

DONAT PHARAND

## The legal régime of the Arctic: some outstanding issues

A comprehensive survey of the legal régime of the Arctic regions would require investigation of the question of sovereignty and jurisdiction over many areas: the lands and islands, the continental shelf, the deep seabed of the Arctic Basin, the Arctic Ocean and its peripheral seas, the Northeast Passage, the Northwest Passage, and the airspace above those regions generally. Such a study would necessarily require a book; my limited purpose in this article therefore is to provide a brief analysis of the main issues involving international law which still remain outstanding.

The question of sovereignty, as such, over Arctic territory is no longer in doubt.<sup>1</sup> Jurisdiction over seabed resources beyond the limits of the continental shelf does not seem to pose any problem, since 'resources' as defined in the 1982 Law of the Sea Convention appear to be absent.<sup>2</sup> The status of the Arctic Ocean and that of the Northeast Passage have been the subject of a special study.<sup>3</sup> The airspace presents no special legal difficulty once the legal status of the subjacent land and water has been determined.<sup>4</sup>

A certain number of questions, however, do remain outstanding, some of which could give rise to international dis-

Professor of Law, University of Ottawa.

- 1 See Donat Pharand, 'The legal status of the Arctic regions,' *Recueil des Cours* 163 (1979), 62-6.
- 2 Donat Pharand, 'L'Arctique et l'Antarctique: patrimoine commun de l'humanité,' *Annales de droit aérien et spatial* 7 (1982), 418-20.
- 3 See Donat Pharand, *The Law of the Sea of the Arctic* (Ottawa: University of Ottawa Press 1973), 144-79 and W.E. Butler, *The Northeast Arctic Passage* (Alphen aan den Rijn: Sijthoff & Noordhoff 1978).
- 4 Pharand, 'The legal status of the Arctic regions,' 106-11.

putes. Now that the Third Law of the Sea Conference (UNCLOS III) is over, and a new legal order for the oceans is gradually solidifying, it seems timely to address briefly those issues. In so doing, at least the following questions should be examined: What is the seaward limit of the continental shelf of Arctic states and how will the lateral delimitation between them be established? What is the extent of Canada's jurisdiction over the waters of its Arctic archipelago? What control can Canada exercise over the straits constituting the Northwest Passage?

#### THE CONTINENTAL SHELF

##### SEAWARD LIMIT

The Continental Shelf Convention of 1958 defined the shelf as extending to a depth of 200 metres or to a point beyond that limit at which the depth of the superjacent waters permitted the exploitation of the natural resources. With developing technology permitting the exploitation of the continental shelf at ever increasing depths, that definition soon became obsolete. In 1967 the United Nations set up a committee on the deep seabed and for a number of years thereafter attempts were made to arrive at a new definition, but without success. It was only after the eighth session of UNCLOS III in April 1979 that a consensus was reached. That consensus is now incorporated in the Law of the Sea Convention and the new definition of the continental shelf reads:

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. [article 76(1)]<sup>5</sup>

5 United Nations Convention on the Continental Shelf, 1958, is found in A/CONF. 13/L.55. United Nations Convention on the Law of the Sea, 1982, is found in A/CONF. 62/122.

The continental shelf in the Arctic Basin is generally very wide, particularly off the coast of the Soviet Union. Indeed, that country has the world's largest continental shelf, and all of the seas along its coast (Barents, Kara, Laptev, East Siberian, and Chukchi) rest on the continental shelf and are characterized as epicontinental seas. However, because of the presence of islands and archipelagos in those seas, the continental shelf is generally within 200 miles from a land area. On the North American side of the pole, the continental shelf is well within 200 miles, except in the Chukchi Sea, where a plateau reaches considerably beyond that limit.

A glance at a map of the Arctic Basin would seem to indicate that the seaward limit of the continental shelf does not cause any problem. However, two undersea features across the middle of the basin, the Lomonosov Ridge and the Alpha Ridge, could conceivably be of continental shelf origin and may therefore represent potential problems – depending on how the seaward limit of the continental shelf is defined in international law.

Presuming that the Lomonosov and Alpha ridges are of continental shelf origin, the question is whether they form a part of the continental shelf off Ellesmere Island and Greenland on the North American side and also of the continental shelf off the New Siberian Islands belonging to the Soviet Union. The answer depends upon the meaning given to 'continental margin' in the legal definition of the continental shelf. Under that definition, the continental margin may extend up to 350 nautical miles and, exceptionally, further. The 1982 convention provides two methods for determining the seaward limit of the continental margin, one based on the thickness of the sedimentary rocks (with a distance limit), and the second on the configuration of the sea bottom. Under the first or geological method, the seaward limit must not extend beyond 350 miles from the baselines from which the breadth of the territorial sea is measured; under the second or physiographical method, the seaward limit must not extend more than 100

miles beyond the 2500-metre isobath. However, when the geological method is used, the 350-mile limit does not apply to 'submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs' [article 76(6)].

It is, of course, under this provision that Canada has been able to issue oil and gas exploratory permits on the Flemish Cap, as far as 380 nautical miles off the coast of Newfoundland. It is also under this provision that Canada could claim that all or part of the Lomonosov and Alpha ridges form a portion of its continental shelf. It is this possibility which led Canada to conduct two expeditions in the Arctic Ocean, LOREX (Lomonosov Ridge Expedition) in 1979 and CAESAR (Canadian Expedition to Study the Alpha Ridge) in 1983. Although both expeditions, installed on drifting ice floes, took numerous core samples to determine if the ridges were continental shelf fragments or ordinary oceanic ridges, public accounts of the results do not indicate any definite answer. However, it would appear that the Lomonosov Ridge is more likely to be of continental origin than is the Alpha Ridge.<sup>6</sup> Should it be confirmed that either or both are of continental shelf origin, the equidistance method of delimitation between opposite states would probably be used to divide the Alpha Ridge between the Soviet Union and Canada, and the Lomonosov Ridge between the Soviet Union, on the one hand, and Canada and Denmark, on the other. In the latter case, since the Lomonosov Ridge begins in the Lincoln Sea between Ellesmere Island and Greenland, there is the additional problem of lateral delimitation between Canada and Denmark.

#### LATERAL LIMITS

The hydrocarbon resources in the continental shelf around the Arctic Basin are known to be considerable, and drilling activity has increased in recent years, particularly in the Beaufort Sea.

6 Such was the opinion expressed by Dr Hans Weber, a senior scientist with both of Canada's expeditions, at a conference on the Arctic Circle on 14 December 1982.

Although there have been negotiations about the delimitation of some of the continental shelf lateral limits between Arctic states, none has yet resulted in actual settlement.

The law applicable to such continental shelf delimitation between neighbouring states has had a rather difficult history and is still not very satisfactory. An understanding of the provision in the 1982 convention thus lies in the antecedents of that provision.

The delimitation rule adopted in the Continental Shelf Convention of 1958 provided that 'the boundary of the continental shelf shall be determined by agreement between them' and 'in the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance' [article 6(2)]. In other words, the principle of equidistance would be the general rule, and a modification of the equidistance line would be the exception when justified by special circumstances. The expression 'special circumstances' was not defined in the convention, but the International Law Commission, which prepared the draft of the convention, specified three situations which qualified as special circumstances: an exceptional configuration of the coast, the existence of islands, and the presence of navigable channels.<sup>7</sup>

In 1969 the International Court of Justice (ICJ), in its judgment of the North Sea Continental Shelf Cases, interpreted that provision as 'the equidistance: special circumstances principle.'<sup>8</sup> The ICJ did not actually say that this constituted a single rule of delimitation, but this further step was taken in 1977 by a special arbitral tribunal of five members, in the English Channel Continental Shelf Case between France and the United Kingdom. This tribunal, which included two members of the International Court, held that article 6 of the 1958 convention

<sup>7</sup> *Yearbook of the International Law Commission 1953* (New York: United Nations 1959), II, 216.

<sup>8</sup> International Court of Justice (ICJ), *Reports*, 1969, 23.

provided a single rule: 'a combined equidistance – special circumstances rule.' Their decision specified that the role of special circumstances was to ensure an equitable delimitation and that the combined rule gave 'particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined by equitable principles.'<sup>9</sup>

Despite the 1977 decision, the delegates at UNCLOS III continued to be divided over the proper method of delimitation. One group maintained that equidistance should remain the basic method of delimitation as provided in the 1958 Continental Shelf Convention, whereas the other argued that the delimitation should be done in accordance with equitable principles. A compromise, incorporated in the Informal Composite Negotiating Text of 1979, provided that 'the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law' and that 'such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.'<sup>10</sup> This compromise did not rally sufficient support to endure, however, and, in August 1981, it was replaced by the rule which finally appeared in the 1982 convention: 'The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution' [article 83(1)]. Because article 38 merely lists the international law sources which the ICJ should apply – basically international conventions and international customs – the provision by itself is rather meaningless. Guidance will still have to be obtained from relevant interna-

<sup>9</sup> ICJ, decision of 30 June 1977, typewritten text of 236 pages, paras 68 and 70.

<sup>10</sup> Informal Composite Negotiating Text/Revision 1 (A/CONF. 62/WP.10/rev. 1), 28 April 1979, article 83.

tional decisions as to what the applicable international law actually is.

There have already been two cases heard by the ICJ since the adoption of the new provision. In the Continental Shelf Case between Tunisia and Libya of February 1982, the International Court took into account the emerging law and held that 'the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances.' As to the meaning of 'equitable principles,' it stated that 'the principles being subordinate to the goal to be attained, the equitableness of the principles to be applied must be determined by reference to the equitableness of the solution.'<sup>11</sup> In the Gulf of Maine Case between Canada and the United States, heard by a five-member chamber of the International Court in the spring of 1984, both parties relied heavily on the 1982 decision. However, since equity is a very flexible concept and relevant circumstances vary from one situation to another, it is not surprising that the delimitation lines proposed by the parties were a considerable distance apart. The American line, relying on a number of special circumstances, englobed all of Georges Bank, whereas the Canadian line, relying basically on the equidistance method and modified by ignoring certain coastal features on the American side, gave Canada about half of Georges Bank. A special feature of this case is that the parties asked the ICJ to delimit not only the continental shelf but also the column of water above it. It was not surprising that the parties asked the court to settle both problems at the same time, since the rule (or absence thereof) applicable to continental shelf delimitation is also applicable to the delimitation of the exclusive economic zone.<sup>12</sup> Thus, the line drawn by the International Court will delimit both the hydrocarbon resources of the continental shelf and the biological resources of the superjacent waters. At the time of writing, no decision has yet been made in this case.

<sup>11</sup> ICJ, *Reports*, 1982, 92 and 59.

<sup>12</sup> Law of the Sea Convention, 1982, article 74.

To conclude, on the law applicable to continental shelf delimitation at least ten factors so far have been held to constitute relevant circumstances which may be taken into account in establishing delimitation lines. These factors are the general configuration of the coast, the physical and geological structure, the natural resources of the area, a reasonable proportionality between the extent of the continental shelf and the length of the coast of a state, the size of the area to be delimited, a marked change in the direction of a coastline, any special feature or configuration of a coast, the existence and position of islands in the vicinity, the land frontier between the parties, and the conduct and attitude of the parties over the preceding period of time.

An examination of the continental shelf and maritime boundary agreements concluded up to the end of 1982,<sup>13</sup> along with the few international decisions on the question, seem to indicate that equidistance has been the basic mode of delimitation. In trying to summarize the law applicable to continental shelf delimitation between neighbouring states, a twofold proposition may be formulated: first, such delimitation must be made in accordance with equitable principles, taking into account all relevant circumstances, in order to arrive at an equitable solution; and second, the equidistance method, with or without modification, has been generally found to produce the desired result.

Turning specifically to the Arctic, none of the lateral limits have been completely established between these states, and there are five delimitation problems.

*Soviet Union (Franz Josef Land) and Norway (Svalbard)*

Norway and the Soviet Union have been meeting irregularly since 1974 to seek an agreement on the delimitation of their shelf in the Barents Sea, but without success. The line is to be

<sup>13</sup> See a list of 88 agreements in *Annexes to the Reply Submitted by Canada*, 1: *State Practice*, 43-7, 12 December 1983, in the Gulf of Maine Case.



drawn between Svalbard, over which Norway's sovereignty was recognized by the Paris Treaty of 1920, and Franz Josef Land and Novaya Zemlya, which belong to the Soviet Union. Norway bases its case mainly on the equidistance principle, whereas the Soviet Union suggests a delimitation line which coincides roughly with the sector line established in its 1926 decree,<sup>14</sup> namely the meridian of 32° 4' 35" longitude east (see figure 1). This difference in approach results in a disputed area of some 155,000 square kilometres, most of which lies in the strategically sensitive Barents Sea, where the Northern Fleet of the Soviet Union is stationed.<sup>15</sup>

It appears that the sector line is one of a number of circumstances which the Soviet Union is relying upon, the others being related to economic, demographic, and security considerations. Without going into the merits of this theory in international law,<sup>16</sup> it is appropriate to mention that when the theory was invoked by Germany in the North Sea Continental Shelf Cases as offering a guideline on equitable apportionment, this suggestion was strongly rejected by Denmark and the Netherlands in the written pleadings. The sector theory argument was subsequently dropped in the oral pleadings and the judgment of the Court makes no mention of it. However, two of the judges who wrote separate opinions rejected its applicability, one of them stating that the doctrine of sectors was 'reminiscent of the abandoned concept of spheres of influence.'<sup>17</sup>

Norway's position appears to be basically sound as a starting point. A number of circumstances could be taken into account, such as the size and position of certain islands on the peripheries of Svalbard and Franz Josef Land. In addition, it might

14 See G.H. Hackworth, *Digest of International Law* (Washington DC: U.S. Government Printing Office 1940), I, 461.

15 For a discussion of this problem, see Willy Østreng, 'The continental shelf – issues in the "Eastern" Arctic Ocean,' in J.K. Gamble, ed, *Law of the Sea: Neglected Issues* (Honolulu: Law of the Sea Institute, University of Hawaii 1979), 165-82.

16 For a discussion of this theory, see Donat Pharand, *The Waters of the Canadian Arctic Archipelago in International Law* (forthcoming 1985), part 1.

17 ICJ, *Reports*, 1969, 116.

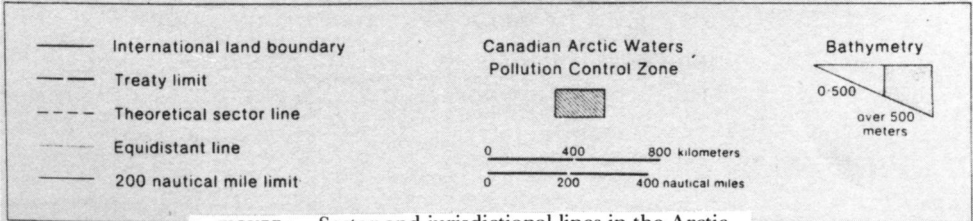
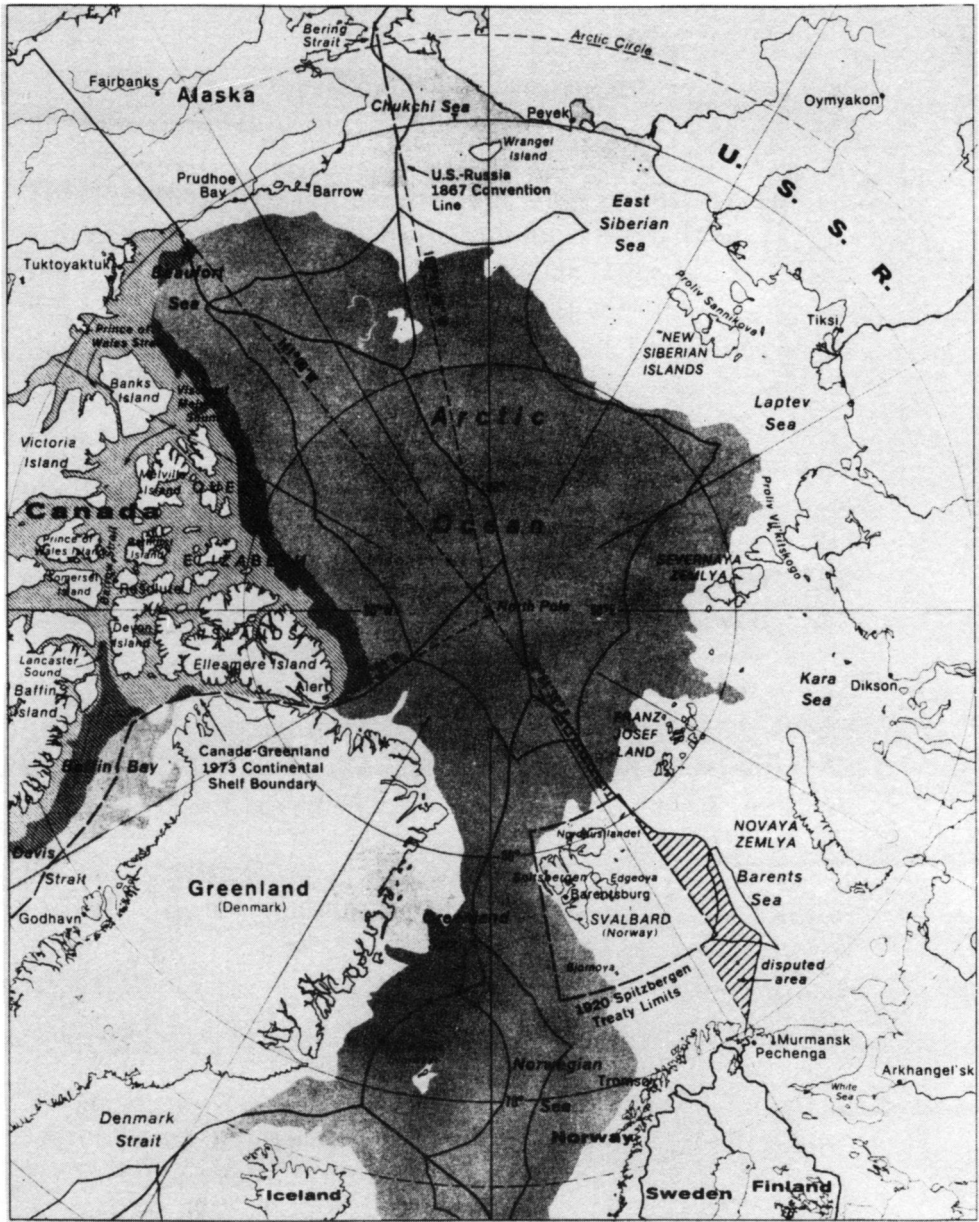


FIGURE 1 Sector and jurisdictional lines in the Arctic.

be possible for the Soviet Union to invoke its security, defence, and navigational interests in the Barents Sea as constituting special circumstances. The parties in the English Channel Case did invoke such interests, and, although the tribunal seemed to have found that the arguments of the parties were mutually exclusive, it did say that such considerations 'may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region.'<sup>18</sup>

*Norway (Svalbard) and Denmark (Greenland)*

Norway has already delimited its continental shelf with Iceland in respect of Jan Mayen, but it has not concluded an agreement with Denmark in respect of Greenland. It may be, however, that the shelf of each state has already been delimited by nature in the sense that the deep trough known as the Nansen Fracture Zone may be a natural boundary. If the trough constitutes a geological interruption in the natural prolongation of the shelf, the Yermak Plateau on the Svalbard side of the Nansen Fracture Zone might represent the limit of the Norwegian shelf.

*Denmark (Greenland) and Canada (Ellesmere Island)*

In 1974 Denmark and Canada agreed upon the delimitation of the continental shelf between Greenland and Ellesmere Island as far north as 82°13' of latitude, where it meets with the 60th meridian of longitude. This line follows the equidistance method, modified in certain sections to take account of special configurations of the coasts and the presence and size of certain islands. It is reasonable to expect that the parties might follow a similar approach to delimit the rest of the shelf in the Lincoln Sea. It is not known to this writer why the delimitation has not been completed, but it may be that the states are waiting for more precise information on the geological nature of the Lo-

<sup>18</sup> ICJ, decision of 30 June 1977, para 188.

monosov Ridge. If the ridge is of continental shelf origin, the equidistance method would create a delimitation line running roughly along the middle of the ridge. Even though the 60th meridian of longitude has been shown as a boundary on a great number of Canada's maps since 1904, it is doubtful that Canada would invoke the sector theory in any negotiation because it would not seem to be to its advantage.

*Canada (Yukon) and the United States (Alaska)*

In 1977 Canada and the United States attempted to negotiate a settlement of their four maritime boundary problems (Gulf of Maine, Juan de Fuca, Dixon Entrance, and Beaufort Sea) as a package, but were not successful. Once the decision for the Gulf of Maine has been handed down by the International Court, presumably the parties will go back to the negotiating table to settle the remaining problems. Considering the intensification of drilling activity by both countries in the Beaufort Sea in recent years and their determination to attain energy self-sufficiency as soon as possible, one would expect the Beaufort Sea continental shelf delimitation to stand fairly high on their agenda. In this particular geographic situation, as distinguished from that in the Gulf of Maine, the equidistance method favours the United States because of the slightly convex coast of Alaska and the concave coast of the Yukon. It would therefore appear that the special configuration of the coast of Canada in the area to be delimited might constitute a special circumstance and warrant a certain modification of the equidistance line.

Perhaps of more importance, since 1965 Canada has been using the 141st meridian of longitude as its western boundary for the exercise of different types of jurisdiction, in particular for the issuance of oil and gas exploration permits. It also used the same meridian up to a distance of 100 nautical miles to describe the waters over which it claimed jurisdiction in the Arctic Waters Pollution Prevention Act of 1970. Furthermore, in 1977 it described the western boundary of its exclusive fishing zone

up to 200 miles by following the 141st meridian for that distance.

These various uses of the 141st meridian do not necessarily indicate that Canada is relying on the 1825 boundary treaty between Great Britain and Russia as having established a maritime boundary up to the North Pole. Indeed, a careful analysis of that treaty, taking into account the historical context, leads to the definite conclusion that the demarcation line between the 'possessions' of the parties went only *as far as* the Arctic Ocean.<sup>19</sup> Moreover, the parties could not have envisaged establishing a boundary for the continental shelf at a time when that concept was absolutely unknown in international law. However, Canada could argue that 'the continuation in the seaward direction of the land frontier' constitutes an accepted method of continental shelf delimitation.<sup>20</sup> In these circumstances, it is quite possible that an equitable solution might be reached by modifying the equidistance line so as to take into account the historical use which Canada has made of the 141st meridian, at least since 1965, and the apparent acquiescence in that use on the part of the United States.

*United States (Alaska) and Soviet Union (East Siberia)*

It would appear that an appropriate starting point for delimitation of the continental shelf between Alaska and East Siberia would be the demarcation line in the 1867 boundary treaty between the United States and Russia, whereby the latter ceded Alaska to the United States. This demarcation line, which passes midway between certain specified islands in Bering Strait, coincides approximately with the 169th meridian of longitude. The treaty provides that the demarcation line 'proceeds due north, without limitation, into the same Frozen Ocean.'<sup>21</sup> It

19 See Pharand, *The Waters of the Canadian Arctic Archipelago*, part 1.

20 See North Sea Continental Shelf Cases in ICJ, *Reports*, 1969, 34, where the court referred to this method as one of four suggested by the committee of experts to the International Law Commission when it was preparing the 1958 Convention.

21 'Convention ceding Alaska between Russia and the United States,' article 4, in *Consolidated Treaty Series*, 134, p 332.

may be contended that the use of the expression 'without limitation' indicates that the parties intended to take the boundary line right up to the North Pole. It is instructive to compare the English and French versions of the treaty on this point, both of which are authentic. The English one uses the expression 'without limitation, into the same Frozen Ocean,' whereas the French reads 'sans limitation, vers le nord, jusqu'à ce qu'elle se perde dans la Mer Glaciale.' Regardless of which text one uses, there seems to be considerable ambiguity in that the boundary line, if the meridian in question is supposed to serve as one, must have a limit. The French text is even more confusing in that the expression 'sans limitation' leads to an unreasonable result when applied to a boundary, and the expression 'jusqu'à ce qu'elle se perde dans la Mer Glaciale' is ambiguous in that it is difficult, indeed impossible, to determine the point at which the boundary may be said to lose itself in the ocean. Resort must thus be had to the context of the whole treaty as well as to the circumstances surrounding its conclusion.

The rest of the treaty makes it clear that the object of the cession or transfer was purely territorial. Every article of the treaty (except article 7 which pertains only to ratification) speaks of 'territories and dominion,' 'territory and dominion,' 'territory or dominion,' and 'territory.' Article 4, in particular, enumerates the following: 'territory, dominion, property, dependencies and appurtenances' as constituting the object of the cession. There is absolutely no indication that the parties contemplated dividing any part of the Arctic Ocean among themselves.

This contextual interpretation is supported by the circumstances surrounding the conclusion of the treaty. In 1867 the parties believed in the existence of a continent which was thought to be somewhere north of Alaska and for which the explorers of the time were still searching. This 'Arctic continent' was of particular interest to Russian and American explorers. In 1820, the imperial Russian government had sent the Wrangel expedition in search of this continent. When Captain Kellet

discovered Herald and Wrangel Islands in 1849, he thought they were appendages to the famous continent. And the explorer V. Stefansson tells us that 'the hypothetical continent was still in the minds of scientists when Lieutenant De Long was fitted out by the New York "Herald" in 1879.'<sup>22</sup> As a consequence, Lieutenant De Long drifted his *Jeannette* right across the location of that theoretical continent.

It seems therefore that the 141st and 169th meridians of longitude were merely used to establish the geographical area within which the land islands forming the object of the transfer were located. This interpretation accords with a 1955 study by a group of American cartographic experts. Entitled 'Coordinate Positions for the Plot of U.S.-Russian Convention of 1867,' this document has been adopted as the standard description for the cartographic representation of the 1867 treaty. It fixes the northernmost point of the demarcation line at 72° north latitude, explaining this choice as follows: 'It should be noted that the original Convention language stated that the line "proceeds due north, without limitation, into the Frozen Ocean". Since the United States does not support the so-called "sector claims" in the polar regions, the northernmost point for the representation of the Convention line was agreed to be 72° 00' N.'<sup>23</sup>

The 1867 line, as interpreted by the United States in 1955, was adopted by the Soviet Union and the United States in 1977 as the delimitation line between their respective fisheries jurisdictions. Realizing that its proposed 200-nautical-mile fishery conservation zone in the waters off Alaska would probably overlap with the 200-mile zone which the Soviet Union was about to establish, the United States suggested that the 1867 line be used and the Soviet Union agreed. Since then, as the former deputy legal adviser of the Department of State explained in 1981, 'both states have observed the 1867 Conven-

<sup>22</sup> V. Stefansson, *The Adventure of Wrangel Island* (London: Jonathan Cape 1925), 20.

<sup>23</sup> United States, Department of State, *International Boundary Study*, no 14 (1 October 1965), 3.

tion line in this manner in enforcing their respective fisheries jurisdiction, and there appears to be no disagreement that the Convention line is a maritime boundary established by treaty.<sup>24</sup>

Presuming therefore that the United States and the Soviet Union have agreed to use the convention line to delimit their continental shelf as far as 72° north latitude (which is just north of Wrangel and Herald Islands), there remains the method of delimiting the shelf north of that point. The shelf extends considerably further under the Chukchi Sea, leading eventually to the Chukchi Plateau and into the abyssal plain. The presence of Wrangel and Herald Islands on the Soviet side of the demarcation line might be expected to encourage the Soviet Union to advocate the equidistance method. However, to do so presumes that the islands would be given full weight in drawing the equidistance line; considering that Herald Island is so small that it is sometimes referred to simply as a rock, it is doubtful that an international tribunal would agree to give it full weight. Indeed, in the English Channel Case of 1977 that tribunal held that the Scilly Isles off the British coast distorted the equidistance line sufficiently to be considered a special circumstance and, thus, to justify departure from the strict median line. Consequently, the ICJ gave only half effect to the Scillies in establishing the delimitation line, thus abating the disproportionate effect of the projection of the islands. Somewhat in the same way, Wrangel and Herald Islands (particularly Herald which lacks any habitation) might be given less than full effect in any attempt to reach an equitable delimitation between the United States and the Soviet Union.

#### WATERS OF THE CANADIAN ARCTIC ARCHIPELAGO

Canada claims that all of the waters within the Canadian Arctic archipelago are internal waters over which it has complete sov-

<sup>24</sup> M.B. Feldman and D. Colson, 'The maritime boundaries of the United States,' *American Journal of International Law* 75 (October 1981), 753.



ereignty in the same way as it does over the surrounding land areas. This claim is not necessarily accepted by all other countries, particularly the United States. There are two main methods for a state to acquire sovereignty over areas of water: one is the proof of an historic title and the other is the establishment of straight baselines.

#### HISTORIC WATERS

In December 1973, the Legal Bureau of Canada's Department of External Affairs expressed the opinion 'that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation.' This position was affirmed by the secretary of state for external affairs in May 1975, when he stated: 'As Canada's northwest passage is not used for international navigation and since the Arctic waters are considered by Canada as being internal waters, the regime of transit does not apply to the Arctic.'<sup>25</sup> In the light of these statements, what are the legal requirements for the proof of an historic title to sea areas?

#### *Legal requirements*

The doctrine of historic waters emerged during the nineteenth century as an enlargement of the doctrine of historic bays and has been preserved in the Convention on the Territorial Sea and Contiguous Zone of 1958, as well as in the 1982 Convention on the Law of the Sea. Although the role of historic waters in international law has been considerably reduced since the approval of the straight baseline system for coastal archipelagos by the International Court of Justice in the Anglo-Norwegian Fisheries Case of 1951 and the incorporation of a maximum

<sup>25</sup> See letter dated 17 December 1973, reproduced in *Canadian Yearbook of International Law* 12 (1974), 279, and statement of Allan MacEachen in Standing Committee on External Affairs and National Defence, *Minutes of Proceedings and Evidence*, 30th Parl, 1st sess, no 24, 22 May 1975, 6.

24-mile closing line rule for bays in the Territorial Sea Convention of 1958, historic waters continue to be recognized in international law. The conventions do recognize that the 24-mile closing line for bays does not apply to historic bays and that the equidistance rule for the delimitation of territorial waters between neighbouring states does not apply when an historic title exists.<sup>26</sup> The conventions, however, are completely silent as to the legal requirements for the existence of historic waters. Fortunately, a number of authoritative studies have been made, and it is generally agreed that there are three requirements before a claim to historic waters is established: (a) the exclusive exercise of state authority; (b) long usage or the passage of time; and (c) the acquiescence of foreign states.

Since a claim to historic waters is one over a maritime area which the coastal state considers an integral part of its national territory, the type of jurisdiction exercised over that area should be essentially the same as that being exercised on the rest of its territory. More precisely, the coastal state must exercise an effective control over the maritime area being claimed to the exclusion of all other states. Naturally, the extent of control will vary, depending on factors such as the area's size, remoteness, and degree of usability. In remote areas actual control might be limited, but yet sufficient. In the words of Professor O'Connell, 'in the case of remote and little used seas, very little in the way of effective exercise of sovereignty need be required,'<sup>27</sup> to show that a state took the action necessary to assert and maintain its authority and control over the area.

As to the manifestations of such sovereignty, Professor Gidel states that '[t]he exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State, which exceed the usual scope of regulations made in the interests of navigation, would obviously be acts affording convincing

<sup>26</sup> See articles 7 and 12 of 1958 Territorial Sea Convention and articles 10 and 15 of 1982 Convention on Law of the Sea.

<sup>27</sup> D.P. O'Connell, *The International Law of the Sea* (1982), I, 428.

evidence of the State's intent.'<sup>28</sup> He is careful to point out, however, that those are not the only acts of authority which constitute evidence of the exercise of sovereignty by the coastal state. Normally, the physical act of excluding foreign vessels is preceded by national legislation which forbids the entry of foreign ships and subjects them to certain conditions. As an example, Professor Bourquin states, in respect of a bay, that 'the State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign.'<sup>29</sup> He emphasizes, however, that the intent or desire of the state must be expressed by deeds and not merely by proclamations.<sup>30</sup> This being admitted, if the laws and regulations of the coastal state are never challenged, very little action is necessary to maintain the effective and exclusive control needed to support a claim of sovereignty.

In 1982 the International Court noted of the second requirement for a claim to historic waters that such title 'must enjoy respect and be preserved as they have always been by long usage.'<sup>31</sup> But as with other activities which become customs over time, it is not possible to determine in advance how long effective control over certain waters must last before it is transformed into an historic title. A great variety of terms is employed to describe the length of time required for a usage to have legal effect. The more common expressions are 'well established usage,' 'continuous usage of long standing,' 'continued and well established usage,' 'immemorial usage,' and usage 'from time immemorial.'

The length of time will depend on factors such as the degree of change being effected, the attitudes of other states, and

<sup>28</sup> G. Gidel, *Le Droit international public de la mer*, III, 633, as translated and reproduced in 'Juridical regime of historic waters, including historic bays,' A/CONF. 4/143 (March 1962).

<sup>29</sup> "Juridical regime of historic waters, including historic bays,' A/CONF. 4/143 (March 1962).

<sup>30</sup> M. Bourquin, 'Les baies historiques,' in *Mélanges Georges Sanser-Hall* (1952), 49.

<sup>31</sup> ICJ, *Reports*, 1982, 73.

the political strength of the claimant state. With reference to historic bays, Professor Bourquin states that 'l'usage, dont l'État se prévaut en pareil cas, remonte au plus lointain passé. C'est un usage immémorial, au sens propre du mot.'<sup>32</sup> Whether such long usage is required for historic waters generally is not certain. What is certain is that the longer effective control endures, the greater the presumption of general acquiescence, the third requirement for a claim to historic waters.

Everybody agrees that the attitudes of foreign states, particularly those of the states primarily affected by the usage in question, are important in determining whether an historic title exists and that some form of acquiescence is necessary before such title can arise. However, there is some disagreement as to the precise form that acquiescence should take. Opinion seems to be divided, depending on one's view of the nature of historic waters. Those who consider a claim of historic waters to be an exception to the general rules relating to the acquisition of maritime sovereignty take the stricter view of acquiescence. They seem to consider acquiescence to be a form of consent or recognition of the sovereignty of the coastal state over certain maritime areas and to believe this recognition or consent must come from the states affected by the claim in question. The other group maintains that silence or the absence of protest on the part of the other states in the face of the exercise of sovereignty by the claimant state is sufficient to result in an historic title. The first group, represented by Sir Gerald Fitzmaurice, admits that acquiescence need not take the form of a positive act on the part of the foreign states and that the role of the theory of historic rights is to create 'a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States.' The other group, represented by Professor Bourquin, maintains that while it is false to say that the acquiescence of these states is required, it is true that if their reactions inter-

32 Bourquin, 'Les baies historiques,' 46.

fere with the peaceful and continuous exercise of sovereignty, no historic title can be formed.<sup>33</sup>

This difference in approach was evident in the Fisheries Case of 1951. While admitting that the reaction of foreign states constitutes a very important element in the formation of an historic title, even in the special sense of consolidation of title, the Norwegian government rejected the view of the United Kingdom that 'le titre historique aurait pour seul fondement l'acquiescement des autres États et se confondrait ainsi, substantiellement, avec l'institution juridique de la reconnaissance.' The Norwegian government went on to say that it considered the absence of reaction on the part of foreign states as sufficient to confirm the peaceful and continuous character of the usage.<sup>34</sup> The International Court seemed to accept the Norwegian argument when it stated that '[t]he general toleration of foreign States with regard to the Norwegian Practice is an unchallenged fact.' Having found as a fact that the Norwegian straight baseline system had met with the general toleration of foreign states, the ICJ went on to hold that Norway was entitled to enforce its system against the United Kingdom. In particular, it stated: 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'<sup>35</sup>

It thus appears from this judgment that a general toleration or absence of protest on the part of foreign states suffices for a consolidation of title to materialize. But would it suffice to create an historic title as an exception to the general rules relating to the acquisition of sovereignty? This is doubtful, because the general toleration in the Fisheries Case was toward the

33 G. Fitzmaurice, 'The law and procedure of the International Court of Justice 1951-1954; general principles and sources of law,' *British Yearbook of International Law* 30 (1953), 30; and *ibid.*

34 ICJ, Pleadings, 1951, III, 462.

35 ICJ, *Reports*, 1951, 138 and 139.

straight baseline system which was found to be, not in derogation of, but rather in accordance with, the general rules for the delimitation of maritime jurisdiction. Consequently, the general toleration resulted in a consolidation of title rather than in the actual creation of title. In the words of the court: 'it is indeed this system [of straight baselines] itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.'<sup>36</sup> If history had been the sole basis for Norway's claim, a more positive form of acquiescence would probably have been necessary. Professor O'Connell puts it as follows: 'In the case of historic waters, what has to be established is the virtually total toleration of those nations whose interests are clearly affected, because the situation, having its origins in an illegal act which time and absence of opposition alone can validate, is analogous to the subversion of a neighbouring title on land by adverse occupation.'<sup>37</sup> Presuming there exists that kind of acquiescence or total toleration, an historic title to sea areas might well arise. But what if, on the contrary, there have been protests?

An effective protest on the part of interested states would, of course, rebut the presumption of acquiescence that would normally arise out of a long period of total toleration. To have legal effect, however, the protest must be a real one and must usually be followed by some more forceful steps by the protesting state. If a state is really concerned about the possibility of an historic title arising, it ought to use all permissible means at its disposal to prevent the practice or exercise of authority from developing into an historic title. Naturally, the effectiveness of a protest will depend on such factors as the interest of the protesting state, its geographical situation, its political strength, and whether it is the sole protestor.

In addition to the three requirements I have discussed, it is important to mention that there appears to be a general consensus that the onus for establishing the existence of an historic

<sup>36</sup> *Ibid.*, 138.

<sup>37</sup> O'Connell, *International Law of the Sea*, 1, 39.

title to maritime areas rests with the coastal state making the claim. In the Fisheries Case, for example, both the United Kingdom and Norway agreed that the burden of proof rested with the party claiming an exceptional right, but they disagreed as to the scope of the burden of proof. Since the Norwegian claim of sovereignty over the waters landward of the baselines was established, not on the basis of an historic title but, rather, on an historic consolidation of the straight baseline system, the ICJ held that a general toleration on the part of foreign states was sufficient. Consequently, there was no special burden of proof on Norway as there would have been if its case had rested on an historic title properly so-called.

*Appraisal of Canada's claim of historic waters*

In light of the legal requirements to establish an historic title to maritime areas, how might one judge Canada's claim to sovereignty over the waters within the Arctic archipelago?

On the positive side, it may be stated that virtually all of the waters of the archipelago were discovered by British explorers and frequented for all practical purposes only by them and British whalers.<sup>38</sup> After the transfer of the islands in 1880, Canada patrolled most of those waters, beginning with the more southerly ones such as Hudson Bay and Strait, Frobisher Bay, and Cumberland Sound, and then extending its patrols to Lancaster Sound, Barrow Strait, and the connecting inlets and sounds to the south. It adopted legislation in 1906 requiring whalers to obtain a licence when hunting in Hudson Bay and the territorial waters north of the 50th parallel. This legislation was enforced until the end of whaling in Arctic waters, around 1915. Indeed, whaling licences appear to have been issued for whaling beyond the limits of territorial waters.

In 1922, the Eastern Arctic Patrol was instituted and annual

<sup>38</sup> For a more complete discussion of British activities before the transfer in 1880 and of Canadian activities since the transfer, see Pharand, *The Waters of the Canadian Arctic Archipelago*, chap VIII.

patrols were made until at least 1958. These patrols extended occasionally to western Arctic waters and were carried out mostly by the Royal Canadian Mounted Police. In 1926, the Arctic Islands Preserve was adopted to protect the natives and wildlife and to indicate that Canada controlled the area within the sector formed by the 60th and 141st degrees of longitude. This was followed in 1929 by the game regulations applicable in the Preserve.

After World War II, the main functions of the newly established Canadian Coast Guard were icebreaking and the resupply of Arctic communities. In particular it has provided ice-breaking services for the few foreign transits of the Northwest Passage which have taken place so far, including that of the *Manhattan* in 1969. The Coast Guard is also charged with the implementation of the regulations relating to pollution prevention and shipping safety control adopted under the Arctic Waters Pollution Prevention Act of 1970. Since 1970, Canadian survey ships have been active in surveying and charting the waters of the archipelago, particularly the straits which are expected to be used for the transportation of hydrocarbons from the Beaufort Sea and the Arctic islands. In 1977, Canada instituted the NORDREG reporting system which provides for all ships to report to the Coast Guard before entering the waters of the archipelago.

On the negative side of Canada's claim of historic waters, it must be realized that both British and Canadian explorers claims to possession were confined to lands and islands. Even the formal taking of possession by Captain J.E. Bernier on 1 July 1909 'of the whole Arctic Archipelago lying to the north of America from longitude 60°W. to 141°W. up to latitude 90°N.'<sup>39</sup> has to be interpreted as limited to the land areas. Bernier himself stated in his report on the expedition that 'specific instructions were given as to the waters to be patrolled, ex-

39 See photograph of plaque with inscription in J.E. Bernier, *Master Mariner and Arctic Explorer* (1939), 128.



plored, and *lands to be annexed*.<sup>40</sup> In addition, the sector theory which is implicit in the formulation of this taking of possession is of no legal value as a basis for a claim of sovereignty in international law, even if such claim is restricted to lands and islands.<sup>41</sup>

Another negative factor in assessing Canada's claim is the considerable doubt that exists as to whether the whale hunting legislation of 1906 applied to all waters north of the 55th parallel aside from Hudson Bay. The wording of the licence itself seemed to limit the requirement for a licence to the territorial waters of Canada which only extended to three miles at that time.

Further but perhaps conflicting evidence on Canada's claim of historic internal waters is found in some of the official statements made when Canada's territorial waters were extended from three to twelve miles in 1970. Explaining the implication of this extension when moving second reading of the bill, the secretary of state for external affairs said that 'the effect of this bill on the Northwest Passage is that under any sensible view of the law Barrow Strait, as well as the Prince of Wales Strait, are subject to complete Canadian sovereignty.'<sup>42</sup> While the minister may have thought this amendment would make the waters internal, it is difficult to imagine how. Indeed, in answering a question on straight baselines the day before, he had stated that 'since obviously we claim these to be Canadian internal waters we would not draw such lines.'<sup>43</sup> Be that as it may, the intended effect of the amendment was to create an overlap of territorial sea in the western portion of Barrow Strait where a string of five islands lies in a zigzag fashion across the strait. The widest passage, between Lowther and Young Islands, being only 15.5 miles, there would now be a sort of gate of territorial waters

40 See Bernier's letter dated 5 April 1910, addressed to the deputy minister of marine and fisheries, accompanying his report, in J.E. Bernier, *Cruise of the Arctic 1908-09* (1910), 1, emphasis added.

41 See Pharand, *Waters of the Canadian Arctic Archipelago*, part 1.

42 Canada, House of Commons, *Debates*, 17 April 1970, 6015.

43 *Ibid.*, 16 April 1970, 5953.

across Barrow Strait, as there was already in Prince of Wales Strait where the Princess Royal Islands, lying in mid-strait, reduce the width of the passage to less than 6 miles.

That this was the intended effect of the amendment was made abundantly clear a few days later by the legal adviser of the Department of External Affairs: 'This has implications for Barrow Strait, for example, where the 12-mile territorial sea has the effect of giving Canada sovereignty from shore to shore. To put it simply, we have undisputed control – undisputed in the legal sense – over two of the *gateways* to the Northwest Passage.'<sup>44</sup> In other words, even if a foreign ship seeking to transit the Passage succeeded in avoiding Prince of Wales Strait, as the *Manhattan* attempted to do in 1969 by entering M'Clure Strait instead, it could no longer remain on a strip of high seas or of the exclusive economic zone. In effect, the extension of territorial waters to twelve miles, partly with a view to creating an overlap of such waters in Barrow Strait, may constitute an admission that the rest of the waters of Parry Channel were considered high seas.<sup>45</sup> And, of related significance, is the fact that it was not until three years later, in 1973, that the Legal Bureau of External Affairs claimed that the waters of the archipelago were '*internal waters* of Canada, on an historical basis.'<sup>46</sup>

In addition, again on the negative side, it must be recalled that the United States made formal protests in 1970 not only against Canada's extension of its territorial sea to twelve miles, but also against the Arctic Waters Pollution Prevention Act. This second piece of legislation enabled Canada to enforce certain pollution prevention standards for the construction, manning, and equipment of all ships navigating in the waters of the archipelago north of the 60th parallel and up to a distance of one hundred miles outside the archipelago. The United States

44 Standing Committee on External Affairs and National Defence, *Minutes of Proceedings and Evidence*, 28th Parl, 2nd sess, no 25, 29 April 1970, 18, emphasis added.

45 Today, the rest of the waters would be considered part of the exclusive economic zone.

46 See 'Canadian practice,' in *Canadian Yearbook of International Law* 12 (1974), 279, emphasis added.

protest note stated that 'international law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the USA can neither accept nor acquiesce in the assertion of such jurisdiction.'<sup>47</sup> The note ends by suggesting to Canada that the matter be submitted to the International Court of Justice for adjudication. Canada ignored the protest note as it related to the extension of the territorial sea, but not so with respect to pollution prevention. On that occasion, the prime minister stated categorically: 'In short, where we have extended our sovereignty, we are prepared to go to court. On the other hand, where we are only attempting to control pollution, we will not go to court until such time as the law catches up with technology.'<sup>48</sup> Indeed, on the same day the government introduced the Arctic Waters Pollution Prevention bill, the Canadian ambassador to the United Nations transmitted a letter to the secretary-general, modifying Canada's acceptance of the International Court's jurisdiction by excepting from it 'disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada ... in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.'<sup>49</sup>

The damaging part of this reservation in relation to Canada's claim of historic waters is that the 'marine areas adjacent to the coast of Canada,' as described in the new legislation, cover not only a 100-mile strip outside of the archipelago but also all of the waters within the archipelago north of the 70th parallel. If these waters had really been considered internal waters, over which Canada claimed as complete a sovereignty as it did over the lands and islands of the archipelago, there would have been no doubt as to Canada's right to adopt such legislation for the waters within the archipelago, and the ICJ reservation could have been limited to the 100-mile strip outside the

47 See text of United States press release, printed as appendix A in *Debates*, 15 April 1970, 5923.

48 P.E. Trudeau, 'Canada leads fight against pollution,' Department of External Affairs, Statements and Speeches 70/3, 15 April 1970, 4.

49 Text of letter reproduced in *External Affairs* 22 (May 1970), 130-1.

archipelago and along the northern coast of the Yukon and the Mackenzie Delta. As it was, the reservation indicated an uncertainty on the part of Canada as to the legal basis of this legislation, not only as it applied to the waters outside the archipelago but apparently also to those inside it. Consequently, Canada cannot be said to have ignored the protest of the United States; on the contrary, it seems to have acted accordingly.

Another negative element in Canada's claim of historic waters is the fact that the NORDREG reporting system is only a voluntary one. And, indeed, if there is any doubt that the waters of the archipelago are internal waters, it would be difficult for Canada to insist that foreign ships abide by the reporting system or be refused entry into the Northwest Passage. Presuming that a foreign ship conforms with the Arctic Waters Pollution Prevention legislation, whose validity should now be considered confirmed by customary international law,<sup>50</sup> it should have a right of innocent passage in the waters of the Northwest Passage. If these waters are not internal, they are at best territorial waters and innocent passage applies.

Weighing the positive factors against the negative ones, it appears that Canada would not succeed in establishing an historic claim that the waters of the Arctic archipelago are internal waters.

#### STRAIGHT BASELINES

The method of delimiting territorial waters from straight baselines instead of along the sinuosities of the coast was developed by Norway from 1812 onwards. The straight baseline system was approved by the International Court in 1951, incorporated in the Territorial Sea Convention of 1958, and retained in the Law of the Sea Convention of 1982. Under this system, where a coast is deeply indented or is bordered by an archipelago, it is permissible to draw straight lines across the indentations and

<sup>50</sup> See Donat Pharand, 'La contribution du Canada au développement du droit international pour la protection du milieu marin: le cas spécial de l'Arctique,' *Études internationales* 11 (septembre 1980), 441-55.

between the outermost points of the islands and to measure the territorial sea outwards from these baselines. This geographical situation is commonly referred to as a coastal archipelago.

*Legal requirements*

Although the establishment of straight baselines is completely within the control of the coastal state, the validity of such lines depends on whether they meet the requirements of international law. Those requirements rest on the geographical configuration of the coast and the way in which the straight baselines are established.

The geography required for the application of the straight baseline system was laid down by the International Court of Justice in the Fisheries Case of 1951. Having stated that the breadth of the territorial sea should be measured from the low-water mark, the court examined three methods of implementing this rule: the *tracé parallèle*, the arcs of circles, and the straight baseline system. It was in its discussion of the method of the *tracé parallèle* that the ICJ in effect described the kind of coast required for the application of the straight baseline system: 'Where a coast is deeply indented and cut into, as is that of Eastern Finmark, 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.'<sup>51</sup> Thus the straight baseline system is made applicable to two types of coast: where it is deeply indented or where it is bordered by an archipelago. (Of course, a coast could have both of those characteristics either in whole or in part.) It could appear that the second type of coast, bordered by an archipelago such as the skjaergaard, is somewhat different from a simple 'fringe of islands along the coast in its immediate vicinity' provided for in the 1958 and 1982 conventions,<sup>52</sup> and thus that customary law as formulated by the ICJ

<sup>51</sup> ICJ, *Reports*, 1951, 128-9.

<sup>52</sup> See A/CONF. 13/L. 52, article 4(1), and A/CONF. 62/122, article 7(1).

would require only that there be an archipelago close to the coast, with the Norwegian skjaergaard given as an example of an appropriate kind of archipelago.<sup>53</sup>

The conventions require that the islands constitute a fringe in the immediate vicinity of the coast. The ordinary meaning of 'fringe,' according to the Oxford dictionary, is 'a border or edging, especially one that is broken or serrated.' While the term is a reasonably accurate description of the skjaergaard, it is somewhat narrower than the geographic situation envisaged. It has been properly pointed out that numerous coastal archipelagos to which the straight baseline system has been applied 'could only be questionably described as "fringes."' <sup>54</sup> Assuming that a group of islands constitutes a fringe, the conventions also require that they be in the 'immediate vicinity' of the coast. Vicinity being synonymous with proximity, and similar expressions having received an extensive interpretation by international tribunals,<sup>55</sup> presumably the expression 'immediate vicinity' would also receive a wide interpretation. In spite of apparent differences in the wording, it would seem that the conventions may be interpreted as a simple codification of the customary law formulated by the International Court.

Once the geographical requirements for the application of the straight baseline system appear to be satisfied, certain criteria in their construction must be followed if their international validity is to be assured – although these may be adapted to diverse situations. In the words of the ICJ: 'certain basic considerations inherent in the nature of the territorial sea, bring to light *certain criteria* which, though not entirely precise, can provide courts with an adequate basis for their decisions, *which can*

53 The Norwegian skjaergaard is composed of some 120,000 insular formations carved out of a mainland coast, broken by large and deeply indented fjords, thus obliterating any clear dividing line between the mainland and the sea. Some of the islands are some 60 miles from the nearest peninsula on the mainland. For a more detailed description of the skjaergaard, see ICJ, *Reports*, 1951, 127.

54 See O'Connell, *International Law of the Sea*, 1, 212, where he gives 18 such examples.

55 See, in particular, the North Sea Continental Shelf Cases (ICJ, *Reports*, 1969, 31) where adjacency was held to imply proximity in a general sense only.

*be adapted to the diverse facts in question.*<sup>56</sup> The court spelled out three such criteria: (1) the general direction of the coast; (2) the closeness of the link between the land and the sea; and (3) certain economic interests evidenced by long usage. All three were incorporated in the 1958 Territorial Sea Convention and the 1982 Law of the Sea Convention.

The judgment of the court states that 'while ... a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, *the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.*'<sup>57</sup> The words emphasized were incorporated without any change in article 4 of the 1958 Territorial Sea Convention and article 7 of the 1982 convention.

As the court itself indicated, judgments on the criteria in general and this one in particular cannot help but be subjective. What constitutes an appreciable departure from the general direction of the coast is a matter on which the coastal state must be allowed a reasonable degree of latitude. In the same way, the court had previously stated that 'the method of base-lines ... within reasonable limits, may depart from the physical line of the coast.'<sup>58</sup> In applying this first criterion in the 1951 Fisheries Case and in refuting the argument of the United Kingdom that the line across the LoppHAVET Basin did not respect the general line of the coast because it was some 19 miles from the nearest point of land, the court answered that 'the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.' In the same context, the court readily admitted that the criterion of general direction is 'devoid of any mathematical precision.'<sup>59</sup>

In arriving at its conclusion on the LoppHAVET line, the ICJ formulated the following test:

<sup>56</sup> ICJ, *Reports*, 1951, 133; emphasis added.

<sup>57</sup> *Ibid*, emphasis added.

<sup>58</sup> *Ibid*, 129. This was published as an *erratum* on 22 October 1956 and should be inserted at page 129 of the 1951 reports.

<sup>59</sup> *Ibid*, 142.

In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.<sup>60</sup>

In other words, the general direction of the coast is determined by examining a small-scale map and, except in a case of manifest abuse, looking at the coast as a whole. If such an examination reveals no distortion of the *general* direction, the first criterion is satisfied. It is important to note that the court itself emphasized the qualifier 'general' to indicate the imprecision of this criterion.

The court's second criterion is that there must be a close relationship between the land and the sea areas which are enclosed: 'The real question raised in the choice of base-lines is in effect whether *sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters.*'<sup>61</sup> (The passage in italics was incorporated without change in the conventions.) The court specified that this close link was a 'fundamental consideration' for the obvious reason that the enclosed waters will acquire the status of internal waters over which the coastal state will have as complete a sovereignty as it does over its land areas. Even the right of innocent passage will not apply to the enclosed waters. Nevertheless, the criterion 'should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.'<sup>62</sup> And the ICJ did apply the criterion rather liberally to the LoppHAVET and Vestfjorden areas. The overall ratio of sea to land areas within the Norwegian archipelago was 3.5 to 1. While the conventions of 1958 and 1982 reproduced this sec-

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 133, emphasis added.

<sup>62</sup> *Ibid.*



ond criterion literally, they made an important change to the resulting legal régime of internal waters. Although the enclosed waters are internal in principle, they will be assimilated to territorial waters and subject to the right of innocent passage if they have previously been considered part of the territorial sea or of the high seas.<sup>63</sup> Consequently, when the right of innocent passage is preserved, the reason for the intimate relationship between the land and sea areas is considerably lessened and the application of the second requirement should be correspondingly liberalized.

These two geographical criteria are mandatory in the implementation of the straight baseline system. When straight baselines meet those two criteria, they are validly established. However, to add to the probative value of such criteria, 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage' may also be taken into account.<sup>64</sup> Again the conventions have retained the key words of the ICJ judgment and express this criterion as follows: 'Where 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.'<sup>65</sup>

In the Fisheries Case, the International Court invoked this third consideration to reinforce its conclusion, with respect to the 62-mile line (44 plus 18 miles on either side of a submerging rock) across the LoppHAVET area, that 'the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast' and, therefore, valid. However, the court continued, 'even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian

63 Article 5 (2) of the 1958 Territorial Sea Convention and article 8 (2) of the 1982 Law of the Sea Convention.

64 ICJ, *Reports*, 1951, 133.

65 Article 4 (4) of the 1958 Territorial Sea Convention and article 7 (5) of the 1982 Law of the Sea Convention.

Government has relied upon an historic title clearly referable to the waters of the LoppHAVET, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt-Commander Erich Lorch under a number of licences.<sup>66</sup>

As recalled by the court in its judgment, the Norwegian government was not relying upon history to justify a claim to areas of the sea which the general law would deny, but, in the words of its counsel, 'it invokes history, together with other factors, to justify the way in which it applies the general law.'<sup>67</sup> The ICJ was satisfied that the historical data produced by Norway lent 'weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of LoppHAVET.' And it concluded by specifying how such rights could be taken into account in validating a particular line: 'Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to have been kept within the bounds of what is moderate and reasonable.'<sup>68</sup> By using the historic fishing and hunting rights of the local population to add probative value to the line across the LoppHAVET, the court was also justifying the length of that line.

Before discussing the applicability of straight baselines to the Canadian Arctic archipelago, it is important to recall that the International Court did not deem it necessary to impose any limit as to the length of straight baselines. It was satisfied that if a straight baseline can be justified under the two geographical criteria and possibly also under the economic criterion, the line is valid regardless of its length. In the case of the Norwegian archipelago, the 47 baselines varied from a few hundred yards to what is, in effect, 62 miles across the LoppHAVET. Both the 1958 Territorial Sea and the 1982 Law of the Sea

66 ICJ, *Reports*, 1951, 142.

67 *Ibid*, 133.

68 *Ibid*, 142.

conventions are silent on the length of straight baselines for coastal archipelagos. Only in the case of oceanic archipelagos constituting the national territory of a state does the 1982 Convention (article 47) provide that such baselines must not normally exceed 100 nautical miles, although up to 3 per cent of the total number for any archipelago may reach a maximum of 125 nautical miles.

*Application to the Canadian Arctic archipelago*

The possibility of enclosing the Canadian Arctic archipelago with straight baselines has been discussed by a number of writers since the Fisheries Case of 1951, particularly after the *Manhattan* transit of the Northwest Passage in 1969. Subject to a few nuances, they all concluded that those waters could be enclosed in a similar way to those of the Norwegian archipelago.<sup>69</sup> Despite their virtual unanimity, their reasons for so concluding varied somewhat from one writer to another, particularly on the precise legal nature of the Canadian archipelago, the use which could be made of history, and the consequence which straight baselines would have on any right of passage that might now exist.

In the Fisheries Case of 1951, the International Court concluded that 'the method of straight base-lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast.'<sup>70</sup> The question then is whether the geography of the northern coast of Canada is of a similarly peculiar nature, thus warranting the use of straight baselines for the delimitation of its territorial waters.

All of the Canadian Arctic archipelago lies north of the Arctic Circle, except for the southern tip of Baffin Island, and constitutes the northern coastal zone of Canada (see figure 2). The base of this triangular-shaped archipelago stretches some 3000 kilometres along the mainland coast, and its apex, the tip of Ellesmere Island, is less than 900 kilometres from the geographic North Pole. The archipelago is one of the largest in the

69 See my review of this material in Pharand, *The Law of the Sea of the Arctic*, 88-93.

70 ICJ, *Reports*, 1951, 139.

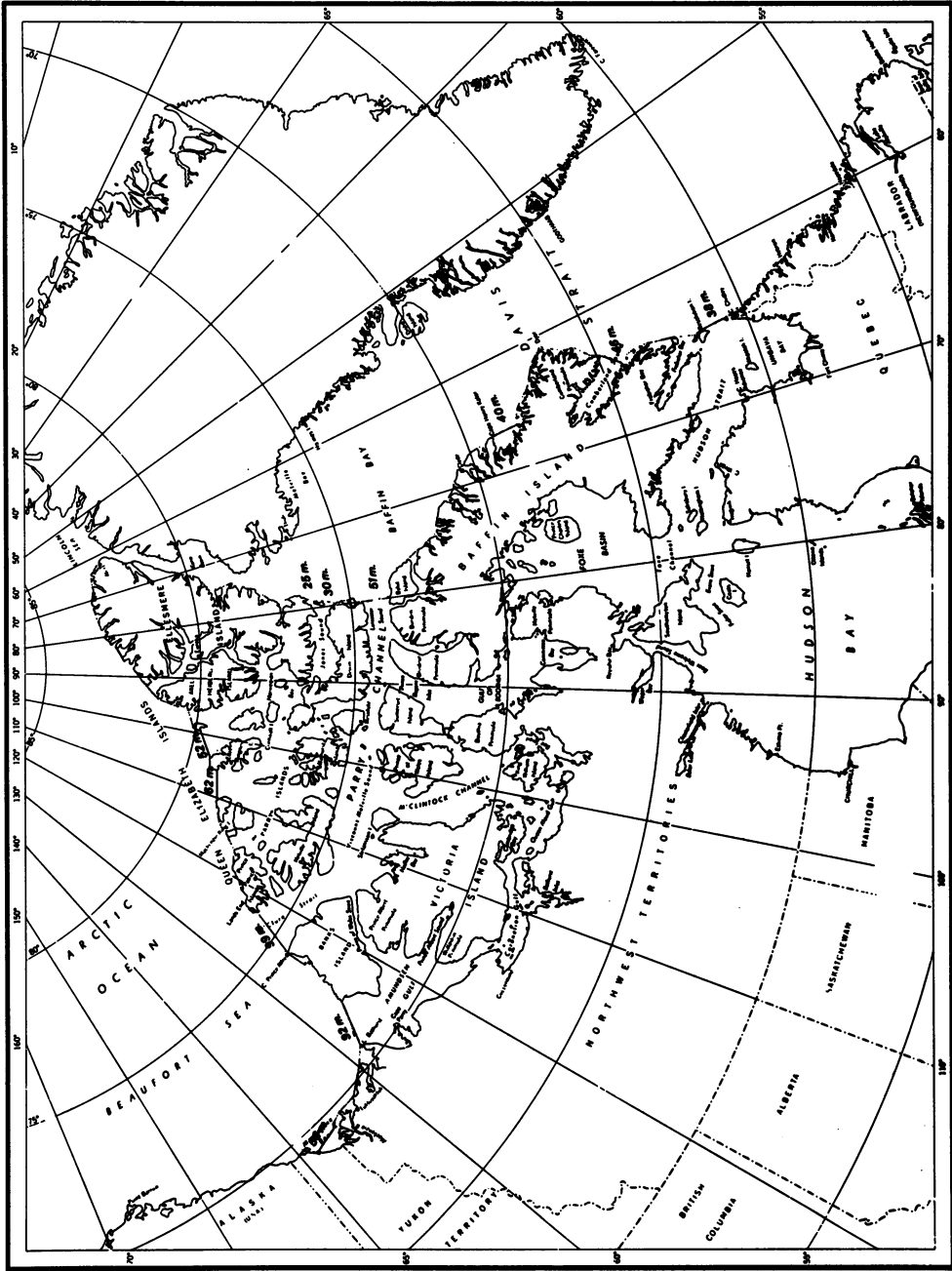


FIGURE 2 Straight baselines for Canada's Arctic archipelago.

world and consists of a labyrinth of islands and headlands of various sizes and shapes. There are 73 major islands of more than 50 square miles in area and some 18,114 smaller ones. The very large islands are Baffin, Devon, and Ellesmere on the east side of the archipelago and Victoria, Banks, and Melville on the west. Virtually all of the land formations are mountainous.

The western part of the mainland coast is broken by large indentations in the form of bays and gulfs, and the eastern section is deeply penetrated by a huge inland sea (Hudson Bay) and smaller bays and basins. Nearly all of these bodies of water are studded with countless islands, rocks, and reefs. Consequently, the coast of the mainland in no way constitutes a clear dividing line between land and sea, as it does in most other countries. In fact, the coast reaches northward as far as an east-west waterway (Parry Channel) crossing the middle of the archipelago; it does so by way of a long northern projection (Boothia Peninsula), barely broken by an extremely narrow strait (Bellot Strait) to form Somerset Island to the north.

To the north of Parry Channel, the Queen Elizabeth Islands' group, comprised of large and small islands of various shapes virtually all of them deeply indented, is interspaced with bodies of water equally varied in size and shape. This northern section of the archipelago is linked with the southern one by a string of five islands lying in a zigzag fashion across west Barrow Strait in Parry Channel, thus forming inter-island passages varying from 8 to 15.5 miles.

For much of the year the islands and peninsulas of the whole archipelago are fused together by ice formations, to the point where ice and land areas often become indistinguishable. The archipelago is then transformed into an immense rampart, protecting the continental part of Canada from the polar ice of the Arctic Ocean and constituting in effect the outer coast of the country. The inhabitants of this barren coastal zone derive their livelihood from hunting and fishing, traversing the ice and land indifferently by dog sled or snowmobile. *Such are the*

*realities which must be borne in mind in determining the applicability of the straight baseline system for Canada.*

The specific question is whether the northern coast of Canada 'is bordered by an archipelago such as the "skjaergaard,"' as the International Court put it, or constitutes a 'fringe of islands along the coast in its immediate vicinity,' in the words of the conventions. There are two elements in this prerequisite: the closeness of the archipelago to the coast and the cohesiveness of the archipelago itself. As for *closeness* to the coast, there can be no question that this element is present; not only are most of the islands forming the base of the archipelago located very close to the coast, but the coast itself, through its central peninsula, advances into the very core of the archipelago. Whether one applies the term 'bordered' or the expression 'immediate vicinity,' this first element of the criterion is fully present.

As for the *cohesiveness* of the archipelago, there exists a general interpenetration of land formations and sea areas which is reinforced by the presence of ice for most of the year. The geographic unity of the archipelago is further assured by the string of closely spaced islands across Parry Channel, linking the northern section with the southern one and forming a single unit. Admittedly, Parry Channel cannot be fully compared with the narrow Norwegian Indrelia which the Court held was 'not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway.'<sup>71</sup> In spite of the considerable width of Parry Channel, however, a global view shows that it does not unduly disrupt the general unity of the archipelago.

The overall conclusion is that the Canadian Arctic archipelago does present very special geographic characteristics, making it absolutely impossible to follow the sinuosities of the coast or of the islands in the measurement of territorial waters and rendering the use of straight baselines necessary.

<sup>71</sup> *Ibid.*, 132.

The archipelago might not constitute a 'fringe of islands along the coast,' if the conventions are interpreted literally, but such an interpretation would not be in accord with the practice of states. This practice indicates that states have been either ignoring the precise wording of the provisions of the conventions or interpreting them as a mere codification of the criteria laid down in the Fisheries Case which, indeed, they were intended to be. Professor O'Connell lists some eighteen coastal archipelagos where straight baselines were used and which constitute very doubtful 'fringes' of islands. And, as O'Connell himself notes, the question of 'how many islands make a "fringe", and what must be their relationship one to another and to the mainland'<sup>72</sup> can only be answered by looking at the three criteria to be met in the actual drawing of the baselines.

The straight baseline system being applicable to the Canadian Arctic archipelago, the task is to draw the baselines along the archipelago in such a way that they will follow the general direction of the coast and that the sea areas will be sufficiently linked to land. The justification for some of the lines may be reinforced by reference to regional economic interests evidenced by long usage. As shown on figure 2, baselines would begin at the 141st meridian of longitude, proceed in a general easterly direction along the continental coast of Canada in the Beaufort Sea as far as Baillie Island off Cape Bathurst at the entrance of Amundsen Gulf, continue in a northeasterly direction across the Gulf and along the west side of Banks Island, across M'Clure Strait and along the perimeter of the Queen Elizabeth Islands as far as the most easterly point of Ellesmere Island in the Lincoln Sea. The baseline would then proceed in a general southerly direction along the perimeter of the islands to Lancaster Sound, across the sound and along Bylot and Baffin islands as far as Resolution Island at the entrance of Hudson Strait where it would join the straight line across that strait established in 1937. Although there is no maximum length for

<sup>72</sup> See O'Connell, *International Law of the Sea*, 1, 212 and 209.

straight baselines of coastal archipelagos, it is of interest to note that the 145 baselines vary from a few hundred yards to 99 nautical miles, with an average length of 16.7 nautical miles.

Considering the triangular shape of the archipelago, the only possible *general direction* which straight baselines can follow, after reaching the entrance of Amundsen Gulf, is that of the outer line of the archipelago itself. The geographic realities are such that it is absolutely impossible to follow the general easterly direction of the coast. In addition, that general easterly direction ends with the Boothia Peninsula which projects at a right angle in a northerly direction in effect as far as Parry Channel, and after that there is no general direction of the coast. On the contrary, there is immediately to the east of Boothia another northerly projection (Melville Peninsula) reaching the underside of the western extremity of Baffin Island which constitutes the eastern limit of the archipelago.

Taking into account these two important northerly projections of the coast in the middle of the archipelago, it would be technically correct to say that those baselines which do not follow the general easterly direction of the coast follow its general northerly direction. But this would be stretching the facts somewhat to fit the law, whereas the opposite should normally be done. As was once properly suggested by the great American judge and jurist, Benjamin Cardozo, if the law does not quite fit the facts the judge should adapt the law to the facts and not do the reverse.

The International Court did adapt the law to the facts in 1951 when it realized that the low-water mark rule could not be applied to the Norwegian archipelago and approved the straight baseline system. Similarly, realizing that the first guideline for the application of the system is not completely appropriate for the Canadian archipelago, which is similar in character to the Norwegian skjaergaard but shaped rather differently, an international tribunal should adapt the guideline to the special geographic reality. More specifically, it should consider that what really constitutes the Canadian coastline is the outer line



of the archipelago – in the same way that the International Court considered that ‘what really constitutes the Norwegian coast line is the outer line of the skjaergaard’<sup>73</sup> – and permit the baselines to follow the outer line or general direction of the archipelago.<sup>74</sup>

The International Court also judged it of fundamental importance that, as a rule, the sea areas be sufficiently closely linked to the land domain to be subject to the régime of internal waters. However, here again, the Court applied this guideline liberally to at least two areas of the Norwegian archipelago, the Lophhavet and the Vestfjorden. In a similar way, the flexibility of this guideline should permit the enclosure of the waters of Amundsen Gulf and Parry Channel.

There are at least three reasons to favour such flexibility. First, the sea-to-land ratio in the Canadian Arctic archipelago would be 0.822 to 1,<sup>75</sup> considerably better than the 3.5 to 1 ratio for the Norwegian archipelago. Second, the quasi-permanent presence of ice over the enclosed waters, which is used like land for travels by dog sled and snowmobile and even for human habitation by the Inuit during their winter hunting trips, bolsters the physical unity between the land and the sea. Third, the innocent passage of foreign ships should be, and presumably would be, permitted by Canada;<sup>76</sup> if so, and the exclusion of foreign ships being the main reason for the close link requirement, the importance of this requirement is considerably lessened.

73 ICJ, *Reports*, 1951, 127.

74 For a similar conclusion, see W.G. Reinhard, ‘International law: implications of the opening of the Northwest Passage,’ *Dickinson Law Review* 74 (1970), 688, and J.W. Dellapenna, ‘Canadian claims in Arctic Waters,’ *Land and Water Law Review* 7 (1972), 418.

75 This ratio represents the water area (366,862 square statute miles) as compared to the land area (445,814 square statute miles), those areas being measured north of the Arctic Circle. It is important to note that the calculation of land areas is restricted to islands and does not include the northern coastal strip above the Arctic Circle.

76 See a statement to this effect by Prime Minister Trudeau in *Debates*, 24 October 1969, 39, and a written assurance in the Canadian note to the United States in 1970, reproduced in *Debates*, appendix, 17 April 1970, 6028.

Although the straight baselines would be justified under the two compulsory guidelines just reviewed, Canada is also in a position to invoke certain economic interests peculiar to some regions, whose reality and importance are clearly supported by long usage. These interests may be relied upon to reinforce the validity of certain baselines, particularly the 51-mile line across Lancaster Sound at the eastern end of Parry Channel and the 92-mile line across Amundsen Gulf on the west side of the archipelago. Considering that these two bodies of water are located at either end of the most likely route for the future shipping envisaged for the Northwest Passage, it becomes particularly important that the baselines across these waters be fully justified.

It will be recalled that the economic interests taken into account by the ICJ in the Fisheries Case were the traditional rights reserved for the local inhabitants over fishing grounds, such rights being founded on the vital needs of that population. In the Canadian Arctic it has now been established that the Inuit have been fishing, hunting, and trapping in the waters and on the sea ice of most of the archipelago. The government-sponsored study on Inuit land use and occupancy completed in 1976<sup>77</sup> reveals that their traditional use of sea ice has covered all of the waters of the central and eastern Arctic, as well as those of the western Arctic as far west as Canada's boundary in the Beaufort Sea and in a northerly direction up to M'Clure Strait and Viscount Melville Sound. This traditional hunting and trapping on the sea is still vital to the Inuit economy. Not only is the traditional hunting of whales, seals, and other marine-related mammals vital to the economic and physical welfare of the Inuit, but it is also essential to their psychological well-being and to the preservation of their identity. A leading anthropologist and long-time student of the Inuit people states that: "To break with hunting ... is to deny in one essential way

77 M.R. Freeman, ed, *Report: Inuit Land Use and Occupancy Project* (3 vols; Ottawa 1976).

the living connection with one's ancestral roots; in short, to deny one's Inuit identity.<sup>78</sup>

These vital interests have been exercised and enjoyed by the Inuit since prehistoric times. Archeologists and anthropologists believe that the Inuit arrived in Canada's western Arctic between 4000 and 4500 years ago from Alaska, to which their ancestors are presumed to have migrated from Siberia long before that. About 700 years ago, probably due to a reduction in the availability of whales caused by climatic and sea-ice changes, their living patterns changed to winter habitation and snow-houses on the sea ice, where seals could be hunted at breathing holes, and to summer occupation in the interior, where fish and caribou could be pursued. This use of the sea ice by the Inuit was observed by British explorers in search of a Northwest Passage, particularly during the first half of the nineteenth century, and by Canadian explorers at the beginning of the present century. Today's Inuit do not camp on the sea ice as often and for as long as their ancestors did; however, because of their use of motorized toboggans and skidoos, Inuit hunters now range for much greater distances off shore. It has been established that all of the twenty-eight Inuit communities across the Canadian Arctic still engage regularly in sea-ice hunts in the water areas of the archipelago, particularly in Barrow Strait where they regularly hunt ringed seals and polar bears. In the circumstances, there can be no doubt that the vital rights and interests acquired and exercised by the Canadian Inuit literally since time immemorial may legitimately be taken into account in support of the validity of the baselines across Lancaster Sound and Amundsen Gulf.

#### THE NORTHWEST PASSAGE

In spite of the conclusion reached in the previous section that Canada could validly establish its claim of internal waters by the drawing of straight baselines around the Arctic archipelago,

78 M.R. Freeman, 'Contemporary Inuit exploitation of the sea ice environment,' paper presented at the Sikumiut Workshop, McGill University, 15 April 1982.

the fact is that it has not yet done so, and the question of the legal status of the Northwest Passage remains. Considering the preparations now being made by both Canada and the United States for the eventual transportation of hydrocarbons from the Beaufort Sea through the Passage, it is important to examine the extent to which Canada may exercise jurisdiction over foreign ships using the Passage.

According to *Sailing Directions, Arctic Canada*, 'the Northwest Passage spans the North American Arctic from Davis Strait and Baffin Bay in the east to Bering Strait in the west.'<sup>79</sup> This is the traditional definition of the Northwest Passage, but the present discussion will be limited to the constricted waters within the Canadian Arctic archipelago between Baffin Bay in the east and the Beaufort Sea in the west. Here, the Northwest Passage may follow five basic routes, plus at least two variations of those routes (see figure 3). All the routes are potentially navigable, although not necessarily for deep-draft ships. The choice of route will depend mainly on the ice conditions, the size of the ship, the icebreaking capabilities of the ship or of its accompanying icebreaker, and the adequacy of hydrographic surveys. Of the five routes, only Routes 1 and 2 are, for the moment, known to be suitable for deep-draft navigation. Route 3 (and its variation 3A) and Route 4, which follow the continental coast of Canada for more than half of the distance, are not suitable for deep-draft navigation. At present Route 5 leads only to Routes 3 and 4, but if it should prove possible eventually to avoid certain shoal areas in Fury and Hecla Strait, its variation, Route 5A, could lead to Routes 1 and 2 and be used by deep-draft ships. Route 5 would then become a viable alternative to Lancaster Sound.

#### LEGAL STATUS

Because of the difference in the applicable legal régime, it is important to determine if the Northwest Passage can be charac-

<sup>79</sup> *Sailing Directions, Arctic Canada* (Ottawa: Canadian Hydrographic Service 1982), I, 1.



terized as an international strait. If it is, the applicable freedom of passage is virtually the same as that on the high seas. The 1982 Law of the Sea Convention describes the type of passage applicable to 'straits used for international navigation,' but does not say when a strait may be so considered. Fortunately, the International Court did address this question in the Corfu Channel Case of 1949, and this is still the only international decision on the point. The court confirmed that an international strait had to meet two criteria, one pertaining to geography and the other to the use or function of the strait.

The geographic criterion is met whenever there is an overlap of territorial waters in the natural passage between adjacent land masses which joins either two parts of the high seas (or, since 1982, exclusive economic zones) or a part of the high seas with the territorial sea of a foreign state. If there is no overlap of territorial waters, and a strip of high seas or economic zone remains throughout the strait, the principle of the freedom of the high seas continues to apply. Since a 12-mile territorial sea is now permitted in international law, a *legal* strait is one which is 24 miles or less in width.

The functional criterion relating to the use for international navigation is much more difficult to apply, because the conventions are silent on how the required degree of use for international navigation is to be determined. In holding that the North Corfu Channel was an international strait, the ICJ found that it had been a 'useful route for international maritime traffic.'<sup>80</sup> The evidence showed that the Corfu Channel had been a very useful route for the flags of seven states – Greece, Italy, Romania, Yugoslavia, France, Albania, and the United Kingdom. During a twenty-one-month period there were 2884 crossings by ships which had put in to port and been visited by customs. As well there were a large number of vessels which went through the strait without calling at the port of Corfu. In other words, the actual use of the North Corfu Channel by foreign

<sup>80</sup> ICJ, *Reports*, 1949, 28.

ships had been quite extensive. In the words of Professor O'Connell, the Corfu Channel Case established 'that not all straits linking two parts of the high seas are international straits, but only those which are important as communication links.' He concluded his analysis by saying that 'mere potential utility is insufficient.'<sup>81</sup>

Applying this definition of an international strait, the question is whether the Northwest Passage meets the two criteria.

#### *Present status*

The geographic criterion is met without difficulty insofar as the Passage links two parts of the high seas. Indeed, its eastern end leads to Baffin Bay, Davis Strait, the Labrador Sea, and the Atlantic Ocean, whereas the western end leads to the Beaufort Sea, the Chukchi Sea, the Bering Strait, and the Pacific Ocean. It has occasionally been suggested that the Beaufort Sea, which is part of the Arctic Ocean, should not be considered high seas because of the presence of ice. However, such a suggestion seems to overlook the fact that pack ice is comprised of ice floes in constant motion and does not extend to the continental coast of Canada and Alaska for about three months of the year.

As for the necessity of there being an overlap of territorial waters, attempts to apply this part of the criterion are complicated because Canada has not yet drawn straight baselines around the archipelago, even though it claims that the waters which would be thus enclosed are internal waters. In these circumstances, and without prejudging in any way the validity of Canada's claim, the hypothesis here is that the waters of the Northwest Passage are not internal. On the basis of that supposition, the extension of Canada's territorial waters to twelve miles in 1970 resulted in an overlap of territorial waters in Barrow Strait, which is part of Route 2 through M'Clure Strait, so that since that date all of the routes of the Northwest Passage must cross the territorial waters of Canada. The effect of the 1970 extension was accurately expressed by the secretary of

81 O'Connell, *International Law of the Sea*, 1, 308.

state for external affairs at the time when he stated: 'Since the 12-mile territorial sea is well established in international law, the effect of this bill on the Northwest Passage is that under any sensible view of the law Barrow Strait, as well as the Prince of Wales Strait, are subject to complete Canadian sovereignty.'<sup>82</sup>

In the light of the stated assumption, the application of the geographic criterion leads to the conclusion that the Northwest Passage constitutes a legal strait, in that it connects two parts of the high seas, or exclusive economic zones, and presents an overlap of territorial waters.

The functional criterion, as applied by the International Court in the Corfu Channel Case, requires a strait to have been a useful route for international maritime traffic, as evidenced mainly by the number of ships using the strait and the number of flags represented, before it can be classified as an international strait. When this criterion is applied to the Northwest Passage, it evidently fails to be met. In its eighty-year history of exploratory navigation, the Passage has seen only 40 complete transits: 27 were by Canadian ships, and 13 were foreign (10 American, 1 Norwegian, 1 Dutch, and 1 Japanese). The historic Norwegian crossing was made in a herring boat, and the Dutch and Japanese adventure crossings took place in pleasure yachts.

Of the 10 American transits, 3 were accomplished by a squadron of icebreakers in 1957, performing hydrographic surveys during the joint Canadian-American establishment of the Distant Early Warning radar system, and all three ships were led through the narrow Bellot Strait by *HMCS Labrador*. Two American submarine crossings took place to test the feasibility of submerged transits of the Northwest Passage: in 1960 the *USS Seadragon* had a Canadian representative aboard in the person of Commodore O.C.S. Robertson; and in 1962 the *USS Skate* made its crossing within the context of bilateral defence arrangements. The other 5 American transits were made in 1969, when the tanker *Manhattan* (loaded with water) made its

<sup>82</sup> *Debates*, 17 April 1970, 6015.



feasibility voyage in Route 1 and was accompanied for part of the voyage by the United States icebreakers, *Staten Island* and *Northwind*. The *Manhattan* had a Canadian representative aboard in the person of Captain T.C. Pullen and was escorted by the Canadian icebreaker, *John A. Macdonald*.

It is clear from this review that by no stretch of the imagination could the Northwest Passage now be classified as an international strait. Those who maintain that the Passage may be so classified confuse *actual use* with *potential use*. The latter test is the one used by American courts to determine whether a waterway is navigable or not, for in such a case it is the capacity for navigation which is the effective criterion.<sup>83</sup> This is not, however, the criterion of actual use required in international law and applied by the International Court in the Corfu Channel Case. In addition, it must be pointed out that not one of the foreign transits which have taken place could be characterized as a commercial voyage, not even that of the *Manhattan* because it carried water and not oil.

#### *Future status*

Looking to the future, the question is whether the Northwest Passage could become an international strait and, in that event, what right of passage would apply.

The possible internationalization of the Northwest Passage will depend on the amount of international shipping which would take place and the measures which Canada would take to exercise control over such shipping and, possibly, prevent the internationalization of the Passage.

International shipping has already begun in the eastern part of the Passage with the transport of minerals from Nanisivik Mine, south of Lancaster Sound, and Polaris Mine, north of Barrow Strait. And it seems likely that before long gas from Melville Island and oil from the Beaufort Sea will be shipped along the full length of the Northwest Passage. This oil would

<sup>83</sup> See R.R. Baxter, *The Law of International Waterways* (1964), 3 (note 5).

probably come from both the Canadian and the Alaskan sides of the Beaufort Sea. A realistic time-frame for this shipping to begin would be between 1990 and 1995.

Assuming that international shipping will take place, would this result in the internationalization of the Passage? More precisely, will the number of foreign flags and foreign transits be sufficient to put the Northwest Passage in the category of straits being used for international navigation? The answer is probably yes. The only uncertainty is the time at which this would occur, which depends in turn on the intensity of use. On this point, it will be recalled that the threshold use in the Corfu Channel Case was fairly high, but a sufficient use for the Northwest Passage might be considerably lower because of the remoteness of the region and the absence of alternative routes.

Should Canada decide to take steps to prevent the internationalization of the Passage, there are three measures which could be adopted. The first and most important one would be to establish straight baselines around the archipelago, in order to provide an adequate basis for Canada's sovereignty claim over the waters within the baselines from which its territorial waters would then extend. Once the baselines were established under customary international law, as applied by the ICJ in the Anglo-Norwegian Fisheries Case, Canada would be in a position to exercise appropriate control over all foreign shipping. The second step would be to accompany its established legal sovereignty by the development of technological sovereignty. As one Canadian official put it recently, 'the Arctic has to be won in fact as well as in law.' In other words, if Canada is to exercise the necessary control to maintain the sovereignty it claims to have acquired over the waters of the Northwest Passage, it must develop a full range of sea- and land-based services to ensure that its control is actual and effective.

The Department of Transport, in its position statement to the Beaufort Sea Environment Assessment Panel in 1982, seemed to recognize this when it said that it should be able to

provide the following services: marine navigational aids, ice-breaking and escorting, marine search and rescue, marine emergencies/pollution control, marine mobile communications services, ports, harbours, and terminals, vessel inspection services, vessel traffic management, marine re-supply administration and support, pilotage, and training.<sup>84</sup> The position paper specified that these services would be in addition to those such as hydrography, oceanography, ice properties, ice distribution and movements, meteorology, dredging implementation, and customs services which other government departments would continue to provide.

Of all these services, perhaps the most important ones for the exercise of effective control are icebreaking and pilotage. These are services for which a coastal state is entitled to charge foreign shippers. In 1967, when the Soviet Union invited certain foreign shippers to use the Northeast Passage, it distributed a brochure setting out the rates. Apparently, the Soviet offer was not accepted, but the important fact is that the Soviet Union insisted upon providing those necessary services to any interested foreign shipper. In addition, the regulations of the Northern Sea Route Administration provide for compulsory icebreaker escort and pilotage for all vessels in most of the straits constituting the Northeast Passage.<sup>85</sup> With the necessary technological tools at its disposal, Canada could establish and enforce a transit management system which could well become the primary means to ensure effective control over foreign shipping.

A third possible step, which would presume that Canada had acquired both legal and actual control over the waters of the Northwest Passage, would be the conclusion of bilateral agreements with foreign shippers setting out the conditions for the use of the Passage. Those agreements would, of course, recognize Canada's control over the Passage and provide for the

84 Transport Canada, *Position Statement to the Beaufort Sea Environmental Assessment Panel*, appendix 1, 22-3.

85 See Butler, *Northeast Arctic Passage*, 95.

conditions to be met by foreign shippers, such as the use of Canadian icebreaking and pilotage services. If one can judge from the reaction of certain American participants at a 1981 workshop on Arctic Ocean issues, such an agreement would not be too difficult to conclude with the United States. A summary of the workshop proceedings states that 'an American participant agreed with an earlier speaker [also an American] that it might be diplomatically feasible for the United States and Canada to negotiate a bilateral treaty that spelled out specific conditions of transit through the Passage for commercial vessels.'<sup>86</sup>

The conclusion of user agreements would follow logically from declarations made by Canada in 1969 and 1970. The prime minister stated in 1969 that 'to close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty, as some commentators have suggested, would be as senseless as placing barriers across the entrances of Halifax and Vancouver harbours.'<sup>87</sup> Again, in its note of 1970 to the United States, the Canadian government reiterated 'its determination to open up the Northwest Passage to safe navigation for the shipping of all nations subject, however, to necessary conditions required to protect the delicate ecological balance of the Canadian Arctic.'<sup>88</sup>

What right of passage would apply in the Northwest Passage as an international strait? On the insistence of the major maritime powers and as part of an integral package, a consensus was finally reached on the type of passage applicable in straits used for international navigation. This new right, called 'transit passage,' is defined in the 1982 Convention as follows: 'Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and an-

86 D.M. Johnston, ed, *Arctic Ocean Issues in the 1980's*, proceedings of workshop, 10-12 June 1981 (Honolulu: Law of the Sea Institute, University of Hawaii 1982), 22.

87 *Debates*, 24 October 1969, 39.

88 *Ibid*, 16 April 1970, 6028-9.

other part of the high seas or an exclusive economic zone.' [article 38(2)]

As in the case of innocent passage through the territorial sea, the question arises here as to whether the right of transit passage in international straits applies to warships, since they are not mentioned in the convention. Nor is there any provision whatever relating to submarines. However, a careful reading of the relevant provisions of the convention, in light of the numerous statements made by the maritime powers at the time of the conference, makes it abundantly clear that the intention was to include warships. In the first place, article 38 of the convention stipulates that 'all ships and aircraft enjoy the right of transit passage, which shall not be impeded.' The applicability of this right to all ships is reinforced by a subsequent provision (article 42) limiting the laws and regulations which may be adopted by bordering states. This limitation specifies that 'such laws and regulations shall not discriminate in form or in fact among foreign ships.' One cannot conclude from this alone, however, that it is clear and unambiguous that the right of free transit is extended to submarines. However I would suggest that this ambiguity is clarified in that part of article 39 which specifies the common duties of ships and aircraft while exercising their right of transit passage. That article provides that they shall 'refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.' As Professor O'Connell succinctly points out: 'since submarines are by definition underwater vehicles, submerged passage is a "normal mode" of operation for such craft.' And, as he further explains, the reason for the express prohibition against submerged passage in the territorial sea and the implied permission for submerged transit in international straits 'rests on the essentially different juridical character of the territorial sea from straits.'<sup>89</sup>

89 O'Connell, *International Law of the Sea*, 1, 333.

This interpretation, based solely on the terms of the 1982 Convention and the ordinary meaning of those terms in their context, is fully confirmed by an examination of the circumstances of the conclusion of the convention. True, the preparatory work is not very satisfactory in that it does not include a complete record of the proceedings of the conference; however, the circumstances of the conclusion of the convention, as they presented themselves throughout the conference, unquestionably confirm the textual interpretation just given.<sup>90</sup>

Now that the United States has decided to stay out of the convention, the interesting question which arises is whether it could exercise this new right of passage, either now or after the convention comes into force. Although a 12-mile territorial sea has unquestionably become part of customary international law, as has the right of non-suspendable innocent passage in international straits, this is not true of the new right of transit passage. The most that can be said is that transit passage might be beginning to emerge as customary law. This means that, if the convention should come into force before the complete emergence of this new right, any non-party to the convention, including the United States, could not exercise that right in the Northwest Passage.

Of course, state practice does not always coincide with legal theory. In his proclamation of an exclusive economic zone in March 1983, the president of the United States established guidelines for his country's oceans policy which might be at variance with the preceding legal analysis. The declaration begins by stating that 'the United States is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to the traditional uses of the oceans, such as navigation and overflight.' However, the proclamation adds: 'Unimpeded commercial and military navigation and overflight are critical to the national in-

<sup>90</sup> For an account of those circumstances, see in particular J.N. Moore, 'The regime of straits and the Third United Nations Conference on the Law of the Sea,' *American Journal of International Law* 74 (January 1980), 89.

terest of the United States. The United States will continue to act to ensure the retention of the necessary rights and freedoms.<sup>91</sup> The president warned at the same time that the United States will not 'acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.'<sup>92</sup>

Should these statements be interpreted to indicate that the United States, having decided to reject the convention because it was dissatisfied with the legal régime proposed for the exploitation of the deep seabed resources, could choose to accept certain new provisions of the convention, such as the right of transit passage through international straits? This would be contrary to the definite understanding throughout the conference that the provisions of the convention were part of a 'package deal' and states were not free to accept some and reject others. Indeed, this is the reason why the ordinary type of reservation is not permitted by the convention. The question is difficult to answer but needs to be posed.

To conclude, although a somewhat lesser degree of use might be required in a remote region such as the Arctic, virtually none has taken place across the Northwest Passage and it cannot possibly be considered an international strait. However, it does not necessarily follow that it is a national sea route, because Canada's claim to historic waters has never been established or confirmed by the drawing of straight baselines. Consequently, the right of innocent passage in favour of foreign ships must be presumed to exist. Of course, this right may be suspended by Canada if such suspension is essential for the protection of its security. In addition, Canada may enforce against foreign ships its Arctic Waters Pollution Prevention Regulations which, it is submitted, have now been validated internationally by the special Arctic clause in article 234 of the

91 Proclamation reproduced in *International Legal Materials* 22 (March 1983), 462.

92 Cited in M.N. Leich, 'Contemporary practice of the United States relating to international law,' *American Journal of International Law* 77 (July 1983), 620.

Law of the Sea Convention. Although the convention is not yet in force, a sufficiently wide consensus has emerged, since the Arctic clause was first introduced at Geneva in 1975, that it may be considered to have already become part of customary international law.<sup>93</sup> However, the coastal state's special regulatory and enforcement power in ice-covered waters is limited to situations where there is a threat to the marine environment – mainly tankers carrying oil and gas. It would appear impossible for Canada to invoke the special Arctic clause to interfere with the exercise of the right of transit passage by foreign ice-breakers, even if they can be classified as warships. The same absence of power applies to nuclear submarines, aside from possible tanker submarines, which may exercise their right of transit in their normal submerged position.

Considering the above, and now that UNCLOS III is over, it would seem more urgent than ever for Canada to draw straight baselines around its Arctic archipelago. Only then would Canada be in a position to ensure that it could exercise the necessary control adequately to protect its Arctic marine environment, the local Inuit population, and its national security. This sense of urgency was reflected at a conference in June 1984, at Queen's University, when the following resolution was adopted: 'Canada should design and adopt a comprehensive transit management system for the Northwest Passage. In the interim and before the Northwest Passage is used for foreign shipping, agreement with other States must be reached regarding, inter alia, compliance with coastal State navigation, routing requirements, and compensation for damage.'<sup>94</sup> The urgency for Canada to draw straight baselines was appropriately underlined also in a recent article in this journal by D.M. McRae.<sup>95</sup> Of

93 For a discussion of this proposition, see my study, 'La contribution du Canada au développement du droit international pour la protection du milieu marin: le cas spécial de l'Arctique,' 441-66.

94 International Law: Critical Choices for Canada 1985-2000, conference held at Queen's University, 14-17 June 1984, resolution DR 415, adopted unanimously in plenary session on 16 June.

95 D.M. McRae, 'Arctic waters and Canadian sovereignty,' *International Journal* 38 (summer 1983), 476-92.



course, the drawing of straight baselines and the adoption of a transit management system presume that Canada would also develop the necessary icebreaking and navigational capacities to insist that its services be used by foreign ships.

#### CONCLUSION

The outstanding international issues in the Arctic discussed in this article pertain to the continental shelf, the waters of the Canadian Arctic archipelago, and the Northwest Passage.

The *continental shelf* problems relate mainly to various lateral delimitations between the five Arctic states. Canada and Denmark have already agreed upon a delimitation between Ellesmere Island and Greenland as far as the Lincoln Sea, but this 1974 agreement is the only one so far. Negotiations between the Soviet Union and Norway have been pursued intermittently since 1974, but no agreement has yet been reached for the delimitation of their shelf in the Barents Sea. In 1977 and 1978, Canada and the United States attempted unsuccessfully to reach a delimitation agreement in the Beaufort Sea as part of a package settlement of their four maritime boundary problems. Negotiations will probably resume after the International Court has rendered its decision in the Gulf of Maine Case. As for the delimitation between the Soviet Union and the United States in the Chukchi Sea, those states agreed in 1977 to use the 1867 convention line for the enforcement of their respective fisheries jurisdiction, and they might agree to use the same line for their continental shelf delimitation. However, such delimitation would not go beyond 72° north latitude, as this is considered by the United States to represent the northernmost point of the convention line. Beyond that point, the general law on lateral delimitation would apply and, for this case as well as for the other delimitation problems, the decision in the Gulf of Maine Case is bound to constitute an important precedent. The seaward limit of the continental shelf might also pose a problem for some of the Arctic states if two submarine features, the Lomonosov and Alpha ridges, prove to be of continental shelf origin.

Canada claims the *waters of the Canadian Arctic archipelago* as historic internal waters. To succeed in this claim, Canada must establish that it has exercised exclusive control over those waters for a long period of time and that this control has been acquiesced in by foreign states, particularly those clearly affected by the claim. Canada could not likely meet the stringent legal requirements for the proof of an historic title, but it does appear that Canada could validly draw straight baselines around the archipelago, with the result that its 12-mile territorial sea would be measured from those baselines and the enclosed waters would have the status of internal waters. In justifying such baselines, Canada could cite the very special geographic and physical characteristics of the archipelago; as well Canada could rely on the year-round and immemorial use of some of those waters to consolidate its title.

The *Northwest Passage* has never been used for international navigation and is not an international strait. However, because the waters of the archipelago have not been enclosed as internal waters, an overlap of territorial sea is presumed to exist in the various routes of the Passage and the right of innocent passage applies. Such right could be suspended by Canada, if it is essential for its security or for the protection of its marine environment. Should there develop a sufficient use by foreign ships for commercial navigation, the Northwest Passage could become an international strait and the new right of 'transit passage' would apply. This new right would permit *all* ships, including warships and submarines in their normal mode of submerged navigation, to use the Passage. Such right could not be suspended or impeded.