APPENDIX

SUMMARY OF CANADIAN NOTE HANDED TO THE UNITED STATES GOVERNMENT ON APRIL 16, 1970

The Canadian Government is unable to accept the views of the USA Government concerning the Arctic waters pollution prevention bill and the amendments to the Territorial Sea and Fishing Zones Act, and regrets that the USA is not prepared to accept or acquiesce in them. The Canadian Government cannot accept in particular the view that international law provides no basis for the proposed measures. For many years, large numbers of states have asserted various forms of limited jurisdiction beyond their territorial sea over marine areas adjacent to their coasts. The position of the USA Government is that the waters beyond a three-mile limit are high seas and that no state has a right to exercise exclusive pollution or resources jurisdiction on the high seas beyond a three-mile territorial sea. The Canadian Government does not accept this view which indeed the USA itself does not adhere to in practice. For example, as early as 1790, at a time when the international norm for the breadth of the territorial sea was without question three miles, the USA claimed jurisdiction up to twelve miles for customs purposes and enacted appropriate enforcement legislation, which is still in force. Since 1935 the USA has claimed the authority to extend customs enforcement activities as far out to sea as 62 miles, in clear contradiction of applicable international law. In 1966, the USA established exclusive fisheries jurisdiction beyond its three-mile territorial sea extending out to twelve miles from shore, and the USA has just passed analogous legislation asserting exclusive pollution control jurisdiction beyond its three-mile territorial sea and up to twelve miles. Canada reserves to itself the same rights as the USA has asserted to determine for itself how best to protect its vital interests, including in particular its national security. It is the further view of the Canadian Government that a danger to the environment of a state constitutes a threat to its security. Thus the proposed Canadian Arctic waters pollution prevention legislation constitutes a lawful extension of a limited form of jurisdiction to meet particular dangers, and is of a different order from unilateral interferences with the freedom of the high seas such as, for example, the atomic tests carried out by USA and other states which, however necessary they may be, have appropriated to their own use vast areas of the high seas and constituted grave perils to those who would wish to utilize such areas during the period of the test blast. The most recent example of such a test by the USA and its consequences for the freedom of the high seas, as was pointed out by some Governments at that time, occurred in October 1969 when the USA warned away shipping within a 50-mile radius of the test it was conducting at Amchitka Island. The proposed anti-pollution legislation, proposed fisheries protection legislation and the proposed 12-mile territorial sea constitute a threat to no state and a peril to no one.

It is a well-established principle of international law that customary international law is developed by state practice. Recent and important instances of such state practice on the law of the sea are, for example, the Truman proclamation of 1945 proclaiming USA jurisdiction over the continental shelf and the unilateral establishment in 1966 by USA of exclusive fishing zones. Overwhelming evidence that international law can be and is developed by state practice lies in the fact that in 1958, at the time of the first of recent failures of the international community to reach agreement on the breadth of the territorial sea, some 14 states claimed a 12-mile territorial sea, whereas by 1970 some 45 states have established a 12-mile territorial sea and 57 states have established a territorial sea of 12 miles or more. Indeed, the three-mile territorial sea, now claimed by only 24 countries, was itself established by state practice.

The USA Government is aware of the major efforts made by Canada at the 1958 and 1960 Geneva Law of the Sea Conferences to bring about an agreed rule of law on the breadth of the territorial sea and on the breadth of contiguous zones for the exercise of various other types of limited jurisdiction. Subsequent to the failure of the 1958 and 1960 Conferences Canada joined with other countries in a further extensive and vigorous multilateral campaign to bring about agreement on these questions, but these efforts