the notion that others have put forward with much sense, that at least for ice islands that move, flag-state jurisdiction might be more appropriate. But I think the treaty does provide some basis for saying that the coastal state might have general civil and criminal jurisdiction over activities occurring in respect to hunting and fishing of living resources not conducted from vessels.

In looking at the sixth type of activity, scientific research conducted from stations that are on the ice (more often than not, I think, on floating sea-ice islands), I would again concede that perhaps the better rule might be that a sort of flag-state jurisdiction should apply to the activities that are associated with the scientific research (to which, of course, the consent regime of the new treaty would apply in general). But general civil and criminal jurisdiction might also be given to the coastal state within 200 miles under the treaty, and I would look very carefully at article 60 of the new treaty, not claiming that scientific research stations on ice islands are artificial islands under that section, but that they definitely could be viewed as installations and structures for the purposes provided in article 56, which, it will be recalled, grants the coastal state jurisdiction over marine scientific research. Also article 60 states that the coastal state shall have exclusive jurisdiction over such artificial islands, installations, and structures including jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations, and I would suggest on the basis of that provision that general civil and criminal jurisdiction might be applied also.

Flag-state jurisdiction has a lot going for it, but I do not find that the treaty, at least, purports to recognize such jurisdiction for ice islands.

I assert that one might conclude that current law of the sea, as reflected in the 1982 treaty, grants significant rights and jurisdiction to coastal states over activities conducted on sea ice within EEZs (or, depending on the activity of course, on the continental shelf, though that zone largely overlaps the EEZ spaces in the Arctic Ocean). Concurrent nationality jurisdiction usually exists, but if coastal state civil and criminal jurisdiction is present, it would be classifiable as a form of territorial jurisdiction and thus arguably predominant. If the concerned states desire a different jurisdictional regime for sea-ice activities in the Arctic, a special treaty would seem to be in order.

In concluding let me say that the Arctic Ocean is different from other oceans and seas. The suggestions that have been made for differences in legal approaches to its human uses are, of course, attributable to the fact that the Arctic Ocean is covered by ice. It takes little imagination to realize that, if this were not true, the Arctic Ocean would undoubtedly be one of the busiest seas in the history of civilization, rivaling the real Mediterranean. The ice has, indeed, been a substantial barrier to the human use of the Arctic Ocean. Little human activity has occurred there until recent times, and even now such activity as compared to that of other oceans and seas is very limited. The need for a comprehensive legal regime for the northern oceans, especially its ice platforms, is probably only marginally greater than the necessity for traffic lights on the Moon. Yet, we can suppose, with some degree of confidence in the prediction, that the need for a full-fledged legal regime, both in the Arctic and on the Moon, will come to pass someday. (I do note that there are three automobiles, lunar-roving vehicles, already parked on the Moon, left there by Apollo missions XV, XVI, and XVII, and supposedly awaiting the installation of traffic lights so that they don't run into each other.) When and if that time comes for the Arctic Ocean and its then multitude of sea-ice activities, we can expect that international law will have devised a scheme for assigning jurisdiction over these activities and the human conduct connected with them, if the revolutionary historical trends in the law of the sea that we have witnessed over the past two or three decades continue. Until that day, we also can assume that



the jurisdictional assignment will be to the governments of the coastal states, at least within 200-mile offshore zones if not beyond, and that this jurisdiction will allow not only the authority to allow or deny the activities, but also general civil and criminal jurisdiction over the human conduct associated with the principal permitted activities. Perhaps, as I have suggested, we are already on the way to such a legal regime.

We can, nevertheless, hope that things will work out better. The adoption of the extended-jurisdiction or "national lake" approach to managing ocean activities never has seemed to me the wisest way. Between now and the time for comprehensive regulation of sea-ice activities, the international community will have acquired much experience in attempting to manage the busier seas of the world ocean within the "national lake" context and by then might have learned the value of regional approaches to the particular challenges of special and unique ocean areas. If so, the many good proposals for a treaty regime for the Arctic Ocean and its seas, and there are many of them, might then be put to good use.

#### REMARKS BY ALAN E. BOYLE\*

It is not difficult to identify the main principles of international law affecting the environment. The control and regulation of sources of harm to the environment of other states or common areas, the conservation of living resources and their habitat, environmental impact assessment, consultation and negotiation with other states whose environment or natural resources may be affected by transboundary development, and warning others of impending harm: these are the core obligations of the subject.

The Stockholm principles,<sup>1</sup> the U.N. Environment Programme's (UNEP's) Principles on Shared Natural Resources,<sup>2</sup> the 1982 Law of the Sea Convention, the work of the International Law Commission (ILC) are all evidence of the growing codification and progressive development of the law around this core. Supported by a network of international commissions, dispute settlement procedures, enforcement mechanisms and international organizations, international environmental law can claim a plausible reality and a measure of coherence.

But it is only the proof of practical application to the resolution of actual environmental conflicts that can give genuine substance to the claim that principles of international environmental law exist. Measured against this reality, it is often the fragmentation of principles, their selective application, their vulnerability to special circumstances that may appear the more convincing picture. The Arctic is one such case.

Issues of pollution, ecological degradation and wildlife conservation, at sea and on land, present themselves in the Arctic and are intimately connected; in each case it is development of a formerly undisturbed environment that poses the threat. A severe climate, a fragile ecosystem, an influence on hemispheric weather patterns give the Arctic its special character, and environmental issues their particular importance there. Approaches to the solution of those issues tell us much about the way the Arctic is perceived, whether as an economic resource to be exploited or as a wilderness to be enjoyed.

\*Faculty of Law, Queen Mary College, University of London; Visiting Professor, University of Texas School of Law.

<sup>1</sup>11 ILM 1416 (1972).

<sup>2</sup>14 ILM 1087 (1975).

Much of this is true also of the Antarctic, but comparison of the polar regions can be misleading or inappropriate. Patterns of resource exploration are very different. In the Arctic, extraction of oil, gas and minerals, at sea and on land, is an important reality; in the Antarctic, it is only a conjecture. The living resources of the Antarctic Ocean are abundant, and significant international exploitation occurs. In the Arctic, large-scale fishing is important only in North Atlantic areas and the Barents Sea, although whaling is still a source of food for indigenous peoples and an expression of their traditional culture. While the Arctic has plentiful caribou, reindeer, polar bears and other land-based mammals, the Antarctic has none, and only shoreline colonies of penguins and seals require protection. Even when the problems are directly comparable—such as the risks posed by marine pollution and the need to control navigation in ice-filled waters—the radically different legal status of both regions may necessitate different solutions.

The Antarctic Treaty gave that continent a unique international status and provided the basis for the creation of a distinctly regional structure of principles and institutions governing the protection and preservation of its environment and living resources. Agreed measures and treaties protect its flora and fauna and seek to ensure conservation and rational exploitation of its marine life. Strong environmental controls, administered through an international regulatory authority, will govern any mineral exploitation anywhere in Antarctica or its adjacent waters. Through the United Nations, the wider international community has assumed a keen oversight of the conduct of the Antarctic Treaty Consultative Parties in performing their environmental and other responsibilities.

The Arctic is very different. No regional structure exists to facilitate or promote cooperation among the seven states that lie within the Arctic Circle. Probably because it is too large, the Arctic Ocean has not been included in UNEP's regional seas program, nor treated as an enclosed or semienclosed sea subject to the obligations of cooperation set out in article 122 of the Law of Sea Convention. Among international organizations with environmental responsibilities, only the International Union for the Conservation of Nature and Natural Resources (IUCN) appears to have shown any interest in the Arctic. Little sense of a shared responsibility among all Arctic states for their environment is evident, although the 1973 Agreement on the Conservation of Polar Bears does recognize the "special responsibilities and special interests of the states of the Arctic Region in relation to the protection of the fauna and flora of the Arctic Region."

The Polar Bears agreement remains the only multilateral treaty dealing specifically with Arctic living resources. Among wildlife treaties it provides a relatively strong conservation regime. Parties are required to protect the bears' ecosystem, habitat and migratory patterns, to use "sound conservation practices" in managing bear populations, and to restrict taking, which includes capture, to very limited circumstances. Native hunting is permitted, exercising traditional rights and using traditional methods, and skins taken may be commercially traded. In practice, national laws and adherence to the Convention on International Trade in Endangered Species<sup>3</sup> make trading very difficult. No institution is created to service implementation of the agreement, but the parties must coordinate research and consult on further protection and management of the bears. They have in fact met at intervals for this purpose since the treaty entered into force. Lyster, in his study, concludes that the agreement has been a success, and that a willingness to make it work has overcome the lack of permanent

<sup>3</sup>12 ILM 1085 (1973).

institutions whose role has been a measure of the viability of many other wildlife treaties.

The Polar Bears Agreement is one of the few products of a 1972 U.S.-Soviet agreement on environmental protection.<sup>4</sup> This treaty imposes no obligation to take specific measures and protects nothing, but it does commit the parties to study and exchange information on the Arctic ecosystem, the impact of development there and the conservation of many of its animal species.

U.S.-Soviet cooperation also produced a treaty on migratory birds, which regulates their taking and requires the parties to identify and protect bird breeding grounds and habitat from pollution or detrimental alteration. Many of the identified areas are in Siberia and Alaska, and are now protected nationally from harmful development. Migratory bird treaties in which Canada and Sweden participate are of lesser significance because they only control taking.

No other regional treaties address issues of conservation of Arctic wildlife, its habitat, or migratory patterns, nor are there any concerned specifically with the marine living resources of the Arctic Ocean. Despite the growing impact of economic development and hydrocarbon extraction there is nothing comparable to the systematic environmental approach of the Antarctic Minerals Treaty or the Convention on the Conservation of Antarctic Marine Living Resources. Some effective environmental controls on development have been adopted nationally, but only in the few cases mentioned above do they result from obligations of regional cooperation.

Nor do relevant global or hemispheric conventions significantly govern conservation issues in the Arctic as a whole or indicate a common approach among Arctic states. The Nordic countries' conservation efforts in the Arctic are based on their participation in the 1979 Bonn Convention on the Conservation of Migratory Species<sup>5</sup> and the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats. These are important treaties imposing wide-ranging conservation obligations and providing effective machinery to supervise their implementation, but the Scandinavian example has not been followed elsewhere in the Arctic. The Migratory Species Convention could govern several Arctic stocks, notably U.S.-Canadian caribou, but neither of these states is a party and long-standing proposals for a treaty to protect these animals have not so far led to anything, despite endorsement by IUCN and Inuit representatives. The Western Hemisphere Convention of 1940 has similar objectives to the Berne Convention, but although the United States is a party, Canada is not. A recent commentator has described this agreement as a "sleeping treaty" of "little or no practical value" because it lacks the machinery for sustained supervision of its implementation which more modern treaties like the Bonn and Berne Conventions enjoy.

The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage<sup>6</sup> is much more widely supported by Arctic states and offers a mechanism for protecting outstanding wildlife and natural habitats. But obligations under the convention only arise for states that choose to designate areas within their territories as possessing the requisite "outstanding universal value," or that take the further step of seeking inclusion of an area on the U.N. Educational, Scientific, and Cultural Organization (UNESCO) World Heritage List. No state has taken such steps in respect to the Arctic territory. Thus although some 40 million acres of Alaska became part of

<sup>4</sup>11 ILM 761 (1972).

<sup>5</sup>19 ILM 11 (1980).

<sup>6</sup>11 ILM 1358 (1972).

the U.S. national park, wilderness and wildlife preservation system in 1979, and of this 19 million constitute the Arctic National Wildlife Refuge, providing habitat for many species, the area is not covered by the World Heritage Convention. Development therefore could occur without breaking this treaty.

International agreements regulating marine living resources are also of little relevance in the Arctic. The Arctic Ocean is an important habitat for some whale species, notably the Bowhead, which is protected by the 1946 Whaling Convention. But Canada is no longer a party to this treaty, and Japan, Iceland and the U.S.S.R. have continued to exploit its weaknesses to try to avoid the present whaling moratorium. Treaties setting up fisheries commissions for the North Atlantic apply to Arctic seas between Canada, Greenland, Iceland and Norway, but most of the fish in these areas and in the Arctic Ocean, where these conventions do not apply, are now in practice regulated by coastal states, whose duty it is to ensure proper conservation and management of their EEZ resources. So far as they exist, Arctic fishing resources are thus not subject to any special treatment.

If applicable treaty law has had little impact on conservation species, other shared populations potentially may fall within UNEP's Principles of Co-operation in the Field of the Environment Concerning Natural Resources shared by Two or More States. These principles reflect closely the obligations regarding transboundary harm, conservation of renewable resources, environmental impact assessment, consultation and negotiation referred to earlier. Although not intended to be legally binding, they are in part based on existing customary law. But they do not define "natural resources," and their application to land-based wildlife and habitat is as yet novel and largely unsupported by broadly representative state practice. Nor, despite the excellence of their national records in environmental matters, have the Arctic states shown convincing acceptance of the international implications of UNEP's principles in the context of Arctic development.

The limitations of these principles must also be noted, for they are essentially a remedy of last resort; they give neighboring states a say in the use or abuse of a limited range of shared resources and a claim for recompense for depletion of their interest in those resources. They do not constitute a comprehensive system of environmental protection and are not a substitute for agreement on policies of conservation and rational use supported by appropriate international institutions. It is in these respects that the Antarctic system compares so favorably.

Evidence of agreement among Arctic states on a legal structure for protecting their marine environment from pollution is equally scanty. Hydrocarbon extraction offshore is regulated largely by national laws and applicable international conventions. These involve treating fixed and floating platforms as "ships" for the purposes of the 1972 London International Dumping Convention<sup>7</sup> and the 1973/78 Marine Pollution Convention. Of Arctic states, Canada alone is not a party to the latter convention, but its Arctic Waters Pollution Act<sup>8</sup> imposes stringent penalties on all discharges of waste in its Arctic waters or territory. Operations in Norway, Iceland, Sweden and Greenland are also covered by Western European treaties on dumping and land-based sources of pollution.

This approach is not ineffective as far as it goes in regulating the operation of such facilities, although it leaves national laws to make allowance for the special problems of the Arctic environment. What it signally does not offer is any framework for re-

<sup>7</sup>11 ILM 1291 (1972).

<sup>8</sup>9 ILM 543 (1970).

quiring states to make environmental impact assessments or to notify, consult and take account of the views of other states that may be affected by proposed offshore development. Again it is not difficult to support the existence of such obligations in customary law; the advantages of incorporating them in a regional agreement, however, lies in the opportunity this gives for specific acknowledgment of their application to the circumstances of the Arctic, unique or otherwise.

It is this that makes important a Danish-Canadian agreement of 1983.<sup>9</sup> The agreement obliges each party to provide prior information of undertakings that may create a significant risk of marine pollution in the other's area, to hold consultations and to ensure that the risk from seabed installations is minimized. Actual or probable discharges of harmful substances threatening the other must be notified immediately and the parties agree to endeavor to make available adequate compensation for damage and clean-up costs caused by discharges from seabed installations. Cooperation and contingency planning to deal with pollution are provided for. Disputes are to be settled by negotiation or arbitration. This treaty seems a model example of the value of cooperative agreements in dealing with shared pollution problems; it reflects accurately UNEP's Principles on Shared Natural Resources and Environmental Impact Assessment, and the pollution provisions of the Law of the Sea Convention, while providing additionally for dispute settlement and administrative implementation.

Control of vessel traffic on environmental grounds has proved a more sensitive issue. Fear of the effects of oil pollution from projected tanker traffic and of the disruption of wildlife and Inuit livelihood which regular passage through Arctic ice might cause have led Canada to claim, in effect, the right to control or restrict passage through her northern waters. Power to do so under the Arctic Waters Pollution Act has now been reinforced by drawing straight baselines around the outer edge of the Canadian Arctic archipelago enclosing the Northwest passage and other intervening waters as internal. Soviet Law closely mirrors this approach, which has met serious U.S. opposition. Nowhere else at sea has the claim to control navigation on environmental grounds been pressed quite so far.

The consensus reached at the Law of the Sea Conference on the acceptability of allowing coastal states special powers over pollution in areas affected by severe climatic conditions and ice hazards is now incorporated in article 234 of the Convention. Since it is difficult to see how article 234 could be invoked in Antarctica without raising issues of nonrecognition of claims and possible violation of the Antarctic Treaty, this article in effect creates a special regime for Arctic waters only. It gives coastal states the power to act without the supervision of the International Maritime Organization which article 211(6) requires for other special areas.

What is not clear is how far the article goes in vindicating Canadian and Soviet claims to their fullest extent. No specific measures are indicated; the only limitations are that they must be nondiscriminatory, for the prevention, reduction and control of pollution, and have "due regard for navigation." If this wording preserves intact rights of freedom of navigation or innocent passage in Arctic waters, then it will not allow for the prohibition or extended control of passage that national laws seem to contemplate.

One interpretation confines the article to the EEZ alone and implies at least a right of innocent passage there, on the basis that it would be inconsistent to give the coastal states greater power over navigation beyond the territorial sea. Passage then can be suspended only temporarily. This is still less than high-seas passage, however.

A second interpretation applies the article to the whole area "within the limits" of the EEZ, including the territorial sea, straits and so far as relevant, internal waters. This view has to overcome the objection of patent inconsistency with article 55, which defines the EEZ as the area "beyond and adjacent to" the territorial sea. But it would allow the Arctic coastal state to apply its own construction standards to both the territorial sea and the EEZ, an obviously desirable consistency.

Extending the area of application, however, only adds to the difficulty of defining what rights of passage remain under article 234. The point is relevant to internal waters because of the preserved right of innocent passage in areas newly enclosed by straight baselines, unless the claim to internal status can be upheld on historic grounds. If such a right applies to Canadian or Soviet Arctic internal waters, then article 234 can offer the only possible ground for environmental restrictions on passage.

In international straits the potential conflict is greater, since rights of passage are stronger, and the pollution jurisdiction of the coastal state is severely restricted. Since nothing explicitly excludes the application of article 234 to straits, the meaning of "due regard for navigation" becomes crucial, if the Northwest Passage or Soviet Arctic Straits are, or become, international straits through use. For this reason it is implausible to argue that straits status ever can be irrelevant to the interpretation of article 234; a more convincing hypothesis is that whether or not its area of application is widely or narrowly defined, the permissibility of restriction on navigation under article 234 may have to vary according to the status and circumstances of the waters in question.

Beyond observing that "due regard" implies a standard of reasonableness dependent on circumstances, it is not possible to develop these points fully here. What is clear is that although article 234 gives Arctic waters a special status, it is uncertain how far it allows subordination of the principle of freedom of navigation to the needs of environmental protection. On this issue, as on those considered earlier, there is incomplete consensus among Arctic states. Systematic acceptance of a body of principles of environmental law has not yet been achieved in the Arctic. Neither a good example of a global system in operation, nor a unique regional case, the Arctic's value as a precedent on environmental matters remains confused.

#### REMARKS BY DONAT PHARAND\*

I, frankly, must say first of all that when I saw that the program was entitled "Legal Regimes of the Arctic," in the plural, I really didn't know what we were going to talk about. I thought, well, for a Canadian, there is only one regime, and probably for the U.S.S.R., for Professor Kolodkin, there is only one regime. We won't say immediately what that regime would be for the Americans; I presume there is only one regime and that is complete freedom, perhaps, of navigation and everything else. So, I then looked at the letter sent to me by the organizer of this particular panel, William Butler, which said: "Each panelist is exploring selected aspects of the legal regime of the Arctic," in the singular and I said: "Oh, my God, that's great!" Unfortunately, I read that only on the plane and didn't know exactly what to do.

In any event, what I did was prepare an outline, and it has seven points. Number one, I thought I would say a few words about the Arctic islands themselves—this has already been covered by our Soviet colleague; number two, a word about the continental shelf; number three, about the deep seabed; number four, about the Arctic Ocean

\*Professor of Law, University of Ottawa.

itself, as to whether or not there should be a special regime, and this has already been covered to a considerable extent; number five, since we are in the United States, and since I understand the United States and Canada do not have a completely unified view of the status of some of the waters, I thought that I would say a word about the waters of the Canadian Arctic archipelago; number six, a word about the airspace; and finally, a question mark, and this has been touched upon considerably by our Soviet colleague, namely, a section I'll call "A Legal Regime for International Cooperation: An Arctic Basin Council?" This, indeed, I should add immediately, is a suggestion made some time ago by my colleague at the University of Ottawa, Maxwell Cohen. So, this is what I intend to do in the short 13 minutes that I have left to me. The emphasis will vary from one point to another, and of course you will have time, then, for discussion.

Number one, with regard to the Arctic islands, takes no time, but I do believe that it is important to get it out of the way immediately. As our colleague from the U.S.S.R. has stated it, there is no question of territorial sovereignty insofar as the land and islands are concerned. I mean, the United States does own Alaska and has since 1867. The U.S.S.R. does own all the islands including, it seems to me, Wrangel Island, although I was interested to read, not so very many years ago, a letter that came from the U.S. State Department, saying that the State Department had not officially recognized the sovereignty of the U.S.S.R. over Wrangel Island. Well, I never thought it was necessary. They've been in possession there since 1924, and it's a bit like the Falklands, perhaps. In any event, I don't think there is much doubt about that. There is no doubt either on the other side with respect to Svalbard: there Norway, since the Treaty of Paris of 1920, has had sovereignty, subject to certain limitations and certain rights in favor of other states. And then, of course, there is Greenland, which is under Danish sovereignty, subject, of course, to an internal autonomy status—that is, the foreign affairs and national defense are still in the hands of Denmark. Insofar as Canada is concerned, since 1930, Canada and Norway having concluded an agreement by way of an exchange of notes whereby Norway recognized Canada's sovereignty over the Sverdrup Islands, there has never been any question about sovereignty or Canada's exclusive jurisdiction over those islands.

Second, insofar as the shelf is concerned, of course there is no question about that except a question of delimitation: seaward delimitation and lateral delimitation. Insofar as the seaward delimitation is concerned, there's not much of a problem except perhaps in two exceptional areas. There is a submarine elevation, the Lomonosov Ridge, and if that ridge happens to be the continental-shelf origin, then there might be a question of delimitation and seaward limit. There is also Alpha Ridge, a second submarine elevation. If those two submarine elevations are of continental-shelf origin, then we do have a problem of seaward limit. And perhaps we even have a problem, insofar as the Lomonosov Ridge is concerned, of opposite state delimitation—namely the U.S.S.R. on one side and Canada and Denmark on the other—because the ridge happens to come just into the Lincoln Sea between Greenland and Ellesmere.

With respect to the lateral delimitation, those problems have not been resolved. There is of course in the Bering Strait between the U.S.S.R. and the United States a question of where the lateral limit is going to be. As I understand a note published in the *American Journal of International Law* in 1981,<sup>1</sup> the United States and the U.S.S.R. have agreed to use the 169th degree, the degree of longitude in the 1867 cession treaty, as a maritime boundary up to the 72nd degree of latitude, but no fur-

<sup>1</sup>Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AJIL 729 (1981).

ther than that. Therefore, there is a question of continental-shelf delimitation north of that. And on the other side, the U.S.S.R. and Norway have been having discussions for the last dozen years, I guess, and they have not arrived as yet at a delimitation agreement in the Svalbard area. Neither have Norway and Denmark arrived at any agreement on the delimitation between Greenland and Svalbard. Insofar as Canada and Denmark are concerned, we have an agreement, but only as far as the Lincoln Sea. There is a little bit left in the Lincoln Sea where no agreement on the continental-shelf delimitation has been reached.

Third, with respect to the deep seabed, the question arises, I suppose, whether there are any resources there that would form part of the resources of the deep seabed under the 1982 Convention. After all, this is new law. I have not been able to find any evidence of the presence of manganese nodules or even of liquids—sulfides, for instance—that would come under the definition of resources in the Convention. In any event, should such resources eventually be found, then it seems to me that, in principle, those resources would fall under the Law of the Sea Convention. Naturally, the Authority would need the fullest cooperation of the five Arctic states in order to exploit those resources, but, nevertheless, in principle, it seems to me that they would fall within the general Law of the Sea Convention common heritage of mankind provision.

Fourth, as to the Arctic Ocean, I personally subscribe to the view that the Arctic Ocean—even though not an ocean like the others since, of course, it is covered with ice most of the time—insofar as the freedoms of the seas are possible, it should fall within the general regime, in spite of the presence of ice. I don't think that the five surrounding Arctic states have any basis in law to assert the sector theory and claim jurisdiction right up to the pole. Personally, I think that claim holds no water whatever, and it is absolutely without basis in international law—without basis, that is, for a claim of sovereignty and without basis as well for a claim of jurisdiction. Of course, you could use the sector theory, or any meridian of longitude, to delimit certain areas of jurisdiction, but not to serve as the legal basis for the acquisition of that jurisdiction. Our Soviet colleague and Professor Boyle were right to mention the importance of the protection of the marine environment, of course. And that is a very delicate environment, particularly when you consider certain areas such as the entrance of Lancaster Sound, perhaps the most productive biological area of the whole of the Arctic. But, you could have a regional agreement for the protection of the marine environment and use the 169th, the 141st, etc., to delimit the supervision and the control of the marine environment within those sectors, but no more than that in my humble opinion.

Fifth, as to the waters of the Canadian Arctic, that would normally take a book—indeed it did take me a book to deal with that, but I will not read from it, I promise you. Instead, I merely will summarize what I have done in the book.<sup>2</sup> I have examined three possible legal bases for Canada's claim that the waters of the Canadian Arctic archipelago, including the waters of the Northwest Passage, are internal waters of Canada, through which there is no right of innocent passage. I examined the sector theory. Perhaps I misunderstood Professor Jacobson, but I believe that it is incorrect to say that Canada subscribes to the sector theory and that Canada claims some jurisdiction under it. I do not speak, of course, for the Canadian Government; I speak only for myself, but, that, at least, is my understanding—that Canada does not subscribe to the sector theory as a legal basis for claiming jurisdiction of any kind, even, it

<sup>2</sup>D. PHARAND, *CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW* (1988).



seems to me, in the delimitation problem, which I neglected to mention earlier, between Canada and the United States with respect to the continental shelf in the Beaufort Sea. As I understand the Canadian position, it is that the 141st meridian, which serves as the boundary between the Yukon and Alaska, ought to be prolonged. In other words, it is the prolongation of the land boundary that would be the method of delimitation, and as you know, this is one of the four methods specifically mentioned by the International Law Commission in its 1956 report. But, insofar as the sector theory is concerned, that is my view, and I do believe that it is compatible with the Canadian Government's view.

With respect to the second basis I examined, I considered whether or not there is historic title. I have considerable doubt about that.

I then examined whether the straight baselines drawn by Canada on September 10, 1985, are valid in international law, and I have come to the conclusion that they are. The reason that I do is because the Canadian Arctic archipelago, the islands north of the continent, do constitute a coastal archipelago. It's certainly not an oceanic archipelago. You cannot speak of an archipelagic state and draw archipelagic straight baselines through which, as in the Philippines or Indonesia, you would have freedom of passage—the new right of transit passage or sealane passage, it's the same thing. And in all the rest of the matters, you would have, of course, the right of innocent passage. To my mind, we are not dealing with that kind of archipelago. It is a coastal archipelago as defined not in the 1958 Territorial Sea Convention, nor in the 1982 Convention—not quite—but rather as defined in the *Anglo-Norwegian Fisheries Case*. In other words, you have a coast there that is “bordered by an archipelago such as the ‘skjaergaard’.” Those are the words of the *Anglo-Norwegian Fisheries Case*, and it seems to me that the practice of states since 1958 has shown that the 1958 Convention, which speaks of a fringe of islands, as does the 1982 Convention, ought to be interpreted extensively rather than restrictively and indeed has been.

And I might recall that in January 1987, the U.S.S.R. did draw straight baselines around two archipelagos north of the U.S.S.R. And Canada, after the *Polar Sea* incident, adopted straight baselines around the archipelago north of its coastline. I referred to this as an incident—it wasn't a war or anything like that, it was just a slight misunderstanding. The United States forgot, perhaps at the beginning, to ask Canada's permission. It simply notified Canada, and said something to the effect: “Presuming you will not have any objection—since we want to go from Thule, Greenland to the Chukchi Sea, and naturally, it would accommodate us greatly to use the Northwest Passage instead of going south—we are giving you notice that that is what we intend to do.” I think the United States was quite surprised at the reaction that came from Canada. Canada objected and said: “Now, look. You've got to ask permission. Those are internal waters.” Well, you went ahead and we accommodated you and helped you, as we very often do. On September 10, however, shortly after that crossing, Canada adopted and established straight baselines around the archipelago, and since then, as you know, there have been negotiations between the United States and Canada, and an agreement of cooperation in the Arctic was concluded in January 1988.<sup>3</sup> It is provided in the agreement that the United States will ask Canada's permission to use those waters, including those of the Northwest Passage. One has to add very quickly, however, that there is an overriding clause, shall we say, in that agreement whereby both parties remain fast on their respective legal positions. That is, the United States continues to maintain that the waters are international—in

the sense that there is a right of freedom of navigation—and Canada continues to maintain that those waters are internal waters. That is, Canada continues to maintain that those waters were historically internal waters and that the only thing that the 1985 straight baselines did was to delimit the geographic extent of the historic internal waters of Canada.

I will spend my final minute commenting on the Arctic airspace. There is no problem there, naturally, since the status of the airspace depends on the status of what is below. I was interested, however, to read on the plane coming here a report in the *Globe and Mail* which reads: Japan to Begin Transporting Plutonium Over High Arctic.<sup>4</sup> The article says that Japan will avoid the airspace above the Canadian Arctic islands and also will avoid the airspace of Alaska. That's fine; what is interesting, however, is this little three-line paragraph that reads: "Originally, Japan and the United States negotiated a deal [I like that] that would have had the plutonium-laden airplanes crossing Canadian territory and refueling at Anchorage, Alaska on their way to Japan." Naturally, it was the shortest route from Europe to Japan. I have the impression here that the United States—if this report is correct, and of course I do not know—originally forgot that the airspace above the Canadian islands is not an international airspace such as that over the Arctic Ocean itself.

If this report is accurate, it would show what I call a certain degree of insensitivity on the part of the United States—somewhat, I might add, as when the United States simply notified Canada presuming that that was all that was necessary, and that we would have no objection whatever to its crossing with an icebreaker. By the way, I was very happy to read recently a decision by an American Court of Appeals—I forget what Circuit—about three years ago that an icebreaker was, in the opinion of the court, a warship. I always thought it qualified as a warship, but there an American Court of Appeal has confirmed my view.

Insofar as the Arctic Basin Council is concerned, I do believe it would be a very good idea if we were to apply article 123 of the Law of the Sea Convention and see what we can do by way of cooperating to protect the marine environment, to do scientific research for the benefit of all Arctic states, and to respond in as positive a way as possible to the proposal Gorbachev made in Murmansk, October 1, 1987.

#### COMMENTS BY ELIHU LAUTERPACHT\*

It is such a pleasure to follow four such distinguished speakers, that I do not mind being obliged to render my comments in very short form. I have boiled them down to five. The first relates to title to the area between the North Pole and the mainland of the states concerned. I was delighted to hear Professor Pharand express doubts about the validity of the application of the sector principle, doubts that I fully share.

I move, though, from that point, which implies that there may not be full sovereignty over the area between the North Pole and the mainland, to ask whether as a result of what we have heard today we should be thinking, not in terms of technical legal problems and their resolution by reference even to international convention, but rather of the establishment of an agreed regime in the area. It is clear that there must be one, particularly to deal with questions such as transit, the difficulties of which have been highlighted by some of the observations regarding recent developments made by Professor Pharand.

<sup>4</sup>The *Globe and Mail* Toronto, Apr. 20, 1988.

\*Q.C., Director of the Research Center for International Law, Cambridge University.

So, we come to the third comment and ask ourselves: "What is the urgency of such a regime, and what are the priorities?" Clearly, there is a degree of urgency. As to the priorities, it is very difficult to choose between the priority of a transit regime and the priority of an environmental protection regime. One can understand that the considerations that lead Canada to assert a degree of authority in the area that may, for some, be questionable, though not in all respects, are ones that are related largely to Canada's sensitivities about the protection of the environment. Those sensitivities impinge on transit, and it is a question of balancing the two, one against the other, and, therefore, there can be no priority as between the two in the establishment of a regime. The two must be dealt with in tandem.

And so, one comes to the fourth comment: What institutional arrangement, if any, should be made regarding the Arctic area? One of the items Professor Pharand was foreclosed from examining in detail, but that is clearly important, is the question of whether there should be an Arctic Council. And if there should be an Arctic Council within the framework of which negotiations may take place, who should be the parties to it? Obviously, the five coastal states. But then, who else is to be added to it? One answer is the international organizations that have a special interest in the problems involved, for example UNEP and the IMO. But does that not exclude other states? The answer surely cannot be no: there are some states, such as the United States, that by their actions have demonstrated an interest in navigation in the area, and presumably they should be involved. The question of who should be added to that list is a delicate one, but no doubt it should be grappled with soon.

And last, by way of final comment, which is of a very general order, and that is that we are here, in relation to the Arctic, in the presence of yet another instance of what one may call the elasticity of the law of the sea. No one knows better than Elliot Richardson how much discussion there was at the Third U.N. Conference on the Law of the Sea of what we may call marginal points, even though they are points of great substance and importance. But the fact is that we are finding constantly, and a good illustration is this whole problem of archipelagos, that coastal states are tending to extend their rights or extend their claims even beyond what the convention permits. That is not to say that those extended claims are in themselves wrong. What is required, however, is to keep a careful watch on the various ways in which both coastal-state claims and navigation-state claims are being extended over the whole range of the law of the sea provisions.

## DISCUSSION

**ARMAND DE MESTRAL:**\* This point has been alluded to very briefly by Professor Boyle, but I think in addressing the question of the relationship of article 234 concerning ice-covered waters and the straits regime, it is necessary to consider the preceding article as well. The relationship is perhaps more subtle than has been suggested, and one should examine it further with respect to the question of priority of environmental jurisdiction.

**Professor BOYLE:** My only comment on that is to agree entirely. It is a question of considerable subtlety, I'm afraid, and in the time available I really didn't have the opportunity to go into that subtlety. That's obviously a complex issue.

**BERNARD OXMAN:**\*\* The first of my two comments is an amendment, in a sense, to the comments of Professor Boyle. There are two provisions in the 1982 convention

\*Professor of Law, McGill University.

\*\*Professor of Law, University of Miami.

that apply not only to the EEZ but to all waters landward of the outer limits of the exclusive economic zone. Both were drafted in large measure by Canada, the U.S.S.R. and the United States. One of those is part of the text on salmon that limits fishing for salmon. That is drafted rather artfully. The other is article 234, which is not drafted as artfully, but the operative language is "within the limits of the exclusive economic zone," and that was intended to embrace all waters landward of 200 miles, including the territorial sea, internal waters, and straits.

My second point is a comment and question directed to Dr. Kolodkin. The difficulty is the following: The theses that have been presented by Dr. Kolodkin and Professor Pharand might find considerable sympathy in many parts of the world, and I suspect that some of Dr. Kolodkin's colleagues, if not Dr. Kolodkin himself, might find themselves uncomfortable with that degree of applause and sympathy. For example, I could imagine that Spain, Morocco, Oman, Southern Yemen, might find Dr. Kolodkin's views on the regime of transitive straits off the U.S.S.R. to be very comfortable with their views regarding transitive straits off Spain or Morocco or Yemen or Oman. In addition, I think that Dr. Kolodkin might want to consider that there well might be many people in Greece who would find Professor Pharand's thesis regarding coastal archipelagos to be quite accommodating of Greek interests in the Aegean. Of course, we all know that in international law you can't have it both ways, and I wonder whether a conference of this sort has ever taken place in the U.S.S.R. between those who are responsible for the coastal defense of the U.S.S.R. in the north, and those who are responsible for the protection of the global interests of the U.S.S.R. in all the oceans of the world.

**Dr. KOLODKIN:** I have addressed today only the straits in the Arctic: It is the opinion of myself and of my Soviet colleagues that we have here the regime of the internal waters and straits. Second, we do not recognize that these straits in the Arctic region are straits used for international navigation. We had two rounds of bilateral consultations with the U.S. delegation, and we did not agree with Louis Alexander, the first Director of the Institute of the Law of the Sea, that our northern straits are covered by the regime of international straits or are used for international navigation. We refused to recognize his view, and now we are continuing the discussion on this point. So allow me to summarize: We recognize the transit passage in straits used for international navigation, but we don't recognize that the Arctic straits are used for international navigation.

MARTIN TRACY LUTZ\*  
*Reporter*

## SELF-DETERMINATION: THE CASE OF PALESTINE

The panel was convened by its Chair, Ved Nanda,\*\* at 8:30 a.m., April 22, 1988.

### REMARKS BY PROFESSOR NANDA

The subject of inquiry in this panel obviously arouses deep passions, especially among those who inhabit the land under question. During the last few weeks, the tragic events on the West Bank and Gaza, or as the area has been known since Biblical times, Judea and Samaria, have caused much soul searching everywhere, not only on

\*J.D. candidate, University of Texas School of Law.

\*\*Professor of Law and Director, International Studies Program, University of Denver.