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## INTERNATIONAL LAW: IMPLICATIONS OF THE OPENING OF THE NORTHWEST PASSAGE

Recent discovery and development of oil deposits on Alaska's northern coast and the subsequent search for the most economic method of transporting the oil to market have caused American oil companies to investigate shipping possibilities in the Northwest Passage.<sup>1</sup> Since the trip of the tanker-icebreaker S.S. Manhattan, which proved the feasibility of the Northern route to the oil fields, some Canadian officials have shown concern over continuing Canadian sovereignty in the area.<sup>2</sup> Canada's gradually increasing activities in the northern provinces and the waters around them, which include mineral exploration, resource development, and scientific data accumulation,<sup>3</sup> have led concerned Canadian legislators to propose that all the waters within the North American

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1. On September 15, 1969, the New York Times reported that the S.S. Manhattan became the first commercial vessel ever to traverse the ice blocked Northwest Passage. The test run was made to determine the ability of a 115,000 ton, 1,005 foot long tanker-icebreaker to make the voyage. The object of what Humble Oil officials called a \$40 million gamble was to assess the feasibility of this route, which is one-half the length of the trip through the Panama Canal. See N.Y. Times, *id.*, Sept. 15, 1969, § 1, at 1, col. 5; *id.*, Aug. 25, 1969, § 1, at 1, col. 3; *id.*, Aug. 31, 1969, § 1, at 23, col. 1.

2. Mr. Paul St. Pierre, a liberal representative from British Columbia, when discussing the three Canadian ships which spilled many gallons of fuel oil when crushed by the ice of the Passage, described the situation as "a shocking example of the need for Canadian control of shipping of the Arctic Archipelago." He also has stated that there is no real doubt that the waters are traditionally Canadian. N.Y. Times, Aug. 31, 1969, § 1, at 23, col. 1.

More recently Canadian officials have issued stronger statements about Canadian sovereignty over the Arctic and uneasiness about United States intentions in the waters of the Arctic has increased. N.Y. Times, Feb. 22, 1970, § 1, at 7, col. 1.

From Mitchell Sharp, Canadian Secretary of State for External Affairs: "It would be difficult to argue that the Arctic waters between Canadian territory have been regarded as part of the high seas. . . . We have regarded the Arctic waters as our waters." *Id.*

Prime Minister Trudeau has indicated that, if the Manhattan makes another voyage this spring, guarantees against the dangers of oil spillage will be required. *Id.* He earlier illustrated perfectly the motivation behind this comment when he said that while Canada certainly owns the islands in the North American Archipelago, he is not sure of the status of the water between. N.Y. Times, Aug. 31, 1969, § 1, at 23, col. 1. See also N.Y. Times, Nov. 26, 1969, § 1, at 14, col. 1.

3. See PHARAND, *Innocent Passage in the Arctic*, in 6 CANADIAN YEARBOOK OF INTERNATIONAL LAW 3, 45 (1968) [hereinafter cited as PHARAND].

Archipelago be declared the internal waters of Canada.<sup>4</sup> Because the islands of the Archipelago are Canadian property and Canada has historically been the guardian of the waters between the islands, this proposal does not seem extraordinary. However, under international law foreign vessels do not have the right of innocent passage through the internal waters of a foreign state.<sup>5</sup> Therefore, a Canadian declaration that the waters of the Northwest Passage are internal could close that channel to commercial oil shipments and cause entities with Alaskan oil interests to challenge such a declaration in order to preserve their right of passage.

In order that Canada make valid a claim that the Northwest Passage is internal water, a system of straight baselines, as this concept is defined below, must be imposed surrounding the entire Archipelago according to the principles of international law. Straight baselines are an exception to the general rules of law which provide that baselines should follow the coastline.<sup>6</sup> This Comment will deal with the right of Canada to impose such a straight baseline system and with the related question concerning the existence of the right of innocent passage in the Northwest Waterway. To analyze these problems the Canadian situation will be discussed in light of the *Anglo-Norwegian Fisheries Case of 1951*<sup>7</sup> and the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.<sup>8</sup> The possibility that the Northwest Passage might be an international strait<sup>9</sup> will also be explored.

#### BASELINE CONCEPT

Key to all zonation of water and seabed off the coast of a state is the *baseline*. It forms the inner limit of the territorial sea. . . . The same baseline forms the maximum margin of a State's internal waters, such as bays, inlets, estuaries and other bodies of water associated with the shoreline.<sup>10</sup>

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4. See, e.g., N.Y. Times, Feb. 22, 1970, § 1, at 7, col. 1.

5. See *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116; U.N. Doc. A/CONF. 13/L. 52 (this is the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone). See generally G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW (5th ed. 1967) [hereinafter cited as SCHWARZENBERGER]; 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1965) [hereinafter cited as 4 WHITEMAN].

6. U.N. Doc. A/CONF. 13/L. 52, art. 3. See also writers cited at 4 WHITEMAN 137ff (1965).

7. [1951] I.C.J. 116.

8. U.N. Doc. A/CONF. 13/L. 52.

9. *Corfu Channel (Merits) Case*, [1949] I.C.J. 1.

10. PEARCY, *Geographical Aspects of the Law of the Sea*, in 49 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 1, 5 (1959) (cited at 4 WHITEMAN, *supra* note 5, at 139 (1965)).

The location of the baseline determines the amount of control the coastal state may exercise over the water around it. From the baseline landward all waters, bays, lakes, rivers, and areas of ocean are considered the internal waters of the state in question.<sup>11</sup> The state exercises jurisdiction over these waters just as if they were land within the state's boundaries.<sup>12</sup> It may restrict any activity, pass any manner of regulation, and prohibit ships of any flag from trespassing. The right to innocent passage does not have to be given.<sup>13</sup>

The sea from the baseline outward for a designated number of miles, usually three,<sup>14</sup> is called the territorial sea. Over this area the control of the coastal state is somewhat limited. It may regulate such activities as fisheries, use of the seabed, coastal trade, and pilotage. However, it must extend to foreign merchant vessels enjoyment of the right to innocent passage.<sup>15</sup> Any passage is innocent when conducted in a manner not harmful to the safety of the coastal state.<sup>16</sup>

All water outside the outer limit of the territorial sea is classified as high seas and is governed by the well established principle requiring freedom of the seas.<sup>17</sup> This catch phrase, "freedom of the seas," actually denotes a group of rules which have become international law because of long international custom and acquiescence in the rules. The right to unlimited navigation and fishing on the high seas have been, more recently, joined by the freedom to overfly and the freedom to lay submarine cables.<sup>18</sup> However, this unlimited usage is slightly tempered by the existence of a contiguous zone. This is a belt of water outside the territorial sea which must be policed by a state for its own protection;<sup>19</sup> therefore the coastal state may exercise control over customs and pollution.<sup>20</sup>

The above explanation indicates that, if the waters of the

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11. U.N. Doc. A/CONF. 13/L. 52.

12. Under normal circumstances internal waters are within the state boundaries and there is no question as to complete sovereignty.

13. The United States has passed legislation prescribing tonnage requirements of ships, establishing duties at United States ports, controlling carriage and discharge of petroleum, regulating carriage of explosives on United States navigable waters. See 46 U.S.C. 77ff (1964).

14. This varies widely and may range up to 200 miles as claims by some nations. See 4 WHITEMAN, *supra* note 5, at 21ff, for a chart-like listing of territorial widths.

15. U.N. Doc. A/CONF. 13/L. 52, § III, art. 14ff; SCHWARZENBERGER, *supra* note 5, at 127.

16. See Corfu Channel (Merits) Case, [1949] I.C.J. 1; U.N. Doc. A/CONF. 13/L. 52, art. 14, ¶ 4.

17. SCHWARZENBERGER, *supra* note 5, at 133; 4 WHITEMAN, *supra* note 5, at 499.

18. See Geneva Convention on the High Seas, U.N. Doc. A/CONF. 13/L. 53, art. 2.

19. 4 WHITEMAN, *supra* note 5, at 480ff.

20. *Id.*

Northwest Passage are internal, no right to innocent passage will exist therein. On the other hand, if the waters are merely part of Canada's territorial sea, innocent passage must be granted.

There are two types of baselines, normal baselines and straight baselines. The legal status of the waters is determined by the type of baselines which are applied. The normal baseline is located by tracing the low waterline along a state's seacoast.<sup>21</sup> This low water line would be the baseline and from it would be measured the width of the territorial sea as described above. A normal baseline is, therefore, drawn on the land mass of the coastal state and no sea area is circumscribed by it. Thus none of the sea area becomes internal waters. Historically, however, there has been an exception to this general rule and straight baselines have been used in very short measures to close the mouths of bays or rivers or natural indentations of a coastline in order to make the territorial sea more uniform and to provide a boundary for the state's internal waters.<sup>22</sup> A straight baseline consists of a line drawn over water which connects parts of a state's land mass and may surround parts of the sea in so doing.<sup>23</sup>

The *Anglo-Norwegian Fisheries Case of 1951*<sup>24</sup> changed radically the status of the straight line exception to the normal baseline rule. That case provides a basis for a Canadian claim that straight baselines connect the North American Archipelago and make the waters of the Northwest Passage internal waters of Canada.

### THE FISHERIES CASE

One method of determining the proper baseline would be to submit the question to the International Court of Justice. The basis for an International Court ruling on such a dispute is the *Fisheries Case*. That case involved a dispute between the United Kingdom and Norway concerning the location and extent of the Norwegian national fisheries. In order to protect and enlarge the waters comprising her fisheries zone, Norway had instituted a system of forty-seven straight baselines surrounding her coastline.<sup>25</sup> These lines connected rocks or islands, sometimes sub-

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21. *Anglo-Norwegian Fisheries Case of 1951*, [1951] I.C.J. 116; U.N. Doc. A/CONF. 13/L. 52.

22. *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116, 129.

23. The essential difference between normal and straight baselines lies in the fact that the former are located on land, while straight baselines are water based connecting stray outcroppings of land mass.

24. [1951] I.C.J. 116.

25. *Id.*

merged, which were part of the *skjaergaard* (rock rampart) that surrounds 500-600 miles of the Norwegian coast.<sup>26</sup> By application of these lines Norway had extended her baseline up to fifteen miles from her coastline and had thus extended her territorial sea, in which a state has exclusive fishing rights, many miles farther from the coast.<sup>27</sup> The United Kingdom brought the dispute before the International Court to test the validity of these forty-seven lines, eight of which were more than twenty miles long and two of which were forty miles in length.<sup>28</sup> Claiming that this use of straight baselines was inconsistent with the historic use of baselines to close natural indentations in coastlines,<sup>29</sup> the United Kingdom asked that the traditional methods of baseline determination be used and that the area claimed by Norway as her fisheries zone be declared high seas.<sup>30</sup>

The court accepted jurisdiction of the controversy stating: The delimitation of sea areas has always an international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessary a unilateral act, because only the coastal State is competent to undertake it, the validity of the determination of the delimitation with respect to other States depends upon international law.<sup>31</sup>

The United Kingdom specifically submitted that the baseline must either be the "normal" configuration, the low water mark on permanently dry land (note that this is not the true definition of a normal baseline) or the line that encloses internal waters such as the bays and fjords of Norway.<sup>32</sup> Alternatively, it was pleaded that if the baseline was to be drawn over water, then it must be within four miles of the mainland.<sup>33</sup> The court felt that the only question for decision was the validity of the straight baselines which Norway had applied. Holding in favor of the Norwegian claim, the court gave three reasons for allowing straight baselines: (1) that the low rather than the high water mark is applicable; (2) that the baseline endpoints need not be on permanently dry rocks; and (3) that straight baselines *under stated circumstances* do not violate international law.<sup>34</sup> With respect to this final reason, the court said:

This [straight baselines] has been done, not only in the case of well-defined bays, but also in cases of minor curva-

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26. *Id.* at 140.

27. *Id.* at 132.

28. Anglo-Norwegian Fisheries Case, I.C.J. Pleadings, vol. I, at 86-7 (1951).

29. Discussed at notes 21-23 and accompanying text *supra*.

30. Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 120.

31. *Id.* at 132.

32. *Id.* at 120.

33. The Norwegians claimed a territorial sea of a four mile width.

34. [1951] I.C.J. 116, 128 (emphasis added).

tures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters.<sup>35</sup>

Having thus decided that straight baselines were not invalid per se, the court had only to determine whether their usage was valid in the particular circumstances of the *Fisheries Case*. In order to make this determination, the court formulated three criteria to help determine whether the straight baselines proposed are valid under international law. First, the baselines must not depart appreciably from the general direction of the coast. Second, the sea areas lying within the baseline must be so closely linked with the land that they are considered internal waters. Third, there should be peculiar economic interests evidenced by long usage.<sup>36</sup> Applying each of these tests to the Norwegian baselines, the court found that the general direction of the coast is "devoid of any mathematical precision"<sup>37</sup> and that in reality the *skjaergaard* is what constitutes Norway's coastline.<sup>38</sup> The first criterion was therefore met. As to whether the sea areas and land domain were closely linked, the court found that there was a "more or less close relationship existing between certain sea areas and the land formations which surround them."<sup>39</sup> With respect to the economic test, the court spoke in terms of a land mass that was relatively barren, the inhabitants of which gained their livelihood essentially from fishing. It cited both the long Norwegian usage of the enclosed waters and the extended United Kingdom acquiescence in such usage.<sup>40</sup> For these reasons the International Court held that the Norwegian baselines were not violative of international law.

Notable was the absence from the court's criteria of any consideration of the length of the baselines or their distance from the mainland. Thus the decision appears to support the idea that lengthy straight baselines far from the mainland may be drawn under stated circumstances. It follows that if Canada can meet the criteria established by the International Court, straight baselines may be drawn surrounding the North American Archipelago.

#### 1958 CONVENTION

The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone<sup>41</sup> provides a more general reference point for baseline

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35. *Id.* at 129.

36. *Id.* at 133.

37. *Id.* at 128-42.

38. *Id.* at 128.

39. *Id.*

40. *Id.* at 142.

41. U.N. Doc. A/CONF. 13/L. 52.

questions than does the *Fisheries Case*. The rules of law taken from the *Fisheries* decision must be limited because they arose from a specific fact situation. While analogies may be drawn, application of the rules from the *Fisheries Case* depends, in the final analysis, on the accuracy of the analogy. On the other hand, the 1958 Convention is not limited by these considerations. It contains several sections important to the determination of baselines:

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. . . .

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 areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters.

. . . .  
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 importance of which are clearly evidenced by a long usage.

. . . .  
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 had previously been considered part of the territorial sea or of the high seas, a right of innocent passage . . . shall exist in those waters.<sup>42</sup>

These sections show that the Convention has incorporated much of the customary international law on the subject of baselines. Article 3 states the general rule, then article 4 sets out in fairly specific terms the straight baseline exception and the tests for application of the exception. The Convention does, however, differ from traditional international law in one important way. The provision in paragraph 2 of article 5, which requires the preservation of innocent passage in newly enclosed internal waters, is at odds with the customary international law as found in the *Fisheries Case*. It was there held that no right to innocent passage existed in the newly enclosed Norwegian internal waters.<sup>43</sup> If Canada is bound by this provision of the Convention, regardless of the status

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42. *Id.* (emphasis added).

43. *See*, [1951] I.C.J. 116ff.



of the waters of the Northwest Passage, Canada will be forced to grant the right of innocent passage.

However, while Canada is a signatory of the 1958 Convention, she has not yet ratified it.<sup>44</sup> The question therefore arises: to what extent is a non-ratifier bound by the provisions of this Convention? It is apparent that Canada may not be contractually bound by the entire Convention because she has not ratified it.<sup>45</sup> The *North Sea Continental Shelf Cases*<sup>46</sup> provide the answer to the binding effect of the Convention. In that case Denmark, the Netherlands, and Germany became involved in a dispute over ownership of the North Sea Continental Shelf and the three countries submitted to the jurisdiction of the International Court. Denmark and the Netherlands had ratified the Geneva Convention on the Continental Shelf,<sup>47</sup> but Germany had not ratified it. The question before the court was whether Germany could be bound by a Convention to which it was not a party. Two aspects of the question were discussed. First, the court recognized that a type of estoppel might be applied in situations like this, but that a state may be bound only by reason of past comments, declarations, statements and pronouncements which clearly and consistently showed acceptance of the Convention. Additionally, there must have been detrimental reliance on these actions by the states claiming the estoppel.<sup>48</sup> Secondly, the court recognized that there are "general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community."<sup>49</sup> To the extent that these rules are reflected in a convention even non-ratifiers are bound by them. Following the reasoning of the *Continental Shelf Cases*, Canada will be bound only by those portions of the Convention on the Territorial Sea and Contiguous Zone which reflect customary baseline rules unless there is an estoppel.

At this point, the important question is whether article 5, paragraph 2 of the Convention reflects customary law. In the *Fisheries Case* it was specifically stated that the right of access to internal waters for the purpose of passage is not a part of custo-

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44. Convention on the territorial sea and contiguous zone, adopted April 29, 1958, [1964] 2 U.S.T. 1606, TIAS No. 5639, 516 U.N.T.S. 205.

45. *North Sea Continental Shelf Cases*, 8 INTERNATIONAL LEGAL MATERIALS 340, 360 (1969).

46. *Id.*

47. U.N. Doc. A/CONF. 13/L. 53.

48. *North Sea Continental Shelf Cases*, 8 INTERNATIONAL LEGAL MATERIALS 340, 360 (1969).

49. *Id.* at 371.

mary international law.<sup>50</sup> Although there is some possible basis for estopping Canada to deny that she is bound by the Convention,<sup>51</sup> the language of the International Court in the *Continental Shelf Cases* should be emphasized. "It is not lightly to be presumed that a State which has not carried out these formalities, [ratification] though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way."<sup>52</sup>

It appears from this discussion that Canada will be bound only by the customary rules of international law which are found in the Convention. Canada will not be bound by that part of article 5 which makes a new rule unless she ratifies the Convention.

#### THE NORTHWEST PASSAGE AS AN INTERNATIONAL STRAIT

One other consideration, with respect to the problem at hand, does not deal with the question of the suitability of straight baselines, but rather with the existence of the right of innocent passage through straits. The *Corfu Channel (Merits) Case*<sup>53</sup> dealt with the right of a British warship to pass through an international strait located within the territorial waters of Albania. The International Court stated:

It is in the opinion of the Court generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of the coastal State provided that the passage is innocent.<sup>54</sup>

If, under the circumstances of the *Corfu Channel Case*, the International Court is willing to allow a warship innocent passage, that same court certainly would extend the same right to merchant vessels in international straits. The voyage of the S.S. Manhattan through the Northwest Passage included the navigation of two straits. At the eastern end of the Passage was Barrow Straits and at the western end was Prince of Wales Strait. If these straits meet the tests set out in the *Corfu Channel Case*, innocent passage must be preserved in them. If it is assumed that normal baselines are applied by Canada, then both of these straits lie between two parts of the high seas. Are they, however, "used for international navigation?" The only activity of an international nature in the North-

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50. [1951] I.C.J. 116, 125.

51. See Reference Re Ownership of Off-Shore Mineral Rights, 65 D.L.R.2d 353 (1968), where the Canadian Supreme Court said: "The logical starting point is now the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone which may be regarded as defining the present state of international law on the subject." See also the 1963 statement by the Canadian Secretary of State for External Affairs which said that the convention "formulates and develops rules which are applicable in international law generally." See generally PHARAND, *supra* note 3, at 51ff.

52. 8 INTERNATIONAL LEGAL MATERIALS 340, 360 (1969).

53. [1949] I.C.J. 1.

54. *Id.* at 28.

west Passage was the single trip of the Manhattan. All other navigations have been strictly local Canadian scientific and developmental efforts.<sup>55</sup> However, the court's ruling in the *Corfu Channel Case* has been interpreted to mean that the decisive criterion is not the volume of traffic, but the geographical location of the strait<sup>56</sup> between two parts of the high seas. Although some weight must be given to the phrase "used for international navigation" in the court's opinion, it is clear that location is of primary importance. Regardless of the fact that geography is important, it is submitted that, where a strait has been used only once in all of history for such navigation, it cannot be called an international strait. Assuming, however, that these two straits do come under the *Corfu Channel* rule using normal baselines, the situation merits further investigation assuming straight baselines are imposed.

It seems clear that under a straight baseline system the right of innocent passage through these straits need not be granted. In that case the two straits would no longer connect parts of the high seas, but would, in fact, connect one area of high sea with one area of Canadian internal water. While international law provides for the right of innocent passage through straits linking two parts of the high seas, it does not provide for such a right in the case of straits linking open sea with an internal body of water.<sup>57</sup> Thus application of the *Corfu Channel Case* also depends upon which type of baselines are used.

#### APPLICATION OF THE FOREGOING PRINCIPLES TO CANADIAN WATERS

If the Canadian desires for the North American Archipelago are viewed in light of the three areas discussed above, several resolutions are available. If normal baselines are required, the Northwest Passage will be delimited territorial sea of Canada or high seas and the right to innocent passage will exist throughout. Additionally, such innocent passage will be preserved in those areas of the Northwest Passage which are straits because of the ruling in the *Corfu Channel Case*. On the other hand, Canada might be allowed to impose straight baselines, either under the *Fisheries Case* or the 1958 Convention. In either case, the right to innocent passage in the newly enclosed waters would be extinguished unless Canada is estopped to deny the applicability of the entire

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55. PHARAND, *supra* note 3, at 42ff.

56. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 204-08 (1962); J. SYATAUW, *DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* 26 (1962).

57. *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116, 125.

1958 Convention.<sup>58</sup>

Under the *Fisheries Case*, the court established three tests used to determine the applicability of straight baselines. The first test was whether the direction of the proposed baseline differs greatly from the direction of the coast. A look at a map shows that a baseline connecting the outer edges of the islands in the North American Archipelago would indeed vary to a great extent from the actual coastline of the Canadian mainland. However, several arguments may be offered to offset this deficiency. The most important argument is based on the emphasis that the International Court placed on its holding in the *Fisheries Case* that the *skjaergaard* or archipelagic configuration was the coastline of Norway.<sup>59</sup> Logically, this statement would apply, with equal force, to the North American Archipelago. In fact, the language of the court that such archipelagoes should be considered as "a whole with the mainland," shows how liberally this test should be applied.<sup>60</sup> Straight baselines as applied in the Canadian situation would follow the direction of the archipelagic unit and meet the requirements of the courts liberal application. Another consideration follows from the court's acknowledgement that there can be no mathematical precision in this area;<sup>61</sup> it must be recognized that any straight baseline, by definition, must depart from the direction of the coast. Therefore it appears that the first requirement can be fulfilled.

The second test offered by the International Court was whether the sea areas enclosed were sufficiently linked to the land to be called internal. Although the court was rather vague about the application of this test, some learned writers feel that it is a reference to the possible coastal need for control over access.<sup>62</sup> Indeed, this interpretation logically follows from the main distinguishing feature of internal waters, the non-existence of the right to innocent passage, i.e. control over access. It is exactly this needed control which prompts Canada's concern. This control over access is a necessity if Canada is to prevent pollution and exploitation of her northern provinces. It seems, therefore, that the second criteria is also met.

The third test proposed by the court was the economic interest test evidenced by long usage. Since the S.S. Manhattan was the first commercial ship ever to make the crossing, there is no evidence of long economic usage. Evidently, Canada must fail under the *Fisheries Case* rules because her economic interests in the northern provinces are as yet undeveloped.

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58. Discussed at notes 41-52 and accompanying text *supra*; selective provisions quoted at text accompanying note 42 *supra*.

59. [1951] I.C.J. 116, 128.

60. *Id.*

61. *Id.*

62. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 121 (1962).

In mitigation, however, a brief discussion of some realities may be enlightening. While the fishing industry in Norway is certainly long established, the northern provinces of Canada are largely virgin territory. There has been no economic usage of the area because its potentialities have only recently been discovered. There simply has been no time to establish long usage and acquiescence by other states. This is an example of emerging rather than historical economic interests. These mitigating arguments notwithstanding, it seems as if Canadian straight baselines must fail under the *Fisheries Case*.

Under the 1958 Convention, however, the opposite result will be reached. As noted above,<sup>63</sup> the Convention seems to apply similar criterion as did the *Fisheries Case*, but the language used there seems to apply directly to the Canadian situation. Paragraph 1 of article 4 covers the coastal archipelago expressly when it speaks of "a fringe of islands along the coast in its immediate vicinity, . . ."<sup>64</sup> When this language is read with paragraph 2 and the language quoted from the *Fisheries Case*<sup>65</sup> indicating that the *skjaergaard*, the fringe of islands, is the coastline, it appears arguable that the fringe of islands make up the coastline and obviate the necessity for a strict following of the coastline. In fact, the "use of a straight baseline for a coastal archipelago, which had direct sanction in the Court's judgment, [in the *Fisheries Case*] was accepted as coming within the 'special case' of the straight baseline system. . . ."<sup>66</sup>

More important is the fact that the Convention relegates the economic test to a secondary role. Paragraph 4 of article 4 states that account "may be taken" of economics.<sup>67</sup> Additional evidence for the secondary role of purely economic considerations is drawn from the report of the International Law Commission:

The International Law Commission in its treatment of the baseline concept . . . allowed straight baselines to be applied to a coastal archipelago or 'a fringe of islands along the coast in its immediate vicinity,' even though the 'economic interests' factor was given a secondary role in deciding the baseline system.<sup>68</sup>

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63. See the provisions of the Convention quoted at text accompanying note 42 *supra*.

64. U.N. Doc. A/CONF. 13/L. 52, art. 4.

65. I.e., that the *skjaergaard* is in reality the coast of Norway.

66. T. KOBAYASHI, *THE ANGLO-NORWEGIAN FISHERIES CASE OF 1951, AND THE CHANGING LAW OF THE TERRITORIAL SEA* 69 (1965).

67. U.N. Doc. A/CONF. 13/L. 52, art. 4.

68. T. KOBAYASHI, *THE ANGLO-NORWEGIAN FISHERIES OF 1951, AND THE CHANGING LAW OF THE TERRITORIAL SEA* 55 (1965).

It is apparent that the Geneva Convention has attached more importance to the geographic configuration of the coastal state in question than to evidence of long economic usage. Therefore, since Canada qualifies on the other factors, as seen above,<sup>69</sup> straight baselines may be drawn around the North American Archipelago and the waters of the Northwest Passage may be called the internal waters of Canada. It follows from the discussion of the applicability of the Convention that Canada would be able to suspend innocent passage in these waters. If straight baselines are applied, the *Corfu Channel Case* is inapplicable and innocent passage will also be suspended in the straits which are part of the Northwest Passage.

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69. See discussion at text accompanying notes 59-61 *supra*.

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