

ARCTIC BASELINES: A LITORE USQUE AD LITUS‡

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This article examines the validity of Canada's claim to exert sovereignty and control over the waters between the Canadian Arctic islands. The claim rests on two propositions. The first is that international law accepts Canada's recent decision to draw straight baselines in the Arctic. These baselines serve as the lines from which Canada's twelve mile territorial sea is measured seaward. Since they follow the perimeter of the Arctic archipelago, the baselines also have the very important effect of enclosing all the waters of the archipelago as internal waters. The second proposition relied upon by Canada is that customary international law gives Canada total control over activity in the internal waters enclosed by the Arctic baselines. The author concludes that Canada's claim is valid under international law, although not for the reason (historic title) publicly espoused by the Canadian government.

Dans cet article, l'auteur examine la validité de la souveraineté et du contrôle revendiqués par le Canada sur les eaux prises entre les îles arctiques canadiennes. La revendication s'appuie sur deux arguments. Premièrement, le droit international accepte la décision récente prise par le Canada de tirer des bases droites dans l'Arctique. Ces bases servent de lignes à partir desquelles le Canada mesure les douze miles de ses eaux territoriales. Comme elles suivent le périmètre de l'archipel arctique, les bases ont pour effet de faire de toutes les eaux de l'archipel des eaux intérieures. Deuxièmement, le droit coutumier international donne au Canada le contrôle absolu sur toutes les activités prenant place dans les eaux prises à l'intérieur des bases arctiques. L'auteur en conclut donc que la revendication canadienne est valide en droit international quoique pour une raison différente de celle adoptée par le gouvernement canadien (titre historique).

Introduction

One month after the 1985 voyage through the Northwest Passage by the U.S.C.G.S. *Polar Sea*, an American icebreaker, the Canadian government enacted the Territorial Sea Geographical Coordinates (Area 7) Order.¹ Despite the turgid nature of its title, this regulation was a major step forward in Canada's assertion of jurisdiction and sovereignty over the

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‡"From shore to shore".

¹ SOR/85-872. The regulation was enacted pursuant to the Territorial Sea and Fishing Zones Act, R.S.C. 1970, T-7, as amended.

waters in the Canadian Arctic archipelago. The official purpose of the regulation is to reinforce Canada's claim that the waters in the archipelago are historic internal waters over which she has full sovereignty and control.² Effective on January 1, 1986, it established straight baselines around the Arctic archipelago.

Since 1970, Canada has claimed a twelve mile territorial sea around all her coasts. This claim is recognized by the international community. The difficulty in the Arctic concerns the location of the baselines from which the twelve mile territorial sea is to be measured. The most common method of locating a baseline is to use the low water mark of the mainland and any islands. In certain circumstances, however, international law allows a state to use a straight baseline connecting two points of land. The straight baseline runs across a body of water, the twelve mile territorial sea is then measured outwards from the baseline. Waters on the landward side of the baseline are treated as internal waters. Both the territorial sea and any internal waters form an integral part of the territory of the coastal state;³ foreign ships, however, have a right of innocent passage through the territorial sea.

If a country uses straight baselines, it achieves two results. First, the country's territorial sea extends further from land than it otherwise would. Secondly, the coastal state may be able to exercise total control over any foreign shipping in the enclosed internal waters; the extent of this power to prohibit or regulate shipping in internal waters will be discussed more fully below.

Before examining the international law validity of Canada's straight baselines in the Arctic, it is worth noting some of the geographical features of this region. The islands of the Canadian archipelago extend almost 1,000 miles north from the mainland coast. In this important respect, they are different from any other coastal archipelago. For example, the fringe of islands off the coast of Norway extends less than eighty miles from the mainland coast. Because of the large distance from the northern end of Ellesmere Island to the mainland coast, the Canadian Arctic islands take on some of the characteristics of a mid-ocean archipelago. Perhaps the best way of characterizing the Arctic archipelago is to call it a hybrid; it has many features of a coastal archipelago but it also has some features of a mid-ocean archipelago.

The Canadian Arctic islands fall into two geographical groups. The northern group, known as the Queen Elizabeth Islands, is separated from

² See the statement by External Affairs Minister Joe Clark when he announced the enactment of the regulation: Can. H.C. Debates (September 10, 1985), p. 6463.

³ This rule of international law would have been domestically confirmed by section 4(a) of the proposed Canadian Laws Offshore Application Act (Bill C-104, 33rd Parliament, 1st Sess.). This bill died on the order paper, and, as of July 1987, had not been reintroduced in the second session of the current Parliament.

the southern group by a wide body of water called the Parry Channel. This channel begins in the east with Lancaster Sound, which averages forty-five miles in width. Going west, there is Barrow Strait, Viscount Melville Sound and, finally, M'Clure Strait, which averages seventy miles in width and opens into the Beaufort Sea. Although Barrow Strait is forty miles in width for much of its length, there are several small islands in the strait which reduce the navigable channel to fifteen and a half miles at one point. These small islands also have the effect of geographically linking together the northern and southern groups of Arctic islands.

The route through Parry Channel might seem the most obvious choice for ships using the Northwest Passage; but the western end (M'Clure Strait) is often impassable because of heavy ice, even in the summer. As a result, the most frequently used route in the western part of the Northwest Passage is through Prince of Wales Strait and Amundsen Gulf. This strait separates Banks Island from Victoria Island and is less than ten miles wide in several places.

The final and most important characteristic of the region is that the sea is frozen during most of the year. Usually there is open water through the Northwest Passage for only two or three months.⁴ This fact has two major consequences. First of all, it means that the sea can be used as if it were land. For much of the year, areas of the sea ice are used as a surface on which to travel and build hunting camps.

The second consequence of the frozen state of the Arctic waters is that for most of the year ordinary vessels are unable to operate in the region. Ship movement is limited to submarines, in those areas where the channels are deep enough, and to icebreakers. Although Canada has plans to build a year-round icebreaker during the next five or six years, the most powerful existing Canadian icebreakers are able to work in the Arctic for only a few months of the year. The Soviet Union has several icebreakers which can operate year-round in the Arctic; the United States has none. In spite of a gradually increasing capability for marine transportation in the Arctic, the frozen nature of the sea makes it quite unlike any other archipelago, whether coastal or mid-ocean.

I. Validity of the Straight Baselines

Canada's legal position is that the waters in the Arctic archipelago are internal waters; in order to reinforce this claim, Canada has drawn straight baselines around the region. But is the claim valid under international law? The first basis for Canada's claim is that the waters are historic internal waters. A second basis is that the straight baselines are justified

⁴ For a fuller discussion of the physical geography and ice conditions in the Arctic, see Donat Pharand, *Northwest Passage: Arctic Straits* (1984), chapter 1.

under customary international law, independently of any claim to historic title over the waters.

A. *Historic title*

The doctrine of historic internal waters probably developed in order to deal with bodies of water which historically had been treated as internal, but which did not fit the usual rules for closing a bay.⁵ A simple coastline has no internal waters; the territorial sea laps the shoreline. But where a bay significantly cuts into the coastline, international law allows the coastal state to draw a closing line between the headlands of the bay.⁶ The waters within the bay are internal, through which foreign ships have no right of passage; the territorial sea is then measured outwards from the closing line. Although there has never been complete agreement on the maximum length of a closing line, there has been general agreement that the coastal state does not have an unfettered discretion in determining the length of the line closing the mouth of a bay. The present maximum length appears to be twenty-four miles.⁷

Although the doctrine of historic waters developed in the context of bays, it is possible that it may include other bodies of water: for example, straits.⁸ The policy reasons for treating a partially enclosed bay as internal waters⁹ are obviously much weaker when applied to a strait through which foreign ships may have a valid reason for passing; nonetheless, there is no absolute reason why a geographical strait, such as the Northwest Passage, could not consist of historic internal waters. The possibility has also been raised that historic waters need not be internal but can be territorial in some circumstances.¹⁰ Even if correct, this prop-

⁵ See Torsten Gihl, *The Baseline of the Territorial Sea* (1967), 11 *Scandinavian Studies in Law* 119, at pp. 142-143; D.P. O'Connell, *The International Law of the Sea*, Vol. I (1982), p. 424.

⁶ Geneva Convention on the Territorial Sea and the Contiguous Zone (1958), 516 U.N.T.S. 205, art. 7; United Nations Convention on the Law of the Sea (1982), art. 10 (subsequently referred to as the Territorial Sea Convention and the Convention on the Law of the Sea).

⁷ *Ibid.*

⁸ See O'Connell, *op. cit.*, footnote 5, pp. 417-420. See also a memorandum prepared by the secretariat of the United Nations, *Historic Bays* (Preparatory Document No. 1), Official Records, Vol. I, United Nations Conference on the Law of the Sea (Geneva, 1958), U.N. Doc. A/Conf. 13/1, pp. 2 and 37; International Law Commission (Secretariat), *Judicial Regime of Historic Waters, Including Historic Bays*, 1962 Yearbook of the International Law Commission, Vol. II, 1, at p. 6.

⁹ Gihl, *loc. cit.*, footnote 5, pp. 138-139. See the discussion, *infra*, in the text at footnote 77.

¹⁰ The United Kingdom suggested this point in *Fisheries Case (United Kingdom v. Norway)* I.C.J. Reports 1951, p. 116, at pp. 122 and 130; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54; Points of Substantive Law* (1954), 31 *British Yearbook of International Law* 371, at p. 381.

osition is of no assistance, however, to Canada's claim that the waters in the Arctic archipelago are internal.

Canada has several areas of sea which are almost certainly historic internal waters: for example, Hudson Bay,¹¹ Conception Bay¹² in Newfoundland, and the waters separating Vancouver Island from the mainland (Queen Charlotte Strait, Johnstone Strait and the Canadian portions of the Strait of Georgia and the Strait of Juan de Fuca).¹³

Can this list be expanded to include the waters in the Arctic archipelago?

The World Court has not had an opportunity to provide a definitive formulation of the criteria for historic waters. However, a study prepared in 1962 by the secretariat of the International Law Commission formulated the factors which it felt should be considered in a claim to historic waters:¹⁴

- (1) the exercise of authority over the area by the state claiming the historic right;
- (2) the continuity of this exercise of authority;
- (3) the attitude of foreign states.

Several domestic courts have stressed both the need for the coastal state to have exercised exclusive dominion over the area for a considerable period of time and also the importance of acquiescence by foreign states.¹⁵

Has Canada exercised the requisite authority over the waters in the Arctic archipelago? Before examining what Canada has done, it is important to note that the Canadian acts relied upon must reflect the scope of a claim to internal waters, not merely to a territorial sea.¹⁶ Because of the often confusing use of the terms "territorial waters", "territorial sea", "internal waters" and "inland waters" until the 1950s, the label attached to a particular claim may not be conclusive as to what, in fact, was being claimed. But any claim to internal waters must include more than a claim to prohibit or regulate foreign fishing or whaling, since a coastal state has the power to do this in its territorial sea. A true claim to

¹¹ See V. Kenneth Johnston, *Canada's Title to Hudson Bay and Hudson Strait* (1934), 15 *British Yearbook of International Law* 1.

¹² See *Direct United States Cable Company Limited v. Anglo-American Telegraph Company Limited et al.* (1877), 2 App. Cas. 394 (P.C.).

¹³ *Reference Re Ownership of the Bed of the Strait of Georgia*, [1984] 1 S.C.R. 388, [1984] 4 W.W.R. 289.

¹⁴ International Law Commission (Secretariat), *op. cit.*, footnote 8, p. 13.

¹⁵ *Direct United States Cable Company Ltd. v. Anglo-American Telegraph Company Limited et al.*, *supra*, footnote 12, at p. 420; *United States v. Alaska*, 422 U.S. 184, at p. 189 (1975). See also O'Connell, *op. cit.*, footnote 5, pp. 427-435.

¹⁶ International Law Commission (Secretariat), *op. cit.*, footnote 8, pp. 13-14, 23; *United States v. Alaska*, *ibid.*, at p. 197.

internal waters should include a claim to the right to prohibit navigation by all foreign vessels.

It may be helpful to categorize the types of acts which can constitute an exercise of authority over an area of water: public pronouncements by government officials, legislation (or proclamations having a legal effect), enforcement and other administrative actions (for example seizure of a ship), and judicial decisions by domestic courts.¹⁷ These four types of governmental activity are directly relevant to any claim to historic title over an area of ocean. They are also forms of state activity which can constitute effective occupation by a state with respect to land territory.¹⁸

The legal consequences, if any, of physical occupation of the sea ice by the Inuit will be discussed separately below. Physical occupation is not a possibility for areas of open sea,¹⁹ but clearly it is not ruled out for areas of sea which are frozen for most of the year.

The first unequivocal government pronouncement that Canada considered the waters in the Arctic archipelago to be internal waters did not occur until 1975. Allan MacEachern, Secretary of State for Foreign Affairs, stated before a parliamentary committee:²⁰

As Canada's northwest passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the regime of transit [passage through international straits] does not apply to the Arctic. We are therefore able to continue to enact and enforce pollution control regulations in that area.

Six years previously, Prime Minister Trudeau had made a series of statements in the House of Commons. On March 7, 1969, he said:²¹

...there is a question whether it [i.e. the water in the Arctic archipelago] is a territorial sea or inland sea.

¹⁷ For the role of domestic court decisions as examples of a state's exercise of sovereignty, see *The Minquiers and Ecrehos Case* (France/United Kingdom), I.C.J. Reports 1953, p. 47, at p. 65.

¹⁸ For example, see Legal Status of Eastern Greenland, P.C.I.J., Ser. A/B, No. 53 (1933) at pp. 53-54, 62-63; *The Minquiers and Ecrehos Case*, *ibid.*, at pp. 65 and 69.

¹⁹ In *Direct United States Cable Company Ltd. v. Anglo-American Telegraph Company Limited et al.*, *supra*, footnote 12, at pp. 419-420, the Privy Council concluded that the British government had occupied Conception Bay for many years; however, it was referring to dominion or effective control rather than to physical occupation.

²⁰ Proceedings and Evidence of the Standing Committee on External Affairs and National Defence, 1st Sess., 30th Parliament, Issue No. 24, p. 6 (May 22, 1975); also reproduced in (1976), 14 Canadian Yearbook of International Law, at pp. 330-331. In 1970, a former Secretary of State for External Affairs, Mitchell Sharp, responded to questions in Parliament about baselines in the Arctic by saying that Canada claimed the waters of the Arctic archipelago as internal waters: Can. H.C. Debates (April 16, 1970), p.5953. This appears to be an unequivocal statement. If, however, Mr. Sharp's comment is read with his answer to a later question (p. 5954), it is difficult to view his statement as a formal and unambiguous claim that the waters are internal.

²¹ Can. H.C. Debates (March 7, 1969), p. 6339.

A few days later on March 10, he informed the House of Commons that he was consulting with his ministers:²²

...with a view to establishing our policy on this matter which, over the years, has not been clarified by any government, so far as the status of these waters is concerned.

The Prime Minister announced this policy to the House of Commons on May 15, 1969:²³

With respect to the waters between the islands of Canada's Arctic archipelago, it is well known that in 1958 the then minister of northern affairs stated the Canadian position as follows:

The area to the north of Canada, including the islands and the waters between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is national terrain.

It is also known that not all countries would accept the view that the waters between the islands of the archipelago are internal waters over which Canada has full sovereignty. The contrary view is indeed that Canada's sovereignty extends only to the territorial sea around each island. The law of the sea is a complex subject which, as can be understood, may give rise to differences of opinion. Such differences, of course, would have to be settled not on an arbitrary basis but with due regard for established principles of international law.

This policy statement was interpreted by the opposition leaders in the House as, at best, an ambiguous claim to internal waters; the Leader of the Opposition, Robert Stanfield, accused the government of having weakened Canada's earlier claim to the waters in the Arctic archipelago. As will be seen, the Prime Minister's statement was not a weakening of Canada's earlier formal claims, but the reaction to his statement indicates that it cannot be viewed as an unequivocal claim that the waters are internal.

In making his statement, Prime Minister Trudeau referred to a government statement in 1958 that the waters were "national terrain". This phrase is not a term of art and could refer to either territorial or internal waters.

One of the earliest post-World War II government statements occurred in 1956 when the Minister of Northern Affairs told the House of Commons:²⁴

We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty exists over the lands and over our territorial waters.

The above government pronouncements about the legal status of the waters in the Arctic archipelago indicate that Canada first unequivocally

²² Can. H.C. Debates (March 10, 1969), p. 6396.

²³ Can. H.C. Debates (May 15, 1969), p. 8720.

²⁴ Can. H.C. Debates (August 3, 1956), p. 6955.

expressed a claim to internal waters in 1975. Taken by themselves, they suggest that Canada has not continuously maintained an internal waters claim for a period of time sufficiently long to form the basis for a claim to historic title.

Despite the weakness of these verbal claims to historic title, may the claim perhaps be justified on the basis of legislative activity over the area? The Territorial Sea Geographical Coordinate (Area 7) Order²⁵ is the first enactment which has the direct legal effect of declaring the waters of the Arctic archipelago to be internal waters. Parliament originally created the legal power to use straight baselines when it passed the Territorial Sea and Fishing Zones Act²⁶ in 1964. The initial use of this power occurred in 1967 when regulations established straight baselines on areas of the east and west coasts. But Canada refrained from creating straight baselines in the Arctic until January 1, 1986. Because of the failure to draw straight baselines in the Arctic, Canada's only legislative claim was to a twelve miles territorial sea around coasts and bays. Section 5(3) of the Territorial Sea and Fishing Zones Act states that in those areas of Canada where straight baselines are not used, the "... baselines remain those applicable immediately before the 23rd day of July 1964". Prior to that date, the territorial sea was not legislatively defined *per se*. However, section 420 of the Criminal Code²⁷ implicitly defined Canada's territorial waters as extending three miles from the low water mark on the coast. In addition, section 2(6) of the Coastal Fisheries Protection Act²⁸ included a definition of "territorial waters" which suggests that the territorial sea was to be measured outward from the coast, bays and harbours. The baselines used for measuring the territorial sea in the Arctic on July 23, 1964 were therefore the traditional baselines following the low water mark around the coast and including the closing lines across bays. The use of these baselines left a high seas corridor through the Northwest Passage until Canada increased the width of her territorial sea to twelve miles in 1970. This new twelve mile limit had the effect of creating a territorial sea gateway wherever a channel is less than twenty-four miles. As noted above, Prince of Wales Strait and parts of Barrow Strait are less than twenty-four miles. The significance of this discussion is that if a foreign state had examined the relevant Canadian legislation at any time prior to 1986, it would have concluded that Canada claimed merely a twelve mile territorial sea around each of the Arctic islands.

²⁵ *Supra*, footnote 1.

²⁶ *Ibid.*

²⁷ S.C. 1953-54, c. 51.

²⁸ S.C. 1953, c. 15. Section 4(d) allowed the Governor in Council to make regulations designating areas of territorial sea for the purposes of the Act. No regulations relevant to the Arctic appear to have been made. See also Customs Act, R.S.C. 1952, c. 58, s. 2(1)(b).

At least one Canadian court, however, has reached a contrary result. In *R. v. Tootalik E4-321*,²⁹ the accused was charged with a hunting offence alleged to have occurred on sea ice. The reasons for judgment do not specify the precise location of the offence but it apparently occurred more than twelve miles from shore. One of the arguments raised by the defence was that the court was without jurisdiction since the alleged offence had occurred outside Canada. Morrow J. concluded that Canada's territory included all the islands and sea ice as far as the North Pole. He reached this conclusion by replying in part on a 1946 statement by Lester Pearson in which he espoused the sector theory. This theory, however, was never clearly adopted by the Canadian government and has now been formally abandoned.³⁰ A further weakness of the decision in *Tootalik* is that it makes no reference to the statutory provisions which establish the location of the baselines from which the territorial sea is measured. The decision was subsequently reversed on appeal, but on a ground unrelated to the jurisdictional issue.³¹ Even if the jurisdictional aspect of the decision is correct, it does not imply that the waters in the Arctic archipelago are internal, since international law grants every coastal state jurisdiction to prosecute one of its citizens for an offence committed in the territorial sea. In summary, Canada's very recent legislative claim to the waters of the Arctic archipelago as internal waters is insufficient, even when combined with the slightly earlier verbal claim, to form the basis for a claim that the waters are historic internal waters.

Another method of exercising sovereignty consists of enforcement and other administrative actions. The administrative act which would most clearly reflect a claim to internal waters would be a refusal to allow the entry of a ship.³² It is true that the lack of an occasion to prohibit the entry of an unwanted foreign ship should not be held against

²⁹ (1969), 71 W.W.R. 435 (N.W.T.); this was a decision of Morrow J. sitting as a police magistrate.

³⁰ Prime Minister Trudeau, Can. H.C. Debates (March 10, 1969), p. 6396. See *infra*, for a discussion of the sector theory.

³¹ (1970), 74 W.W.R. 740 (N.W.T. Terr. Ct.).

³² In order to constitute an effective claim to internal waters, a refusal of entry could not be based on non-compliance with the Arctic Waters Pollution Prevention Act, R.S.C 1970 (1st Suppl.), c. 2. A refusal to allow entry of a ship which did not meet the requirements of the Act would only mean that Canada was enforcing her right under international law to take special measures to prevent pollution in ice-covered areas of an exclusive economic zone. See the Convention on the Law of the Sea, article 234. For a discussion of whether the power in article 234 forms part of customary law, see Pharand, *op. cit.*, footnote 4, pp. 108-109; D.M. McRae, Arctic Waters and Canadian Sovereignty (1983), 38 International Journal 476, at p. 479. Canada has not declared a formal exclusive economic zone; however, there is no reason why this power to prevent pollution should not be available to Canada simply because she has declared separate functional powers (fishing and pollution) rather than a comprehensive exclusive economic zone.

Canada. In addition, the extent of administrative activity needed to support a claim to historic title in a remote and unfrequented part of the globe is not as great as in more accessible regions.³³ Yet the fact remains that Canada appears unable to point to any act which would unequivocally show that she has historically treated the waters as internal. Canada has in the past taken enforcement action against foreign vessels in Arctic waters,³⁴ but these actions all related to whaling and fishing activities which foreigners do not have a right to carry on in the territorial sea of another state. They are not adequate to support a claim that the waters are internal. In any event, even if some of Canada's non-judicial acts of administration in the Arctic were consistent only with a claim that the waters were internal, they would be unable to remedy the legislative failure to treat the waters as internal until 1986.³⁵

A further type of state activity which can constitute an exercise of state sovereignty is judicial decision-making by a domestic court. The *Tootalik* case has already been discussed. Due to the absence of enforcement activity against foreign ships in the Arctic, Canadian courts have had no opportunity to pronounce on the government's claim that the waters are internal.³⁶

The final requirement for a valid claim to historic title is acquiescence by foreign states. The United States has been consistent in its verbal opposition to Canada's claim to internal waters ever since the claim was first enunciated by Prime Minister Trudeau in 1969. Despite its consistency, the American opposition to Canada's claim may contain several weaknesses. For instance, sixteen years passed from 1969 to 1985 without the United States mounting a practical protest to Canada's claim. The voyage by the *Polar Sea* in 1985 was the first American passage through the archipelago since a number of voyages made in 1969.³⁷ In any event, the voyage by the *Polar Sea* probably cannot be considered an effective protest to Canada's claim since both countries

³³ See the decision of the Permanent Court of International Justice in a case involving title to a remote region of land: *Legal Status of Eastern Greenland*, *supra*, footnote 18, at p. 46; see also the criticism by O'Connell, *op. cit.*, footnote 5, at p. 428, of the emphasis placed by American courts on the need for the effective exercise of sovereignty in remote maritime regions.

³⁴ Pharand, *op. cit.*, footnote 4, p. 112.

³⁵ If the Territorial Sea and Fishing Zones Act, *supra*, footnote 1, did not exhaustively deal with the location of Canada's territorial sea, the Canadian government probably could have relied on the royal prerogative as the basis for an order in council declaring the waters of the Arctic archipelago to be internal. The United Kingdom's straight baselines were created under the royal prerogative; see, *infra*, footnote 84.

³⁶ Cf. the discussion of *B.P. Exploration Company (Libya) Limited v. Hunt*, [1981] 1 W.W.R. 209 (N.W.T.S.C.), in footnote 92, *infra*.

³⁷ For a very useful review of voyages in the Northwest Passage before 1984, see Pharand, *op. cit.*, footnote 4, chapters 2 and 3.

agreed that the trip would be made without prejudice to their respective claims.³⁸

A further possible weakness of the American protests against Canada's claim to internal waters raises the difficult question of the degree of international acceptance which is required in order to support a valid claim to historic internal waters.³⁹ Is an objection by a single, but very important, country sufficient to prevent the creation of a historic title? Given the great interest of the United States in having a right of passage from the north shore of Alaska through the Northwest Passage to the eastern coast of the United States, it seems likely that its protests should be given significant weight.

The question of acquiescence by foreign states is, however, moot because of Canada's inability to meet the other requirements for a claim to historic internal waters. On the basis of Canada's claim as evidenced by government pronouncements, legislation and actual governmental activity in the region, Canada could, at best, validly claim a historic territorial sea (through which foreign ships would have a right of innocent passage).

For many centuries, the Inuit have occupied areas of the sea ice for significant periods of time during the year. As previously noted, hunting camps are often located on the ice, which is also used as a surface for the same types of transportation as are used on land.⁴⁰ Does this Inuit use of the sea ice have any legal impact on Canada's claim that the waters in the Arctic archipelago are historic internal waters? The answer must surely be no, if these usually frozen areas of the world's oceans are treated in the same way as other maritime areas. The oceans are not susceptible to physical occupation. But at least one commentator has argued.⁴¹

Traditional theories of marine law and administrative regulation are not designed for a world in which land and sea are often indistinguishable, where an individual hunter may walk for kilometres over sea ice to secure his food.

It seems to the present writer that the historic Inuit use of the sea ice would support a claim by Canada that the waters are historic internal

³⁸ In order to give some legal consequence to that agreement, Canada granted formal permission for the voyage one day before the ship entered the disputed waters: U.S.C.G.C. Polar Sea Exemption Order, SOR/85-722. This regulation had the effect merely of exempting the *Polar Sea* from compliance with the Arctic Shipping Pollution Prevention Regulations.

³⁹ See International Law Commission (Secretariat), *op. cit.*, footnote 8, pp. 16-19; O'Connell, *op. cit.*, footnote 5, pp. 433-435.

⁴⁰ For a discussion of Inuit use of the sea ice, see Sikumiut: "the people who use the sea ice", a collection of workshop papers published by the Canadian Arctic Resources Committee (Ottawa, 1984); and Pharand, *op. cit.*, footnote 4, pp. 134-139.

⁴¹ Peter Brunet, Introduction, Sikumiut, *ibid.*

waters only if it were possible to gain title to ice by physical occupation in the same way as physical occupation can form a basis for title to land. If this were possible, then the historic Inuit use and occupation of the ice might be able to validate Canada's claim to historic title first made legislatively in 1986.⁴²

Although several scholars have in the past suggested that permanently frozen sea ice can be treated like land and thus be susceptible to occupation, none has suggested that ice which melts most summers can be treated in this way.⁴³ The permanently frozen areas of sea ice in the Arctic archipelago occupy only a small part of the total region and all lie well north of the Parry Channel. Moreover the increased icebreaking capability of maritime nations makes it more difficult than ever to argue that special rules for acquiring sovereignty should apply to ice covered areas of the sea. This point is reinforced by Canada's publicly stated policy of encouraging navigation in the Arctic.⁴⁴ Therefore, it seems that any claim to historic internal waters based on Inuit occupation of the sea ice has little chance of success. But, as will be seen below, Inuit occupation of the sea ice may nonetheless be an important factor in establishing Canada's title to the waters as internal, independently of any claim to historic title.

B. *Straight baselines: customary and treaty law*

The International Court of Justice in the *Fisheries Case (United Kingdom v. Norway)*⁴⁵ held that, in certain circumstances, customary international law allows a coastal state to use straight baselines from which to measure its territorial sea. The northern half of Norway's coast is deeply indented with fjords and for much of its length is bordered by

⁴² A further difficulty in relying on Inuit occupation is that the acts of occupation relied upon for a claim to sovereignty must be governmental acts, not merely acts by private individuals: see Judge Hsu Mo (separate opinion) *Fisheries Case, supra*, footnote 10, at p. 157. The only way around this obstacle would be if the Inuit had been treated by international law as a sovereign entity and if they had ceded their title to either Great Britain or Canada. For an example of an indigenous nomadic people having title to land by virtue of historic occupation, see the decision of the International Court of Justice in *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, at pp. 39-41. The court held that the Western Sahara was not *terra nullius* at the time of Spanish colonization. See also David Vanderzwaag and Donat Pharand, *Inuit and the Ice: Implications for Canadian Arctic Waters* (1983), 21 *Canadian Yearbook of International Law* 53, at pp. 79-83.

⁴³ See C.H.M. Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies* (1948), 25 *British Yearbook of International Law* 311, at pp. 317-318, where he refers to some of the earlier scholarly views. See also Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* (1957, II), 92 *Hague Recueil* 1, at p. 155.

⁴⁴ *Supra*, footnote 2.

⁴⁵ *Supra*, footnote 10.

a fringe of islands known as the "skjaergaard". The dispute between Norway and the United Kingdom concerned the right of British fishing boats to catch fish in the area near the coast. By upholding Norway's use of straight baselines to enclose the waters, the court reduced the area of ocean available to foreign fishermen.

In reaching its decision, the court was greatly influenced by what it perceived to be the very unusual, or possibly unique, features of the Norwegian coastline.⁴⁶

The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea.

Two dissenting judges (McNair and Read) and several subsequent commentators have stated that the court was overly impressed by the unusualness of the Norwegian coastline. Indeed, as the two judges noted, the Norwegian coast has many features similar to the east, west and northern coasts of Canada.⁴⁷

The court began by stating the general principle "that the belt of territorial waters must follow the general direction of the coast".⁴⁸ It obtained this principle in part by relying on the need for a "close dependence of the territorial sea upon the land domain".⁴⁹ It then formulated the first consideration for locating a baseline:⁵⁰

. . . while. . . a [coastal] 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.*

A second important consideration is the need for a "more or less close relationship" between the land and the waters enclosed by the baselines:⁵¹

The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are *sufficiently closely linked to the land domain to be subject to the regime of internal waters.*

The court went on to add that geographical criteria are not the only factors that need to be considered. "Economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" must also be taken into account.⁵²

⁴⁶ *Ibid.*, at p. 127.

⁴⁷ *Ibid.*, Judge McNair (dissenting) at pp. 169-170; Judge Read (dissenting) at p. 193; and see Gihl, *loc. cit.*, footnote 5, at p. 132.

⁴⁸ *Ibid.*, at p. 129.

⁴⁹ *Ibid.*, at p. 133.

⁵⁰ *Ibid.* (Emphasis added). A practical expression of the court's willingness to grant latitude to the coastal state is its decision to leave to Norway the choice for the proper location of the baseline closing the Vestfjord (at pp. 142-143).

⁵¹ *Ibid.*, at p. 133. (Emphasis added).

⁵² *Ibid.*

Later in the judgment, the court noted that baselines "must be drawn in a reasonable manner".⁵³ The requirement of reasonableness will usually, if not always, be satisfied if the earlier considerations have been given proper effect.

This decision by the International Court of Justice clearly established that a system of straight baselines is not an exception to the normal rules for locating the baselines of the territorial sea; rather, it is merely an application of general principles of international law.⁵⁴ The effect of the decision was to weaken greatly the use of the low water mark as the primary rule for locating a territorial sea baseline.⁵⁵

The results of the *Fisheries Case* have been generally approved by the international community. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone contains provisions for straight baselines. With two minor alterations, the 1982 United Nations Convention on the Law of the Sea contains identical provisions in article 7.⁵⁶ Canada has not ratified the 1958 Territorial Sea Convention; nor has she ratified the Convention on the Law of the Sea which, in any event, will not enter into force for a number of years. Although Canada is therefore not bound by the precise provisions of either treaty, it is nevertheless important to examine the text of the treaty provisions. Articles 3 and 4 of the 1958 Territorial Sea Convention state:

Article 3

Except where otherwise provided in these Articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the seas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

⁵³ *Ibid.*, at pp. 140-141. Judge Alvarez, in an individual opinion, stated, at p. 150, that the technical rules for baselines should be abandoned and reliance placed instead on reasonableness and a few other non-technical criteria.

⁵⁴ *Ibid.*, at p. 131.

⁵⁵ For a trenchant criticism of this aspect of the court's decision, see Gerald Fitzmaurice, *Judicial Innovation—Its Uses and its Perils*, in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965), pp. 42-43.

⁵⁶ The two alterations concern low tide elevations (for example, rocks which are exposed at low tide but submerged at high tide) and deltas which change their configuration.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, 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 a long usage.
5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Many commentators have assumed that these treaty provisions accurately codify the customary law as stated in the *Fisheries Case*.⁵⁷ However, it will become apparent below that article 4 of the Territorial Sea Convention and article 7 of the Convention on the Law of the Sea narrow, in one or possibly two crucial respects, the customary law position as stated by the International Court of Justice. If one assumes that the customary law remains today as it was stated in 1951, the differences between the customary law and treaty law on straight baselines may become significant to Canada if she ratifies the Convention on the Law of the Sea and it enters into force.

The fundamental requirement for a valid system of straight baselines is that there must be an irregular coastline. As noted previously, the International court was impressed by the irregularity of the Norwegian coast; it referred several times to the "rugged nature" of the coast.⁵⁸ In preparing the draft provisions for the 1958 Territorial Sea Convention, the International Law Commission looked at the physical geography of the Norwegian coast. The final text of the treaty accurately reflects the geographic facts faced by the International Court of Justice. Article 4(1) states that straight baselines may be used:⁵⁹

... in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.

Fitzmaurice correctly concluded that these geographical situations are exhaustive of when straight baselines may be drawn under the Territorial Sea Convention.⁶⁰

Does the Canadian Arctic satisfy either of these criteria? The northern mainland coast of Canada is deeply indented, but this fact would justify using straight baselines only along the mainland coast. Despite

⁵⁷ For example, Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea: Part I—The Territorial Sea and Contiguous Zone and Related Topics* (1959), 8 *International and Comparative Law Quarterly* 73, at pp. 76-77; O'Connell, *op. cit.*, footnote 5, p. 208. One writer has incorrectly suggested that the treaty provisions extend the scope of the court's decision: L.C. Green, *Canada and Arctic Sovereignty* (1970), 48 *Can. Bar Rev.* 740, at p. 757.

⁵⁸ *Fisheries Case*, *supra*, footnote 10, at p. 129.

⁵⁹ (Emphasis added).

⁶⁰ *Loc. cit.*, footnote 58.

contrary views expressed by other writers,⁶¹ it seems difficult to describe the islands of the Arctic archipelago as a "fringe of islands" in the "immediate vicinity" of the coast. The islands extend almost 1,000 miles north from the mainland. Moreover, the northern group of islands is separated by a wide body of water from the southern group. Thus, even if the southern group could be treated as a fringe of islands in the immediate vicinity of the mainland, it would be more difficult to include the northern group despite the existence of a few small islands in Barrow Strait linking the two groups of islands.

But did the International Court of Justice limit the scope of its decision to the precise geographical facts as they were subsequently formulated in the treaty provisions? It seems that the court was prepared to allow the use of an appropriate straight baseline system on any highly irregular or rugged coast. The deep indentations and the fringe of islands on the Norwegian coast were merely the particular manifestations of the irregular nature of Norway's coastline. The treaty provisions therefore appear to be more restrictive than the customary law. The Arctic archipelago undoubtedly satisfies the geographical requirement of a rugged or irregular coastline.

If the irregular nature of a coast authorizes the use of straight baselines, these baselines must follow the "general direction of the coast". This requirement raises a number of questions:

- (1) In situations where there are islands along the mainland coast, should one consider the direction of the mainland coast or of the outer coast of the islands?
- (2) How does one determine what is the general direction of a particular coast?
- (3) Are individual straight baselines so long that they do not follow the general direction of the coast?

The International Court of Justice in the *Fisheries Case* appears to have treated the outer coast of the skjaergaard as the relevant coastline for determining the general direction of the coast.⁶² The treaty provisions seem to refer, however, to the general direction of the mainland coast. The reference to "coast" in article 4(2) of the Territorial Sea Convention can only refer back to the "coast" in article 4(1), which is clearly the mainland coast.⁶³

⁶¹ See Vanderzwaag and Pharand, *op. cit.*, footnote 42, at pp. 61-62.

⁶² *Supra*, footnote 10, at pp. 127-128, 130. The force of this statement is admittedly weakened slightly by the fact that the outer coast of the skjaergaard parallels the mainland coastline.

⁶³ O'Connell appears to assume that the relevant coastline is that of the mainland: *op. cit.*, footnote 5, pp. 208-209.

The question of the relevant coastline is critical for Canada. The general direction of the straight baselines on the western side of the archipelago is almost perpendicular to the northern mainland coast of North America from Point Barrow in Alaska as far east as the Adelaide Peninsula. These western baselines can be said to follow the general direction of the coast only if the relevant coast is the outer coast of the islands. The problem may not be so severe on the eastern side of the archipelago since it could be argued that the baselines follow a continuation of the general direction of the mainland coast of Labrador. It is vital for Canada that the straight baselines need only follow the general direction of the outer coast of the archipelago. Canada's ability to rely on the outer coast of the islands may be jeopardized if she becomes a party to either of the treaties dealing with straight baselines.

The second question, that of how one determines the general direction of a particular coast, raises the issue of whether one should examine a comparatively short length of coastline adjacent to a particular baseline or examine a much greater length of coastline. In the latter case, any deviation from the general direction of the coastline in the immediate vicinity of the straight baseline will appear much less significant. The International Court of Justice stated very clearly that a liberal approach should be used in determining the general direction of a coastline and that charts covering only a small portion of the coast should not be used.⁶⁴

Closely related to the question of how the general direction of a coast should be determined is the question of whether a particular baseline is so long that it does not follow the general direction of the coast. The straight baselines which close the three main entrances to the Northwest Passage are all more than fifty nautical miles long. The line closing the eastern entrance to Lancaster Sound is 54.5 miles; the line closing the western entrance to M'Clure Strait is 103.5 miles; and the line dividing Amundsen Gulf from the Beaufort Sea is ninety-three miles.⁶⁵

Are these lines too long? The final answer to this question will be affected by two additional factors which are discussed below,⁶⁶ but an initial response can be given on the basis of an examination of the length of straight baselines used by other countries. In the *Fisheries Case* the International Court of Justice discussed several individual baselines used by Norway. The line closing the Lofthavet basin consists really of two lines (forty-four miles and eighteen miles respectively), separated by a

⁶⁴ *Supra*, footnote 10, at p. 142.

⁶⁵ These distances were calculated by the author, using the following Canadian Hydrographic Service charts: 7220, 7832 and 7081.

⁶⁶ These factors are: (1) the need for a close link between the enclosed areas of water and the surrounding land, and (2) the long time economic use of the area by the local inhabitants.

drying rock (that is a rock submerged at high tide). The resulting line runs for sixty-two miles with only a tiny alteration of course at the drying rock.⁶⁷ The court had no difficulty concluding, however, that the line closing the LoppHAVet basin does not diverge from the general direction of the coast.⁶⁸

Subsequent to the Court's decision more than fifty-five countries have used straight baselines.⁶⁹ A significant number of these countries have one or more baselines over fifty miles in length. For example, Burma has lines of 222.3 and 80.8 miles; Ecuador has lines of 136 and 124 miles; Venezuela has a line of 98.9 miles; and South Korea has a line of 60.3 miles.⁷⁰ Although the law concerning the use of straight baselines by archipelagic states is not as clear as that for mainland countries, many island states have also used straight baselines. For example, the longer Icelandic lines are 92, 74.1 and 70.3 miles; Indonesia has five lines longer than one hundred miles; Madagascar has lines of 123.1, 117.7 and eighty-six miles; and Cuba has five lines longer than fifty miles (the longest is 69.24 miles).⁷¹ Although these lengthy baselines may not all be acceptable under international law, they are nevertheless indicative of a significant body of practice by coastal states.

One should perhaps also examine the maximum distance from any point on a straight baseline to the nearest land. The greatest distance in the *Fisheries Case* was less than twenty miles.⁷² In contrast, the maximum distance to land from a point on Canada's longest Arctic baseline is slightly over fifty miles. Although this distance probably should be considered, the International Court of Justice stated very clearly that the rule requiring a baseline to follow the general direction of the coast "is devoid of any mathematical precision".⁷³ This statement means that numerical distances are not the sole, or perhaps even the primary, factor in determining whether a baseline follows the general direction of the coast.

If one uses a small scale chart of the Arctic archipelago and takes into account the guidance given by the International Court of Justice and subsequent state practice, one must conclude that the straight baselines in the Canadian Arctic follow the general direction of the coast. This is

⁶⁷ See dissent by Judge McNair, *supra*, footnote 10, at p. 167.

⁶⁸ *Ibid.*, at p. 142.

⁶⁹ United States, Office of the Geographer, *Limits in the Sea*, No. 76 Straight Baselines: Cuba (1977).

⁷⁰ These figures were obtained from individual issues of *Limits in the Sea*, published by the United States, Office of the Geographer.

⁷¹ *Ibid.*

⁷² *Supra*, footnote 10, at pp. 167-168. The distances calculated by Judge McNair were measured from the outer edge of Norway's four mile territorial sea, not from the straight baseline itself.

⁷³ *Ibid.*, at pp. 141-142.

true despite the significant distances separating the northerly and southerly groups of islands at both entrances to the Parry Channel.

It is still necessary to consider whether the waters enclosed by the straight baselines are "sufficiently closely linked to the land domain to be subject to the regime of internal waters".⁷⁴ It is not entirely clear what this requirement for a close link means.⁷⁵ Since the most significant characteristic of the regime of internal waters is that foreign ships do not have a right of innocent passage, the requirement must relate in part to an evaluation that the waters are so closely connected to the land that foreign ships should not have a right of innocent passage. As McDougal and Burke have noted, this interpretation of the close link requirement is incompatible with the treaty provision that a right of innocent passage exists in newly enclosed areas of water.⁷⁶ Although the treaty requirement for a close link may be meaningless, as suggested by McDougal and Burke, this fact does not alter the importance of the close link requirement for customary law.

Some assistance in deciding what factors should be considered in making this evaluation can perhaps be gained by examining the reasons why international law has traditionally allowed states to draw closing lines across the mouths of certain types of bays.⁷⁷ Because bays do not lead to further areas of the high seas, foreign ships have virtually no interest in being able to navigate through them. On the other hand, the coastal state may have a number of compelling reasons for wishing to treat a body of water which cuts into its land territory as if it had the same legal status as land. National security concerns suggest that a coastal state may be reluctant to see foreign warships able to operate at will in an area of water which is largely surrounded by its land territory. A coastal state may also have valid commercial and other reasons for wishing to treat the water of a bay as internal.⁷⁸

How do these competing interests apply to the waters in the Arctic archipelago? As previously noted, the Northwest Passage is a strait through which foreign ships can pass from one area of the high seas to another. For this reason maritime states have a legitimate interest in ensuring that those waters are not treated as internal. On the other hand, Canada has very clear national security reasons for wishing to treat these waters,

⁷⁴ *Ibid.*, at p. 133.

⁷⁵ See Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962), p. 410.

⁷⁶ *Ibid.*; see *Territorial Sea Convention*, art. 5(2) and *Convention on the Law of the Sea*, art. 8(2).

⁷⁷ Gihl, *loc. cit.*, footnote 5.

⁷⁸ *The North Atlantic Coast Fisheries Case* (Great Britain/United States of America) (1910), 11 U.N. Reports of International Arbitral Awards 167, at p. 196 (Permanent Court of Arbitration).

which cut through her land territory, as internal waters. This would guarantee that foreign warships would not have a right of innocent passage.⁷⁹

Another important reason why these waters should be treated as being closely linked to the land is the use made by the Inuit of the sea ice during most of the year. This use has been discussed above and reference has been made to the fact that "economic interests peculiar to the region, the reality and importance of which are clearly evidenced by long usage,"⁸⁰ can be considered when deciding whether a particular set of straight baselines is acceptable under international law. The force of this argument may be weakened, however, by the fact that Canada wants to increase the amount of shipping in the Arctic.

On balance, the geographical and other factors favouring treatment of the waters as internal appear to outweigh the competing interests of foreign states.

Before leaving the issue of the validity of the Arctic baselines, it is worth considering whether the practice of other states lends any support to the tentative conclusion that the straight baselines are valid.

The Union of Soviet Socialist Republics has several small groups of islands north of its Arctic coast. The Northeast Passage runs between these islands and the mainland coast. When the United States attempted to send two icebreakers through the Volkitsky Straits in 1967, the U.S.S.R. refused to allow passage on the basis that the strait consisted of territorial waters.⁸¹ The Soviet Union has legislation authorizing the use of straight baselines,⁸² and has recently established straight baselines in the Arctic.⁸³ Unfortunately, details of these baselines were not available to the author at the time of writing.

There are, however, three other examples of straight baselines used for coastal archipelagoes in situations somewhat analogous to the Canadian Arctic archipelago. In these three cases, distinct groups of islands are separated by varying distances from the mainland by a strait con-

⁷⁹ Although the law is not settled, the better view is that foreign warships have a right of innocent passage through the territorial sea of a coastal state. International law, however, requires foreign submarines to operate on the surface when in the territorial sea of another state.

⁸⁰ *Fisheries Case*, *supra*, footnote 10, at p. 133; and see the text, *supra*, at footnote 52.

⁸¹ O'Connell, *op. cit.*, footnote 5, p. 317. The U.S.S.R. is one of those states which maintains that warships do not have a right of passage through the territorial sea of a foreign state.

⁸² Article 6 of Law on the State Boundary of the U.S.S.R., 24 November 1982, reproduced in Kenneth R. Simmonds (ed.), *New Directions in the Law of the Sea*, Vol. I (1984), item C4.

⁸³ William E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy* (1987), 81 *Am. J. Int. Law* 331, at pp. 335-336, note 27.

necting two parts of the high seas. One crucial difference, however, between these examples and the Arctic archipelago is that they exist in non-polar regions of the world's oceans.

On the west coast of Scotland, the Outer Hebrides are separated from the Inner Hebrides and the mainland coast by The Minch, a strait which is fifteen to twenty miles wide at its narrowest. Three weeks after the Territorial Sea Convention came into force in 1964, the United Kingdom established straight baselines between the outer Hebrides and the mainland.⁸⁴ The line closing the northern entrance to The Minch is approximately forty miles long.⁸⁵ The Minch is used by foreign fishing boats in passage, but it is not heavily used by large deep sea ships unless they are going to or from a British port.⁸⁶ Although the length of the straight baselines and the total area of enclosed water are much less than in the Arctic archipelago, the British use of straight baselines lends support to Canada's decision to use them in the Arctic.

The other two examples both involve regularly used international straits. The southern end of Chile consists of a complex archipelago containing the Straits of Magellan. At its narrowest point the strait is less than three miles wide. The eastern coast of Denmark contains a number of large and important islands. The capital of Denmark, Copenhagen, is located on one of these islands. Except for a strait known as the Belts, these islands effectively block the entrance for large ships to the Baltic Sea. Both Chile and Denmark have used straight baselines around their groups of islands, but the two countries have drawn the lines so that they do not enclose the waters in the international straits.⁸⁷

⁸⁴ Territorial Waters Order in Council 1964, as amend. by Territorial Waters (Amendment) Order in Council, 1979. These two instruments were made under the royal prerogative. The amended order is reproduced in Halsbury's Statutory Instruments, Vol. 23 (4th re-issue), p. 132. The United Kingdom is, of course, not strictly speaking a mainland country; this fact, however, strengthens rather than weakens the argument developed below. The United Kingdom is a party to the Territorial Sea Convention.

⁸⁵ Limits in the Sea, No. 23: Straight Baselines: United Kingdom (1970).

⁸⁶ This information was provided to the author by Commander Anthony Bull, R.N. (Ret'd.).

⁸⁷ See Limits in the Sea, No. 80: Straight Baselines: Chile (1978). Chile was not a party to the Territorial Sea Convention when she created the straight baselines (*ibid.*, p. 5). Also see Limits in the Sea, No. 19 (Revised) Straight Baselines: Denmark (1978). In addition to excluding the Belts from the straight baselines system, the Danish Royal Decree on the Delimitation of the Territorial Sea, article 3, expressly preserves the existing right of passage for foreign vessels in those waters. For a discussion of the Danish treatment of its archipelago waters before the existing Royal Decree of 1966 (amended in 1978), see Jens Evensen, Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos (Preparatory Document No. 15), Official records, Vol. I, United Nations Conference on the Law of the Sea (1958), U.N. Doc. A/Conf. 13/18, pp. 295-296. Denmark is a party to the Territorial Sea Convention.

In both cases, passage through the straits is guaranteed by treaty.⁸⁸ This fact and the closely related fact that the straits have been important arteries for maritime shipping for many years distinguish these two cases from the situation in the Canadian Arctic.

Insofar as the examples discussed above are analogous to the Arctic archipelago, they provide no clear indication that Canada's straight baselines are out of step with state practice; indeed, the British example provides positive support for the Canadian position.

The final criterion for a valid system of straight baselines is that it must be reasonable.⁸⁹ In the light of the discussion above, the straight baselines in the Canadian Arctic appear to be reasonable. They do not enclose needlessly large expanses of sea and they comply with all the customary law criteria for straight baselines.

C. Other possible grounds for validity

Before discussing the legal effect of enclosing the waters of the Arctic archipelago, it is necessary to review very briefly three other grounds which have on occasion been referred to as justification for Canada's claim that the waters are internal.

Mention has already been made of the sector theory. Under this theory, Canada would be able to claim all the land, ice and sea lying between two lines of longitude and extending northwards from the mainland coast to the North Pole. The western line of longitude is a continuation of the boundary between the Yukon and Alaska; the eastern line begins in the Lincoln Sea at the boundary between Ellesmere Island and Greenland. The resulting wedge-shaped sector includes a significant part of the Beaufort Sea as well as all the Arctic archipelago.

This doctrine has a superficial attractiveness and has been advocated on a number of occasions.⁹⁰ As recently as 1970, at least one academic supported the application of the sector theory in the Canadian Arctic.⁹¹ Morrow J. in *Tootalik*⁹² relied upon the sector theory in order

⁸⁸ For the Straits of Magellan, see O'Connell, *op. cit.*, footnote 5, pp. 322-324; for the Belts, see the pre-World War II discussion by Erik Bruel, *International Straits*, Vol. II (1947), pp. 11-115.

⁸⁹ *Supra*, footnote 53.

⁹⁰ See Donat Pharand, *The Law of the Sea of the Arctic: with Special Reference to Canada* (1973), pp. 134-141; Gustav Smedal, *Acquisition of Sovereignty over Polar Areas* (1931), pp. 54-67.

⁹¹ Green, *loc. cit.*, footnote 57, at pp. 754, 760.

⁹² *Supra*, footnote 29. This aspect of the decision in *Tootalik* was relied upon by Tallis J. in *B.P. Exploration Company (Libya) Ltd. v. Hunt*, *supra*, footnote 36, at pp. 244-245 (N.W.T.S.C.). However, this latter case involved jurisdiction over an area of the continental shelf and so did not squarely raise the question of the application of the sector theory to sea and ice.

to find that an alleged offence which had occurred on sea ice in the Arctic archipelago was within Canadian territory. In 1982, at least one Canadian hydrographic chart still used the sector principle and indicated that Canada's territory extends to the North Pole.⁹³ But despite this occasional support for the sector theory, it has never been formally adopted by the Canadian government and is now a dead letter.⁹⁴

The doctrine of vital interests would allow a country to appropriate or, at the very least, exercise jurisdiction over a maritime area if this action were necessary in order to protect the state's vital interest. In the context of the present discussion, the doctrine seeks to elevate the military, economic and other legitimate interests of a coastal state to the level of an independent basis for appropriating areas of the world's oceans. In other words, the vital interests of a coastal state could justify a claim to internal waters or a territorial sea which would not be allowed under the usual rules for obtaining title to these areas of water. Canada has a range of vital interests which would support a claim to the Arctic waters based on the doctrine of vital interests.

But does this doctrine form part of international law? The doctrine has, in fact, not been generally accepted.⁹⁵ The interests relied upon by the doctrine of vital interests are the same policy reasons for a coastal state having a normal territorial sea. The existing rules for measuring the territorial sea already reflect the attempt by international law to balance the vital interests of coastal states with the interests of other states in having access to the oceans of the world. In particular, the rules for closing lines on bays, for straight baselines and for a twelve mile-wide territorial sea are attempts to protect the vital interests of a coastal state, while at the same time giving effect to the legitimate interests of other states. To assert vital interests as a reason for ignoring the usual rules reflects a failure to recognize that international law has already determined what protection should be given to these vital interests.⁹⁶

⁹³ Canadian Hydrographic Service, Chart 7000 (Arctic Archipelago), (new chart, 1982).

⁹⁴ *Supra*, footnote 30.

⁹⁵ See O'Connell, *op. cit.*, footnote 5, pp. 435-438; Vanderzwaag and Pharand, *loc. cit.*, footnote 42, at pp. 76-79; International Law Commission (Secretariat), *op. cit.*, footnote 8, p. 20, para. 140. Norway sought to rely on this doctrine in its written argument in the *Fisheries Case*, Pleadings, Vol. I, p. 534:

Mais le principe général sur lequel repose la notion du domaine maritime de l'État et qui, du même coup, permet d'en déterminer les bornes, est celui, universellement reconnu, de la nécessité de ce domaine pour assurer la protection des intérêts de l'État côtier.

Norway, however, did not rely on this doctrine in its oral argument: C.H.M. Waldock, *The Anglo-Norwegian Fisheries Case* (1951), 28 *British Yearbook of International Law*, 114, at p. 130.

⁹⁶ This is not to say that the existing rules will no longer continue to evolve with the passage of time.

Finally, the doctrine of historical consolidation should be mentioned. If it were part of international law, it would provide a further method by which Canada might be able to justify its claim that the waters in the Arctic archipelago are internal. The doctrine is most succinctly summed up in the following sentence by de Visscher, the leading exponent of the doctrine:⁹⁷

Proven long use, which is its foundation, merely represents a complex of *interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state.*

Unfortunately for Canada, this doctrine has little support in international case law or in the writings of most publicists.⁹⁸

In summary, the validity of Canada's straight baselines in the Arctic rests solely on the customary international law for straight baselines as originally enunciated by the International Court of Justice in the *Anglo-Norwegian Fisheries Case*.

II. *Effect of the Straight Baselines*

If one assumes that the straight baselines in the Arctic are valid under international law, the precise legal effect of these lines must be considered. In particular, do foreign ships have a right of innocent passage through the Northwest Passage?⁹⁹ If a right of innocent passage does not exist, Canada would have a number of powers not otherwise available. For example, she could prohibit any foreign ship from entering the waters of the Arctic archipelago; she could require foreign ships to carry a Canadian pilot while in the Northwest Passage; and she could impose a levy on foreign ships using the passage. This levy could be used to help defray the cost of providing navigational aids, icebreakers and air/sea rescue facilities in the Arctic. In addition, the absence of a right of innocent passage would avoid the problem of whether foreign warships are entitled to make use of the right of innocent passage.

The answer to the question whether a right of innocent passage exists in the Arctic waters enclosed by straight baselines depends first upon the legal justification for the baselines. Secondly, the answer may be influenced by whether an international strait exists through the Northwest Passage.

⁹⁷ C. de Visscher, *Theory and Reality in Public International Law* (rev. ed., 1968), p. 209. (Emphasis added).

⁹⁸ E.g., R.Y. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 26-28; Ian Brownlie, *Principles of Public International Law* (3rd ed., 1979), pp. 168-170. See also Vanderzwaag and Pharand, *loc. cit.*, footnote 42, pp. 74-76.

⁹⁹ The following discussion is based on two assumptions: (1) the foreign ships have complied with the requirements of the Arctic Waters Pollution Prevention Act, *supra*, footnote 32, together with the regulations made under the Act, and (2) these anti-pollution laws are valid under international law; see, *supra*, footnote 32.

If the straight baselines merely delimit an area of sea which consists of historic internal waters, then foreign ships clearly do not have a general right of innocent passage. The possibility of an international strait existing through historic internal waters will be discussed below.

If, as was suggested above, Canada is unable to rely on a claim to historic title, the question of innocent passage will be settled by what happens to areas of former territorial sea or high seas which become enclosed by straight baselines. The answer provided by both the Territorial Sea Convention and the Convention on the Law of the Sea is very clear. Article 5 of the Territorial Sea Convention states:

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

Article 8 of the Convention on the Law of the Sea has an analogous provision. If Canada had been a party to the Territorial Sea Convention when the straight baselines were drawn in the Arctic, foreign ships would have a right of innocent passage through the recently enclosed waters of the Northwest Passage. If Canada becomes a party to either treaty in the future, the only way of avoiding the effect of article 5(2) of the Territorial Sea Convention or article 8(2) of the Convention on the Law of the Sea would be to argue that the straight baselines in the Arctic were not established in accordance with the treaty provisions. There are two grounds for the argument. First, the straight baselines were not established pursuant to the treaty provisions since Canada was not a party to either treaty at the time the lines were drawn. Secondly, as noted above, the straight baselines in the Arctic do not comply with the treaty criteria for straight baselines even though they satisfy the customary law criteria; they were therefore not established in accordance with the treaty provisions and article 5(2) of the Territorial Sea Convention and article 8(2) of the Convention on the Law of the Sea are inapplicable. This second argument obviously has some danger for Canada if an international tribunal were ever to decide that the customary law criteria do not differ from the treaty criteria for straight baselines; the tribunal might then decide that the straight baselines were not valid under international law.

What is the situation if the straight baselines are, in fact, valid under customary international law and neither article 5(2) of the Territorial Sea Convention nor article 8(2) of the Convention on the Law of the Sea is binding on Canada? The International Court of Justice in the *Fisheries Case* clearly assumed that foreign ships do not have a right of innocent passage in waters enclosed by straight baselines.¹⁰⁰ Although

¹⁰⁰ Cf. Pharand, *op. cit.*, footnote 4, p. 112, where he ambiguously suggests that

the dispute between Norway and the United Kingdom in the *Fisheries Case* was concerned primarily with fishing rights,¹⁰¹ the issue of innocent passage arose with respect to the Indreleia, a navigation route between the mainland and some of the islands. This route had been made useful for navigation by the installation of navigational aids by Norway. The United Kingdom argued that the Indreleia should be treated as territorial sea. The court rejected this argument¹⁰² and implicitly accepted the statement made by the United Kingdom in its memorial that there is no right of innocent passage in waters enclosed by a straight baseline.¹⁰³

Canada will be able to rely on this aspect of the *Fisheries Case* only if the customary law on this issue remains unaltered since the decision of the International Court of Justice in 1951. McRae has noted that article 8(2) of the Convention on the Law of the Sea (similar to article 5(2) of the Territorial Sea Convention) was adopted with little if any dispute at the Third United Nations Conference on the Law of the Sea. He went on to suggest that this article, which provides for a right of innocent passage in newly enclosed waters, therefore reflects current customary law.¹⁰⁴ This argument has considerable force; however, certain state practice suggests that Canada may be able to maintain that the customary law has not altered.

As will be explained below, the right of innocent passage referred to in article 5(2) of the Territorial Sea Convention includes the normal (that is suspendable) right of innocent passage as well as the non-suspendable right of innocent passage in an international strait.¹⁰⁵ The use of straight baselines by Chile and Denmark has been discussed above. The fact that Chile deliberately omitted to enclose a major international strait suggests that it is of the view that a right of innocent passage does not exist in waters enclosed by straight baselines.¹⁰⁶ This conclusion is supported by one of the primary rationales for the use of straight baselines to enclose waters where there is a group of islands off the main

either Canada or the legal effect of the *Fisheries Case* might permit innocent passage in waters newly enclosed by straight baselines. Cf. also *The Northwest Passage in International Law* (1979), 17 *Canadian Yearbook of International Law* 99, at p. 125, where the same author enigmatically relies upon the *Corfu Channel* case as authority for the proposition that a right of innocent passage does not exist in waters newly enclosed by straight baselines under customary law.

¹⁰¹ *Supra*, footnote 10, at pp. 118-119, and Judge McNair's dissent, at p. 158.

¹⁰² *Ibid.*, at pp. 132, 142.

¹⁰³ *Fisheries Case*, Pleadings, Vol. I, pp. 58-59.

¹⁰⁴ McRae, *loc. cit.*, footnote 32, at p. 486.

¹⁰⁵ A slightly different but analogous argument could be made for article 8(2) of the Convention on the Law of the Sea: see article 35(a), and, more generally, articles 34-45.

¹⁰⁶ A similar argument can be made for Denmark only with respect to states which are not bound by the Territorial Sea Convention, (art. 5(2)).

coast of a country. Gihl noted that the policy reasons why traditional rules allow bays to be enclosed as true internal waters "should apply to other internal waters situated within the coastline, for example, skjaergaard waters".¹⁰⁷ Canada therefore has a plausible argument that customary law does not accord a right of innocent passage in regions where straight baselines have enclosed waters formerly classified as territorial sea or high seas. If this conclusion is correct, it would be one more example of where the treaty provisions on straight baselines do not reflect existing customary law.

If one accepts that customary law does not grant a general right of innocent passage through internal waters, one must consider whether there is an exception for international straits. The United States has consistently maintained that the Northwest Passage is an international strait. The passage clearly meets the geographical criterion for an international strait, since it links two parts of the high seas (the Beaufort Sea and Baffin Bay). The Northwest Passage, however, does not meet the second, or functional, criterion since it has not been sufficiently used for international navigation.¹⁰⁸

On the other hand, if the Northwest Passage has been sufficiently used for international navigation, is it possible, in any event, for an international strait to exist through internal waters? This question raises the thorny issue of whether international straits are a separate regime or merely one aspect of the territorial sea regime. In the four 1958 Geneva conventions arising from the First United Nations conference on the Law of the Sea, the only provision dealing with international straits is article 16(4) of the Territorial Sea Convention. It very clearly treats the non-suspendable right of innocent passage through international straits as merely one component of the general right of innocent passage in the territorial sea.¹⁰⁹ If article 16(4) is read in conjunction with article 5(2), the Territorial Sea Convention undoubtedly envisages the possibility of an international strait existing through waters newly enclosed by straight baselines.¹¹⁰ A similar result under the 1982 Convention of the Sea is

¹⁰⁷ *Loc. cit.*, footnote 5, p. 145. For a discussion of these policy reasons see the text, *supra*, at footnotes 77 and 78. For a view contrary to Gihl's, see Fitzmaurice, *loc. cit.*, footnote 57, at pp. 78-79; Fitzmaurice views the newly enclosed waters as being "in front of the coast".

¹⁰⁸ See *Corfu Channel Case*, I.C.J. Reports 1949, p. 4, at pp. 28-29; Territorial Sea Convention, article 16(4) and Convention on the Law of the Sea, articles 34-45. For an excellent discussion on whether the Northwest Passage is an international strait, see Pharand, *op. cit.*, footnote 4, chapters 6-8.

¹⁰⁹ The right of innocent passage can be temporarily suspended in areas which are not international straits.

¹¹⁰ If this conclusion is correct, Denmark did not, strictly speaking, have to exclude the Belts from its system of straight baselines (*supra*, footnote 87), at least *vis à vis* other parties to the Territorial Sea Convention.

reinforced by article 35(a) of that convention. The treaty provisions are silent, however, concerning the possibility of an international strait in historic internal waters, and they leave unanswered the question whether an international strait can exist in waters enclosed by customary law straight baselines. Even though the Territorial Sea Convention deals with international straits as part of the territorial sea regime, customary law probably treats international straits as a separate regime.¹¹¹ As a result, it may be theoretically possible for an international strait to contain internal waters.¹¹² But the fact remains that there is very little support for the proposition that international straits can exist in bays, historic internal waters or any other type of internal waters.¹¹³

This discussion concerning international straits may lose some of its significance, however, when one realizes that the special power given to coastal states to protect ice covered areas of their exclusive economic zone¹¹⁴ probably overrides the right of foreign ships to non-suspendable innocent passage in an international strait.¹¹⁵ This fact means that Canada could still enforce pollution prevention measures in the Northwest Passage even if it were an international strait.

Conclusion

Canada's straight baselines in the Arctic are valid under customary international law, but not for the reason publicly relied upon by the government. Foreign ships do not have a right of innocent passage through the waters of the Arctic archipelago. Canada is therefore able to take any steps it wishes in order to regulate or prohibit activity in these waters.

¹¹¹ See O'Connell, *op. cit.*, footnote 5, p. 327. The Convention on the Law of the Sea, Part III (articles 34-45), also treats international straits as a separate regime.

¹¹² Although not impossible, it would be a very unusual geographical situation which required a strait to bend its way through a bay. The situation could occur if offshore navigational hazards required ships to sail through the mouth of a bay in order to have a safe channel between the mainland and an offshore island.

¹¹³ Cf. O'Connell, *op. cit.*, footnote 5, p. 316.

¹¹⁴ *Supra*, footnote 32.

¹¹⁵ See Pharand, *op. cit.*, footnote 4, pp. 119-120; but cf. McRae, *loc. cit.*, footnote 32, at p. 480.