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Canadian Claims in Arctic Waters

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Canadian interests in Arctic waters are many and varied. These interests, however, do not exist in a vacuum. Other nations, too, have aspirations to exploit the Arctic waters either for natural resources or for navigation. This article analyzes various theories of international law which might reconcile these conflicting interests. The author concludes that, to date, Canada's assertion of claims in Arctic waters have been too broad and that there are other more limited methods of protecting legitimate Canadian interests.

CANADIAN CLAIMS IN ARCTIC WATERS

*Joseph W. Dellapenna**

MEN have struggled to open the Northwest Passage for more than four centuries. During this time natural barriers prevented it. Gradually technology has been developed which will permit regular commercial traffic to use the Passage before the decade is out. Oil tankers are only the first ships to attempt it. They will be followed by ships to carry out other mineral resources and perhaps to fish. The route may compete for maritime traffic from Europe to the Far East.

While some men struggle to open the Passage, others have set about erecting legal barriers to replace the now largely breached natural barriers. This paper will examine the limits which international law imposes on such legal barriers, suggesting an optimal solution by which the realization of the various competing interests are collectively maximized.

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I. THE CANADIAN ARCTIC

The Arctic Ocean is the smallest in the world.[1] It is unique in other significant respects. It is nearly landlocked, and it is covered by perennial pack ice over 80% of its area.[2] At least one-third of the Ocean is underlaid by continental shelf. At numerous places the extensive shelf breaks the water surface, forming groups of generally low islands. The largest such group lies off the northern and northeastern coasts of Canada. With the exception of Greenland, this group is under Canadian sovereignty. This Canadian Arctic archipelago can be divided into two groups. South of the Parry Channel are a number of large islands more or less close to the Canadian mainland. To the north are the Queen Elizabeth Islands, stretching to within 8° of the North Pole. On the largest of these islands is the most northerly inhabited spot on earth—the military weather station at Alert, Canada.

This vast northern region is generally described as bleak and barren. No trees grow. Only a few stunted plants can survive. Men have been present in the Arctic since prehistoric times but in very small numbers. The Queen Elizabeth Islands were totally uninhabited until 1953, when the Canadian government established several Eskimo families there.[3]

Survival has been difficult because of the scarcity of immediately consumable resources. Vegetation and animal life are scarce not only because of the prevalent cold,[4] but also because of permafrost and aridity. Permafrost is a condition where the ground is permanently frozen below a shallow zone which may melt in summer. In some parts of the Canadian Arctic archipelago it extends to a depth of 1800 feet or more,

1. For clear discussions in plain terms of the geography of the region see ENCYCLOPEDIA OF GEOMORPHOLOGY 22-28 (1968); ENCYCLOPEDIA OF OCEANOGRAPHY 49-55, 157-68 (1966); Pharand, *Innocent Passage in the Arctic*, 6 CAN. Y.B. INT'L L. 3, 48-51 (1968).
2. ENCYCLOPEDIA OF GEOMORPHOLOGY, *id.* at 25. Its surface is almost entirely frozen over from November to June with pack ice averaging 3 meters thick, but it is not solid. Leads and polynyas occur even in winter. Pharand, *Freedom of Seas in the Arctic Ocean*, 19 U. TORONTO L.J. 210 (1969).
3. BAIRD, *Canadian Arctic Archipelago*, in GEOGRAPHY OF THE NORTHLANDS 354 (1955).
4. The entire Canadian Arctic archipelago and adjacent mainland is within the area where average temperatures in the warmest month are less than 50° F (10° C). By any of the various definitions used to define the Arctic, the archipelago is entirely Arctic. *See* ENCYCLOPEDIA OF GEOMORPHOLOGY, *supra* note 1, at 23-25.

while the surface active layer is nowhere more than three feet thick.[5] Primitive man could not excavate permafrost. Modern man can only by overcoming special engineering difficulties. These include the tendency of his construction activities to melt the surrounding permafrost.[6] Despite the extensive incidence of fresh surface water, the area is really a desert, averaging less than 15 inches of rain per year.[7] The permafrost renders the underlying ground impermeable, preventing percolation, while the cold keeps evaporation minimal. The little water there is runs off into lakes and streams creating an illusion of abundance. Many temperate plants would die of thirst while surrounded by large, shallow lakes.

Commercial development of the Canadian north is becoming increasingly practical. After World War II the region became an armed camp with United States and Soviet bases directed at possible bomber attacks across the Arctic.[8] The DEW line was built jointly by the United States and Canada across Alaska, northern Canada, and Greenland. The advent of ICBM's made these bases obsolete. They have been largely abandoned. In Canada only radar installations were developed, although overflights by bombers armed with nuclear weapons continued until 1968. Joint weather stations did not come under complete Canadian control until 1970. A consequence of this activity was the development of year-round technical capabilities, much of which is readily translatable into civilian uses.

The primary natural resources of the Canadian north are minerals, oil, fishing and the promising shipping route.[9] Although there are special technical difficulties to mining or drilling in the Arctic, oil has been discovered in Alaska. Oil is also found in Canada: in the MacKenzie delta, in the Queen Elizabeth Islands, and on the continental shelf.[10] Even more

5. *Id.* at 835.
6. *Id.* at 837-38.
7. *Id.* at 28.
8. This is the shortest route for such attacks. For a discussion of the changing defense posture in the Arctic see Lloyd, *Canada's Arctic in the Age of Ecology*, 48 FOREIGN AFFAIRS 726, 728-30 (1970).
9. *Id.* at 730-32, 735-36. Agriculture, forestry, and fresh water export are at best marginal industries. *See* note 7 *supra* and accompanying text.
10. Wilkes, *International Administrative Due Process and Control of Pollution—The Canadian Arctic Waters Example*, 2 J. MARITIME L. & COMMERCE 499, 502, 530 (1971).

important was the opening in 1971 of the Mary's River iron mines on Baffin Island. This is one of the richest in Canada. Other minerals found in the area include lead, zinc, and silver.[11] Seven such mines are already open north of 60° N latitude in Canada. Canadians entertain high hopes for even more development of these resources.[12] The success of the mining and petroleum industries in mastering the inhospitable deserts a generation ago portends a similar achievement in the far north as well. This can be expected to occur with startling rapidity notwithstanding any reasonable governmental regulation.[13] Fishing is only beginning to emerge as an important industry in this area. Fish in small quantities are found within 300 miles of the North Pole.[14] They are found in commercial quantities in the waters between the Canadian Arctic archipelago and Greenland, in Hudson's Bay and other waters claimed by Canada.[15] The quantities are increasing as the waters warm slightly,[16] while greater competition makes smaller stocks commercially attractive.

Modern man entered the Canadian Arctic in a search for the Northwest Passage. From the Cabots in 1497 to *St. Roch* in 1944, nearly all have been English or Canadian. The Arctic frustrated them until the twentieth century.[17] The first all-sea passage in a single season was achieved in 1944 by the Royal Canadian Mounted Police schooner *St. Roch*.[18] This accom-

11. *Id.* at 530. Present known deposits of iron and zinc in the world will be consumed by 1988, absent large-scale recycling. There are seven lead/zinc/silver mines in Canada north of the Arctic circle. *Id.*
12. BROWN, CANADA'S ECONOMIC GROWTH (1965); CARR & ASSOC., THE YUKON ECONOMY, ITS POTENTIAL FOR GROWTH AND CONTINUITY (1970); JUDD, YUKON STUDIES 1968 (1970); MOWAT, CANADA'S NORTH (1967); SLATER, WORLD TRADE AND ECONOMIC GROWTH: TRENDS AND PROSPECTS WITH APPLICATION TO CANADA (1968).
13. Lloyd, *supra* note 8, at 732.
14. Pharand, *supra* note 2, at 232.
15. Lloyd, *supra* note 8, at 731.
16. Ritchie-Calder, *Mortgaging the Old Homestead*, 48 FOREIGN AFFAIRS 207, 215 (1970). Some attribute this to the "greenhouse effect" of pollution, others to long range climatic cycles. If it continues it will raise average temperatures about 6.5° F (3.6° C) over the next half century, melting the polar caps, raising sea levels, and changing weather patterns. As it is, the North Polar pack is thinning and shrinking, the Arctic Ocean temperature is rising, and fish are migrating to higher latitudes. *See also* Pharand, *supra* note 2, at 225; Detroit News, July 18, 1971, § A at 10, col. 1.
17. See Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL, L.J. 200, 210-11 (1963), for a summary listing of these expeditions. Many geographic features in the Arctic memorialize men who lost their lives in these attempts.
18. Wordie, *The Voyage of the St. Roch Through the Northwest Passage—1944*, 4 POLAR RECORD 259 (1945).

plishment was made possible by improved technology and by the slight but perceptible warming trend in the Arctic. Since 1944 such crossings have become frequent for an increasing variety of ships moving in each direction.

The Northwest Passage may be through several routes of varying difficulty.[19] The easiest and usual passage is by way of Parry Channel to Banks Island. This is the widest and generally deepest of the passages.[20] It passes through Lancaster Sound, Barrow Strait, and Viscount Melville Sound. The narrowest of these is Barrow Strait. Between Young and Lowther Islands it is only 15 miles wide. The Sounds are 25 to 75 miles wide. Beyond Viscount Melville Sound, Parry Channel continues north of Banks Island through M'Clure Strait. This strait is more than 100 miles wide but suffers from severe ice conditions the year around.[21] To avoid this, one can turn south through the Prince of Wales Strait between Banks and Victoria Islands. This strait ranges from 5 miles to 11 miles in width but is sheltered from ice in the summer and early fall.[22] Beyond Banks Island the Prince of Wales Strait leads into Amundsen Gulf which is nowhere less than 50 miles wide.

Navigation in the Arctic may be by any of three methods. Surface drift has been used for weather and research sta-

19. Pharand, *supra* note 1, describes the various routes in considerable detail.

20. *Id.* More southerly routes closer to the mainland are shallower and narrower. They contain numerous small islands. The M'Clintock Channel funnels Arctic ice flows into these cramped waters, making their passage particularly dangerous. The ice passes through M'Clure Strait and Byam Martin Channel to M'Clintock Channel. See ENCYCLOPEDIA OF OCEANOGRAPHY, *supra* note 1, at 158 for the circulation patterns. More northerly routes are even less sheltered from ice. Ships using them emerge more quickly into the Arctic Ocean proper. These routes are also narrower and shallower than the main route. They are frequently studded with small islands. The DEW line supply routes were generally the southern, noncommercial routes.

21. Ice conditions in the Canadian archipelago worsen as one goes from east to west rather than from south to north. ENCYCLOPEDIA OF OCEANOGRAPHY, *supra* note 1, at 157. This is due to the blocking effect of the islands. *See also* METEOROLOGICAL BRANCH, CANADIAN DEPARTMENT OF TRANSPORTATION, ICE SUMMARY AND ANALYSIS—THE CANADIAN ARCTIC; Dunbar, *The Pattern of Ice Distribution in Canadian Arctic Seas*, TRANS. ROY. SOC. CANADA, Sec. III, No. 48 at 9-18.

22. The *Manhatten* was forced to use this strait when it could not force its way through M'Clure Strait in September 1969 because of heavy ice conditions. Not even special icebreakers could force the passage. *See* N.Y. Times, Sept. 15, 1969 § 1 at 1, col. 5.

tions.[23] Subsurface navigation is possible the year around. The layer of the Arctic Ocean between 200 meters and 900 meters below the surface has a temperature above freezing even in winter.[24] Across the Arctic Ocean proper, submarine routes would cut 13 days off Japan to Europe shipping, shortening the route by 4,900 miles.[25] The feasibility of this route is demonstrated by the voyages of military submarines. Private commercial submarines have been under study for some time, but have not yet become available.[26] Neither of these two techniques are particularly useful in the shallower and more difficult passages of the Canadian Arctic archipelago. In these waters, conventional surface navigation alone is feasible. Conventional surface navigation is possible, even there, only in specially constructed ships and with the cooperation of the coastal states in the form of icebreakers, navigational aids, ice reconnaissance, and a workable communications network.[27] Shipping through the Arctic waters is practical now. It has been used for military purposes for two decades. It is beginning to be used on a large scale for non-military purposes.

II. THE COMPETING INTERESTS

In international legal disputes, a careful assessment of the various interests asserted by the participants is necessary

23. The Soviets average one drift per year, while the United States averages one every two years. This does not include Fletcher's Ice Island which has been continuously occupied by the United States since 1952, averaging a complete revolution around the "Pacific gyral" every 6 to 7 years. *See* Pharand, *supra* note 2, at 221.

24. ENCYCLOPEDIA OF OCEANOGRAPHY, *supra* note 1, at 53.

25. From a present 13,800 miles to 8,900 miles, the savings is 35%. *See* Pharand, *supra* note 2, at 222; Note, *Polar Problems and International Law*, 52 AM. J. INT'L L. 746, 748 (1958).

26. *See, e.g.*, Anderson, *The Arctic as a Sea Route of the Future*, 115 NAT'L GEO. MAG. 22 (1959). Changing military technology makes commercial submarines, which were used successfully in World War I, all the more likely to emerge in the near future. Cohen, *The Erosion of Surface Naval Power*, 49 FOREIGN AFFAIRS 330 (1971). *Cf.* Young, *To Guard the Sea*, 50 FOREIGN AFFAIRS 136, 142-43 (1971).

27. *See* Pharand, *supra* note 2 at 223-26 for a discussion of recent developments in such technology. Canada now maintains 200 vessels in the Arctic to provide these services. Pharand, *supra* note 1, at 44-45. The number must grow as the volume of traffic grows. The absence of these services as well as the greater difficulties of navigation prevents conventional surface navigation in the Arctic Ocean proper, except along the coast. The North Pole has been reached by snowmobile. Pharand, *supra* note 2, at 217. It will be some time before it is reached by surface ships. *Cf.* Wilkes, *supra* note 10, at 515.

before any assessment of solutions is possible. The legal system is too decentralized,[28] the prescriptions of norms are too informal,[29] and the fact situations too diverse[30] to allow even the illusion of what has been called the "Formalized-Deductive Model"[31] of decision-making. The unique set of circumstances in the Arctic make the validity of even such apparently universal norms as the four Geneva conventions[32] on the law of the sea doubtful. Local norms and traditions are few and incomplete. Consequently, an assessment of possible compromises among competing claims in Canadian Arctic waters is especially dependent upon analyzing the clashing interests of various states in that region to discover what Canadian claims will win acceptance by foreign offices around the world.

28. The international arena is a primitively structured legal system where national officials alternately assert claims on behalf of their own states and judge claims on behalf of other states, rather than requiring the resolution of these claims by disinterested third parties. This dual role makes reciprocity the principal sanction. For a thorough examination of this process see MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 39-40, 296-302 (1961); McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955). *See also* GOULD & BARKUM, INTERNATIONAL LAW AND THE SOCIAL SCIENCES (1970); MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 1-88 (1962).

29. International law is found in custom, treaty, and general principles of law. Although some place emphasis on treaties, most international law is customary, based on the acceptance, or at least the acquiescence, of most states. It is changes by the process of claim and counter-claim described in note 28 *supra*. *See* LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW, 4-7 (1965); Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MODERN L. REV. 1 (1956). Whether custom, treaty, or general principles are considered, it is essentially the consent of the nations involved which give an international norm its efficacy. DEVISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 161-62 (rev. ed. Corbett Transl. 1968).

30. FRIEDMANN, LISSITZYN, & PUGH, INTERNATIONAL LAW 82-84 (1969).

31. "[W]herein the classic syllogistic form [is] applied to continuing, repetitive problem situations." Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 381-83 (1964). This analytical-mechanical model of legal decision making can be described as the "slot machine theory" of jurisprudence.

32. Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas, *opened for signature* April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Geneva Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Geneva Convention on the Continental Shelf, *opened for signature* April, 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Geneva Convention on the High Seas, *opened for signature* April 29, 1958, 15 U.S.T. 2312, T.A.I.S. No. 5200, 450 U.N.T.S. 82. Although Canada has ratified only one of these Conventions, it has on several occasions recognized them as generally embodying customary international law. *See, e.g.*, Gottlieb, *Canadian Practice in International Law, 1966*, 5 CAN. Y.B. INT'L L. 253, 262-65 (1967). *See also In re* Dominion Coal Co. Ltd. and County of Cape Breton, 40 D.L.R.2d 593 (1963).

The Canadian interests in the region are clear and direct. In possession of a suddenly rich but virtually unpopulated north,[33] Canada is interested in profiting from the development and exploitation of the largely mineral resources now being unearthed. These discoveries are occurring through the efforts of corporations controlled by non-Canadians. Thus the control of resource development affects not only economics but also the problem of creating a peculiarly Canadian national identity. This problem has economic, military, and psychological dimensions. Canada has attempted to encourage indigenous economic development by various means. One is the creation of a Canadian owned and based oil company—Pan Arctic Oil Ltd.[34] The regulation of the use of the Crown lands on which the discoveries are made offers another means of evolving towards economic independence. Militarily, Canada has not attempted to develop an independent posture. Even now there is only one Canadian regional task force along with air patrol activity in the area.[35] Although an increase in such activity is improbable,[36] Canada is not likely to permit the re-entrance of a major power militarily. Culturally and psychologically, the problem of national identity is far more difficult. By making the north their own, young Canadians may radically alter the traditional view of Canada as a narrow strip along the northern edge of the United States, dependent on the United States economically, politically, and culturally.[37] Further, the growth of Canadian activities in the north will increase Canadian contact with northern European states and the Soviet Union.

Canada is further interested in protecting the native people of the region. Indians and Eskimos make up half of the local population. After centuries of neglect, they are at

33. No one this century has challenged Canadian sovereignty over the mainland or the islands of the Canadian sector. *See* Head, *supra* note 17, at 216. During this time, Canada has occupied the lands in question as effectively as conditions have permitted. *Id.* at 213-18; *see also* CASTEL, INTERNATIONAL LAW 257 (1965).
34. The Canadian government has substantial holdings (45%) in the company. Lloyd, *supra* note 8, at 733.
35. *Id.* at 729-30.
36. *Cf.* Mathews, *A New Atlantic Role for Canada*, 17 FOREIGN AFFAIRS 334 (1969).
37. *Cf.* Lloyd, *supra* note 8, at 740. *See also* Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 4 (1970).

long last beginning to be integrated into North America's industrial economy.[38] To accomplish this, the removal of non-renewable resources must be carefully regulated so that permanent employment opportunities are created. Finally, Canada has a new-found urgency in protecting the physical environment. Most of the Canadian north has constituted, in effect, a wildlife preserve for over 40 years. Within the area strict game laws are enforced. These cover not only the land, but also the waters between the Arctic islands and a "good measure of the open ocean to the northwest and east of the islands."[39]

All of these interests bear directly on the waters between the Canadian lands and in the Canadian sector of the Arctic Ocean. Canada needs to control these waters if she is to control resource exploitation in the waters and if she is to prevent the intrusion of a foreign military power. The waters are no less important than the land to the cultural and psychological problems of Canadian identity. Many locals still derive their livelihood from the water. To the extent they depend on renewable resources they may hold the long run solution to providing meaningful employment on a permanent basis. Finally, the Arctic environment is peculiarly susceptible to pollution.[40] Life is precarious at best in the Arctic. Hydrocarbons decompose very slowly. Oil would lose most of its viscosity in the Arctic. Any pollution in the Arctic might have disastrous and irreversible consequences. Most locally caused pollution will occur in water,[41] threatening both man and animal. Additionally, in order to prevent the intrusion of a foreign governmental presence in these waters, Canada

38. This faces serious difficulties because of the long delays in providing basic education and social services to the natives. Almost all the more skilled jobs must go to outsiders. Lloyd, *supra* note 8, at 734.

39. Lloyd, *supra* note 8, at 736. Many of these were enacted as ordinances of the Northwest Territories rather than Acts of Parliament.

40. Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MARITIME L. & COMMERCE 1, 4 (1971); Bilder, *supra* note 37, at 5; Lloyd, *supra* note 8, at 738-39; Schachter & Serwer, *Marine Pollution Problems and Remedies*, 65 AM. J. INT'L L. 84, 89 (1971); and Wilkes, *supra* note 10, at 501-02, 534.

41. Activities on land would be strictly localized, whereas water transports pollution and is used for transportation of pollution causing activities. Even in the Arctic, however, much water pollution is airborne from the distant North American and Eurasian industrial areas. Hardy, *International Control of Marine Pollution*, 11 NATURAL RESOURCES J. 296, 305 (1971).

will be burdened with providing services for ships using these waters, whether or not they use the waters agreeably with Canadian desires. If Canada doesn't, others will.

The interests of other nations are strictly transitory. Any interests they have in the development of land resources must be realized by cooperation with or intimidation of Canada.[42] Europe and Japan are interested in passing through these waters in order to trade with each other. They may even decide to fish the waters. The interest of the United States in using these waters as a shipping route from its east coast to the north coast of Alaska has been dramatically illustrated, as has its interests for naval purposes. The Soviets have not as yet evidenced any interest in these waters other than to deny their use to the United States or other powers unfriendly to them. The Soviet Union may eventually desire to use the sea routes for trade between Siberia and Western Europe.[43] It may also decide to fish there. At present, other nations have only an abstract interest in protecting the freedom of the seas.

The Canadian interests are long-term, contrasting sharply with foreign interests in these waters. Others pass through the region; Canadians have to live with the region. The uses claimed as of right by other nations are essentially for transportation, a use compatible with the realization of all Canadian interests but even more easily attained by the destruction of Canadian interests. The complete realization of Canadian aspirations involves placing some restrictions on uses by others, but it need not lead to the prohibition of such uses. Unfettered use by non-Canadians almost necessarily leads to the limitation or destruction of Canadian interests. The problem for international law is to reconcile these imperfect compatibilities so as to realize the optimal interest mix.

42. As no one challenges Canadian sovereignty over the land (*see* note 33 *supra*) and the continental shelf, fishing is the only resource arguably not subject to Canadian regulation.

43. Canada is presently exploring cooperative development of polar transportation with the U.S.S.R. Head, *The Foreign Policy of the New Canada*, 50 FOREIGN AFFAIRS 237, 250 (1972).

III. ALTERATIVE SOLUTIONS

In addition to international regulation, one might suggest any of five different unilateral solutions to the problem thus posed, each solution having several variations. Each solution must be analzed both with respect to whether it fulfills the participants' goals and whether it is in accord with international legal doctrine. These solutions are discussed here in ascending order from the least to the greatest assertion of sovereignty.

A. International Regulation of Arctic Pollution

Both the United States and Canada have called for an international conference on the Arctic to establish rules for navigation beyond national jurisdiction.[44] No conference to deal specifically with the Arctic seems probable at this time, although the question may arise at the 1972 Stockholm Conference on the Environment or at the 1973 Geneva Conference on the Law of the Sea. That no conference has been convoked two years after the Canadian-American exchange of notes should not be surprising. Experience with multilateral regulation of pollution and with bilateral Canadian-American regulation of border pollution suggests that such solutions are not to be expected even when the parties are in basic agreement as to what is to be done.

The problem of oil pollution of the sea has been recognized since World War I.[45] Efforts to solve the problem by application of customary international law have been unsuccessful. Only ambiguous maxims which are almost meaningless as guides for conduct[46] have been prescribed by custom. Prob-

44. Dept. of State Press Rel. No. 121 (April 15, 1970), reprinted in 9 INT'L LEGAL MATERIALS 605, 606 (1970); Canadian Note of April 16, 1970, reprinted in 9 INT'L LEGAL MATERIALS 607, 614 (1970).
45. For detailed reviews of the historical evolution of multilateral efforts to deal with this problem see COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 430-36 (6th ed. 1967); 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 687-726 (1965); Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. MARITIME L. & COMMERCE 13, 17-24 (1971); Hardy, *supra* note 41; Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155, 186-94 (1968); and Comment, *Oil Pollution of the Sea*, 10 HARV. INT'L L.J. 316, 323-38 (1969).
46. An example is *sic utere tuo ut alienam non leadas* (use your property so as not to injure that of another). *See, e.g.*, Trail Smelter Case (United States v. Canada), 3 U.N.R.I.A.A. 1905 (1941) (a parallel situation, *i.e.*, air pollution).

lems of establishing jurisdiction, proving responsibility for a particular event, determining applicable law, and enforcing sanctions have prevented relief.[47] These problems go to the very root of a system of law organized around independent sovereignties subject only to such international authority as they have consented to.[48] Such authority becomes particularly weak when the consent is only implied. Attempts to resolve these difficulties have resulted in increasing resort to multilateral conventions.

The first convention seeking to deal with oil pollution was drafted in 1926.[49] It was not until 1954 that a convention was drafted which could secure even one ratification.[50] Despite certain modifications to enhance its effectiveness, this convention was unable to stop the growth of deliberate oil spillage into the ocean.[51] This failure appears to arise from the convention's rigid insistence on the exclusive jurisdiction on the high seas of the country where the ship is registered.[52] The adjacent coastal state is limited to merely reporting violations if they occur outside its territorial waters. A further complicating factor is the difficulty of tracing the source of a spill. The technical capacity to trace has existed for over a decade. Tagging each oil cargo with a minute quantity of

47. See the examination of this problem in Jordan, *Recent Developments in International Environmental Pollution Control*, 15 MCGILL L.J. 279, 285-89 (1969).

48. The limits of this theory go a long way toward explaining Canada's addition of a reservation to its acceptance of compulsory jurisdiction in the International Court of Justice, preventing anyone from litigating its pollution laws before the Court without Canadian assent. Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, April 7, 1970, reprinted in 9 INT'L LEGAL MATERIALS 598 (1970). *See* note 187 *infra*. Not only must the adverse party consent to the jurisdiction, it must (implicitly at least) consent to the law. *See* HENKIN, *Arctic Anti-Pollution: Does Canada Make—Or Break—International Law?* 65 AM. J. INT'L L. 131, 132 (1971). *See generally* MacDonald, *The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 8 CAN. Y.B. INT'L L. 3 (1970).

49. Preliminary Conference on Oil Pollution of Navigable Waters (1926) T.S. No. 736-A. *See also* Sweeney, *supra* note 45, at 187-89.

50. International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

51. This oil spillage is now estimated to be as high as one million tons per year, Comment, *Oil Pollution of the Sea*, 10 HARV. INT'L L.J. 316, 319 (1969).

52. International Convention for the Prevention of Pollution of the Sea by Oil, art. X, *opened for signature* May 12, 1954, 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3. Flags of convenience might further complicate this, although the evidence is not clear. Comment, *supra* note 51, at 331-32. *Cf.* Sweeney, *supra* note 45, at 190-91, 202.

relatively inactive radioactive compounds would allow certain and simple identification of oil found in the ocean.[53] Such tagging, however, has never been required by an international conference. Consequently, except for certain spectacular accidental spills, it is impossible to determine what ship is responsible. Deliberate deballasting continues to be the major source of oil pollution.

A series of oil spills from ships and offshore wells led the Intergovernmental Maritime Consultative Organization (IMCO)[54] to convene a conference at Brussels in 1969 to consider new protections concerning ship caused oil pollution. It produced two conventions on such pollution.[55] The deficiencies of these conventions, which are yet to enter into effect, point up the difficulties in achieving effective multilateral solutions. The conventions authorize a state threatened in its territory by oil pollution on the high seas to take any measure necessary to protect itself,[56] but only after consultations with states interested in the ship or cargo.[57] The measures must be proportional to the threat,[58] with the coastal state responsible for damages caused by acts not reasonably necessary to protect it (determined by compulsory international arbitration).[59] Civil liability, again liimted to injuries in a state's territory,[60] is imposed except where caused by inevitable or irresistable events, intentional acts of third parties, or coastal state negligence in the maintenance of navigational aids.[61] Civil liability is limited to $134 for every registered ton and in total to $14,200,000 for each inci-

53. This can be done at a cost of less than three cents per ton shipped. *See* Comment, *supra* note 51, at 354.

54. Hereinafter referred to as IMCO.

55. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *opened for signature* Nov. 29, 1969, reprinted in 9 INT'L LEGAL MATERIALS 25 (1970) [hereinafter referred to as the Public Law Convention]; International Convention on Civil Liability for Oil Pollution, *opened for signature* Nov. 29, 1969, reprinted in 9 INT'L LEGAL MATERIALS 45 (1970) [herinafter referred to as the Private Law Convention].

56. The Public Law Convention, art. I.

57. *Id.* art. III. This is not a requisite in cases of extreme urgency.

58. *Id.* art. V.

59. *Id.* art. VI & VIII. There is no provision for compulsory arbitration for failure to regulate one's ships.

60. The Private Law Convention, art. II. Both conventions exclude government owned non-commercial vessels. *Id.* art. XI.

61. *Id.* art III.

dent.[62] Exclusive jurisdiction is established in the court where the action is first brought.[63] These conventions clearly establish new protections for a state whose coasts or territorial waters are threatened by oil pollution—at least after accidents. Problems of detection and tracing of deliberate spills are not dealt with by these conventions.

The conventions are close to the position taken by the United States at the IMCO Conference.[64] The conventions and the United States position represent a compromise between powerful shipping lobbies and coastal interests. As most nations attending the conference were shipping nations, the balance is in favor of shipping.[65] Liability is limited in nature and amount. The coastal state bears the risk of miscalculation of danger from a spill. No technique is required to assure the tracing of spills to the responsible parties. Canada alone voted against the private law convention, while it joined with several others in abstaining on the public law convention.[66] While various points of disagreement appear from an examination of the Canadian position at the conference, these can be summarized as two inherent weaknesses:[67] the conventions only bind the parties and only provide remedies for pollution after it occurs. Canada has one of the world's longest coastlines but virtually no merchant marine of its own despite its large foreign trade. It is particularly well situated, then, to advocate a victim oriented law to re-

62. *Id.* art V.

63. *Id.* art. VI. This is not so with respect to claims which cannot be litigated in the particular court whose jurisdiction has been invoked. The *Torrey Canyon*, a small tanker, caused at least $16,000,000 in actual damages. Sweeney, *supra* note 45, at 197. *See also* Gold, *supra* note 45, at 22.

64. However, the United States had favored absolute liability on the ship, *i.e.*, with no exceptions for inevitable events, etc. *See* Sweeney, *supra* note 45, at 197-98.

65. *Cf.* Neuman, *Oil on Troubled Waters: The International Control of Marine* Pollution, 2 J. MARITIME L. & COMMERCE 249, 353 (1971). *See also* the comparison of the Draft Convention of the Comite Maritime International (a private, largely shipping, organization) with the IMCO Conventions in Healy, *The CMI and IMCO Draft Conventions on Civil Liability for Oil Pollution*, 2 J. MARITIME L. & COMMERCE 249, 353 (1971). *See also* the com-Convention did not even go as far as the shipping industry's own private arrangements to assure private recovery. *Cf.* The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), 10 INT'L LEGAL MATERIALS 137 (1971).

66. Gold, *supra* note 45, at 27; Legault, *The Freedom of the Seas: A License to Pollute?* 21 U. TORONTO L.J. 211, 215 (1971).

67. Legault, *id.* at 214-16. *See also* Hardy, *supra* note 41, at 328; Newman, *supra* note 65, at 352-53; and Sweeney, *supra* note 45, at 186-87.

place the law oriented towards facilitating the consumption of the seas, and to press for protection not only of commerce but of quality of life. Her experience as an advocate in international forums, however, amply justifies a belief that international solutions take too long for unilateral action to await the conclusion of appropriate multilateral dispensations.

Experience with other pollutants, if anything, is worse than the international experience in regulating oil pollution. Apart from a few extremely general prescriptions regarding reasonable use[68] and binding parties to cooperate in preventing pollution by radioactive or other harmful substances,[69] the major conventions dealing with the sea are silent. The International Atomic Energy Agency (IAEA) has performed some minimal service with regard to radioactive wastes largely by studies, reports, and the adoption of standards. IMCO has also contributed marginally to solving these problems. Many commentators who have examined the problem of international regulation of pollution have concluded that the most that can be expected for some time will be international research and information exchange.[70] Such international initiatives as there are, *e.g.,* the International Seabed Regime proposal,[71] are more likely to catalyze development than to limit pollution.[72] Indeed, the vision of the oil pollution conventions as prototypic of future regulation of and

68. Geneva Convention on the High Seas, art. 2, *opened for signature* April 29, 1958, 15 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.
69. *Id.* art. 25. *See* Schacter & Serwer, *supra* note 40, at 108-10. Brown *International Law and Marine Pollution: Radioactive Waste and "Other Hazardous Substances,"* 11 NATURAL RESOURCES J. 221 (1971), surveys the subject. Art. 24 prescribes similar general norms for pollution by offshore oil drilling. *See generally* BOWETT, THE LAW OF THE SEA 45-50 (1967). Other treaties also touch on the problem. *See, e.g.,* The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and Ocean Floor, General Assembly Res. No. 2660 (XXV), reprinted in 10 INT'L LEGAL MATERIALS 145 (1971).
70. Hardy, *supra* note 41, at 314; Kennan, *To Prevent a World Wasteland,* 48 FOREIGN AFFAIRS 401, 402-03 (1970); Wolman, *Pollution as an International Issue,* 47 FOREIGN AFFAIRS 164, 171-74 (1968).
71. United Nations proposal submitted by the 1971 session on Committee for Peaceful Uses of Seabed. Press Release SB 160 Aug. 27, 1971, reprinted in 10 INT'L LEGAL MATERIALS 973 (1971).
72. This is so because of the removal of doubt regarding authority to develop and because pollution will be controlled, if at all, by the very same agency whose primary responsibility is to distribute revenue earned through development of resource exploitation. *See* Kennan, *supra* note 70, at 407-08; Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act,* 10 NATURAL RESOURCES J. 442, 489-90 (1970); and Mirow, *The Outer Continental Shelf—Managing or Mismanaging its Resources,* 2 J. MARITIME L. & COMMERCE 267 (1971).

entrepreneurial liability for most pollution of the seas seems reasonable and not merely because it is the only pattern thus far devised.[73]

Bilateral solutions do not offer a better prospect. The United States and Canada have a long history of cooperation on mutual problems with a fairly high degree of achievement where their interests coincide. Lacking compulsory resort to third party decision makers, their record where their interests are antagonistic is not better than between other countries. In the field of pollution, they long ago in the Boundary Waters Treaty established an International Joint Commission on boundary waters to examine and report on problems of utilization and pollution of these waters.[74] The Commission has functioned largely as a hydraulic engineering board to pass on utilization, diversion, or obstruction of the flow of boundary waters. Its investigative powers have only rarely been invoked for questions of pollution.[75] The Commission lacks surveillance or enforcement machinery and cannot invoke the domestic machinery of either party.[76] This dependence on voluntary compliance by the relevant national or local governments involved has hamstrung the Commission in the performance of its duties.[77] Up to now, the Commission has utterly failed to produce any scheme of pollution prevention or control. The waters under its review have deteriorated steadily. The situation in parts of Lake Erie has become catastrophic.[78] The Commission has been simi-

73. Sweeney, *supra* note 45, at 205-06. The United States Draft Convention on the Regulation of Ocean Dumping, reprinted in 10 INT'L LEGAL MATERIALS 102 (1971), doesn't even go so far as the oil pollution conventions have.
74. The Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448-49 (1909), T.S. No. 548.
75. Only six of 80 applications to the Commission before 1964 related to pollution. *Id.* at 826-71. It has become more active in this area recently as the problems have become more severe.
76. The Boundary Waters Treaty, art. II, Jan. 11, 1909, 36 Stat. 2448-49 (1909), T.S. No. 548.
77. Jordan, *supra* note 47, at 298-301; *see also* 3 WHITEMAN, *supra* note 45, at 787-88.
78. INTERNATIONAL JOINT COMMISSION, *Report on the Pollution of Boundary Waters* (1918); INTERNATIONAL JOINT COMMISSION, *Report on the Pollution of Boundary Waters* (1950); INTERNATIONAL JOINT COMMISSION, *Report on the St. Croix River Basin* (1959); INTERNATIONAL JOINT COMMISSION, *Report on the Pollution of Rainy River and Lake of the Woods* (1965); INTERNATIONAL JOINT COMMISSION, *Interim Report on the Pollution of Lake Erie, Lake Ontario, and the International Section of the St. Lawrence River* (1965); INTERNATIONAL JOINT COMMISSION, *Interim Report on the Pollution of Lake Erie, Lake Ontario, and the International Section of the St. Lawrence River* (1968).

larly ineffective with regard to air pollution.[79] Despite the broad language of the Boundary Waters Treaty banning pollution,[80] the Canadians may justifiably conclude that the treaty machinery is a failure which cannot produce effective bilateral action before serious, perhaps irreparable, injury to the environment occurs.

The interests of the United States and Canada in Arctic waters are fundamentally opposed. Canada, through its recent laws,[81] has clearly indicated its willingness to sacrifice passage for environmental protection. The doctrine they invoke to justify their acts is self-defense,[82] the basis which justifies the broadest interference with innocent passage.[83] On the other hand, the United States is preoccupied with preserving free passage through all waters which have until recently been considered high seas and in particular through straits. In a recent statement, the Legal Advisor of the Department of State proposed the creation of a new concept in international law—territorial waters subject to free transit (both navigation and overflight).[84] The coastal state would

79. Authority over pollution of boundary airsheds apparently derives from the spill-over of air pollution into the water. A majority of most water pollution is first airborne. Hardy, *supra* note 41, at 305. See 3 WHITEMAN, *supra* note 45, at 840-41, 855-56, for a description of the two referrals prior to 1964.

80. The Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448-49 (1909), T.S. No. 548. Art. IV states: "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

81. Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c.47 (Can. 1970), reprinted in 9 INT'L LEGAL MATERIALS 543 (1970), and 69 MICH. L. REV. 38 (1970). It bars all unauthorized pollution (§ 4), imposes absolute liability on pollutors (§§ 7, 9), authorizes regulation of land and sea activities threatening pollution (§§ 10, 11, 12), including a ban on navigation (§ 12), requirement of proof of financial responsibility before navigation is permitted (§ 5), and establishment of ship construction standards (§ 12). Violation is made a crime subject to stiff ($100,000/day) fines (§18).

82. *See* Canadian Note, *supra* note 44, 9 INT'L LEGAL MATERIALS 608 (1970). This has become a recurrent theme with Canadian commentators.

83. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 16(3), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. *See* authorities cited notes 99-103 *infra* and accompanying text.

84. *See* Statement by Mr. Stevenson to the U.N. Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, Geneva, Aug. 3, 1971, accompanying the submission of United States Draft Articles on Territorial Sea, Straits, and Fisheries, reprinted in 10 INT'L LEGAL MATERIALS 1013, 1015 (1971). This solution is acceptable where free navigation and overflight do not interfere with the values sought to be maximized by the coastal state. *See, e.g.*, The Declaration of Montevideo on the Law of the Sea, May 8, 1970, decl. 6, reprinted 9 INT'L LEGAL MATERIALS 1081, 1083 (1970).

be limited to designating lanes, although special provisions might be made for island nations. It is precisely such passage which threatens Arctic waters. There has been almost a complete failure to avert pollution by joint Canadian-United States efforts where they were cooperating to achieve the same goals. It is unlikely they can cooperatively avert pollution where they seek to achieve antagonistic goals.

Canada has a long record of international cooperation.[85] The deficiencies of international mechanisms to prevent or control pollution either multilaterally or bilaterally are evident. Canadian experience amply justifies Canadian refusal to await the maturation of such mechanisms. Canada further will not participate in any international conference on Arctic pollution which will discuss such matters as fall "wholly within Canadian domestic jurisdiction."[86] Apparently this would include any substantial interference with the scope and effect of the Arctic Waters Pollution Prevention Act.[87] In view of the failure of international conferences to devise mechanisms capable of effectively dealing with even the obvious and serious pollution at hand, this Canadian reticence is quite reasonable.

B. The Marginal Belt

The minimal territorial water claims which are universally asserted and recognized are to a narrow belt of waters along the actual coast of each state. By the beginning of the twentieth century a large majority of the states of the world had settled upon three miles as the breadth of these waters.[88] Canada was committed to this breadth as a dependency of the United Kingdom.[89] Beginning with Imperial Russia in 1909,[90]

85. *See, e.g.*, Gottlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law*, 2 CAN. Y.B. INT'L L. 55 (1964).

86. Canadian Note, *supra* note 44.

87. For a succinct summary of the major provisions of the Act see note 81 *supra*.

88. For a summary of the events leading to the acceptance and later the rejection of this breadth see COLOMBOS, *supra* note 45, at 87-113; and MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 446-564 (1962).

89. *See* Regina v. Keyn, [1876] L.R. 2 Ex. D. 63; Attorney-General for British Columbia v. Attorney-General for Canada [1914] A.C. 153; The Territorial Waters Jurisdiction Act, 41 & 42 Vict., c. 73 (Can. 1878).

90. *See* BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS 4-5 (1967).

an increasing number of states have asserted broader claims. These claims are most frequently asserted as necessary to control fishing off the coasts of the claimant states[91] and for security against hostile naval forces.[92] The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone implicitly limited the breadth of the territorial sea to twelve miles.[93] Since that time the twelve mile limit has become prevalent[94] with some countries asserting even broader claims. Even the United States, long one of the staunchest supporters of the three mile limit, has now indicated acceptance of the twelve mile limit.[95]

Canada, by legislation enacted in 1970, has extended the breadth of its territorial sea to twelve miles.[96] At this time such a claim seems incontestably within the limits of discretion accorded Canada by international legal decision makers. This act itself would minimally achieve the most important present objective of the Canadian government in Arctic waters—control of conventional surface navigation. Although it is possible to navigate the Northwest Passage without coming within three miles of any Canadian land, it is not possible by any route to remain more than twelve miles from Canadian land.[97] Therefore, ships using the passage must pass within Canadian territorial waters. At that point they must comply with Canadian laws and regulations designed to protect the "peace, good order, and security of the

91. MCDOUGAL & BURKE, *supra* note 88, at 501-04, criticize this claim at least as to narrow water limits.

92. *Id.* at 482-85. Although modern naval forces can be threatening from well beyond twelve miles, in some special circumstances territorial water limits can confer security on the coastal state. Dellapenna, *The Philippines Territorial Water Claim in International Law*, 5 J. LAW & ECON. DEV. 45, 55 (1970). *See also* BOWETT, *supra* note 69, at 5-12.

93. Geneva Convention on the Territorial Sea and the Contiguous Zone, arts. 6, 24(2) *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

94. U.N.F.A.O. Tech. Paper No. 79, *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf* (1968), reprinted 8 INT'L LEGAL MATERIALS 516 (1969). *See also* BOWETT, *supra* note 69, at 13.

95. *See* Announcement of President Nixon on United States Oceans Policy, May 23, 1970, reprinted in 9 INT'L LEGAL MATERIALS 807, 809 (1970). The U.S. still adheres to three miles for its own territorial waters.

96. An Act to Amend the Territorial Sea and Fishing Zones Act, 18-19 Eliz. 2, c. 68 (Can. 1970), reprinted in 9 INT'L LEGAL MATERIALS 553 (1970).

97. *See* authorities cited notes 19-22 *supra* and accompanying text. *Cf.* Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH L. REV. 1, 22 (1970).

coastal State.'"[98] Although this would not give Canada any authority directly over such ships except in one or two narrow straits, this would be enough to effectively close the Northwest Passage to all ships which do not meet Canadian safety and sanitary standards.

As the waters in question would be territorial sea, Canadian sovereignty would be limited by the right of innocent passage in the international community. The coexistence of these rights is an old and well established attempt to reconcile the conflicting interests of coastal and maritime states.[99] Thus, any denial of passage to a foreign ship becomes a question for international contention: is the *threat* to Canadian interests sufficient to warrant the *interference* with the rights of another state.[100] Canada further cannot suspend innocent passage through an international strait such as the Northwest Passage.[101] Although the prevention of pollution was not expressly mentioned in the Territorial Sea Convention as grounds for controlling passage in the territorial sea,[102] the inclusion of sanitary regulations as a basis of control outside the territorial sea[103] should be ample authority for such control within the territorial sea.

If, however, fishing becomes common in the Davis Strait or if merchantile submarine traffic becomes common in the Arctic Ocean proper,[104] this regime would not begin to pro-

98. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 14(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

99. See COLOMBOS, THE INTERNATIONAL LAW OF THE SEA, 132-35 (6th ed. 1967); MCDOUGAL & BURKE, *supra* note 88, at 174-304, for a discussion of these principles.

100. MCDOUGAL & BURKE, *supra* note 88, at 184-86, set out clearly the difficulties posed by such a clash of interests. As Canada will want to act before the pollution occurs, its claim is presented in its weakest light. *See also*, Dellapenna, *supra* note 92, at 56.

101. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 16(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. Corfu Channel Case (United Kingdom v. Albania) (merits), [1949] I.C.J. 4; *In re* Dominion Coal Co. Ltd. and County of Cape Breton, 40 D.L.R.2d 593 (1963). *See also* the statement of the Canadian Undersecretary of State for External Affairs in Gottlieb, *Canadian Practice in International Law, 1966*, 5 CAN. Y.B. INT'L L. 253, 262 (1967). *Cf.* "D.C. Whitney" v. St. Clir Navig. Company, 38 Can. S. Ct. 303 (1907).

102. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 17, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

103. *Id.* art. 24(1)(a).

104. Military traffic would pose pollution and other problems, but on a vastly reduced scale as compared with submarines carrying many tons of oil.

tect Canadian interests. Furthermore, Canada is not necessarily satisfied by a regime which, at best, compels Canada to answer an adverse claim from its least defensible posture.

C. Historic Waters

A well recognized exception to the limitation of territorial waters to a narrow margin is the regime of historic waters.[105] Although this claim is usually discussed with reference to bays, there is no good reason for so limiting its application.[106] The doctrine of historic title is that a long continued assertion of authority as of right over a definite area which has been acquiesced in by other states ripens into title.[107] This "concession of law to a situation of fact"[108] has been applied to bays at least by all Arctic states except perhaps Denmark.[109]

Canada has asserted an historic claim to Hudson's Bay and Hudson's Strait.[110] This claim is traceable to the original grant by the English Crown to the Hudson's Bay Company in 1670. Hudson's Bay is a body of water 600 miles wide and 900 miles long; the Strait across its mouth is 500 miles long and 35-50 miles wide. They may be considered a single body of water, aggregating 580,000 square miles. This is easily the largest body claimed anywhere as an historic bay. The claim was formally enacted into Canadian law in 1906.[111] Under

105. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965). *See also* COLOMBOS, *supra* note 99, at 180-88, 191-94, and MCDOUGAL & BURKE, *supra* note 88, at 356-72.

106. BLUM, *supra* note 105. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 7(6), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, mentions historical waters only in regard to bays, although straight baselines can be drawn with reference to historical interests. *Id.* art. 4(4). *Cf.* Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 130-39. *See* Blum, *supra* note 105, where the doctrine was applied not only to water, but also to land. *See* Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6. For a complete discussion of historic bays see BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 199-302 (1964).

107. This is similar to prescription (which is sometimes used as a synonym), but it is actually an instance of special customary international law. Acquiescence, not prescription, is the essence of the title. *See* BLUM, *supra* note 105, at 38-39.

108. *Id.* at 4. *Cf.* BOUCHEZ, *supra* note 106, at 238-44.

109. BOUCHEZ, *supra* note 106, at 215-37, lists bays validly claimed by Arctic states as historic waters. *Cf.* 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 233-58 (1965). Several of these bays, however, have entrances of less than 24 miles (the current normal closing line for bays).

110. BOUCHEZ, *supra* note 106, at 229-30; COLOMBOS, *supra* note 99, at 186; 4 WHITEMAN, *supra* note 109, at 236-37; Balch, *Is Hudson Bay a Closed or an Open Sea?* 6 AM. J. INT'L L. 409 (1912); and Johnston, *Canada's Title to Hudson's Bay and Hudson's Strait*, 15 BRIT. Y.B. INT'L L. 1 (1934).

111. CAN. STAT. c. 45, § 9(12), (1906).

this statute, these waters would be internal for which no right of innocent passage would exist. The United States has consistently protested this claim and does so today.[112] Americans have from time to time fished these waters in defiance of Canadian claims. Canada's claims to the waters in its Arctic archipelago could also be interpreted as a claim of historic title. Canada has asserted various measures of control over these waters for some time. Professor Ivan I. Head has traced the assertion of such a claim to waters north of Canada back at least to 1938.[113] He further argues that effective occupation of the land, water, and ice up to the pole has gradually consolidated over 450 years into effective title.[114] Assertions on the floor of parliament to this effect by cabinet ministers are balanced by denials from like sources.[115] There is some doubt that these assertions would be effective to notify other states of such claims even if they were unanimous. The first international assertion of an historic claim by Canada appears to have been made in a note to the United States presented on April 16, 1970.[116] Even this is not a clear assertion of historic title, especially since Prime Minister Trudeau had disclaimed any new assertion of sovereignty only the day before.[117]

The foregoing Canadian claims to historic title illustrate the difficulties presented by the doctrine. The evidence of claim and counterclaim is ambiguous at best and contradictory

112. HACKWORTH, DIGEST OF INTERNATIONAL LAW 700-01 (1940); 4 WHITEMAN, *supra* note 109, at 237.

113. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L.J. 200, 208-10 (1963). Professor Head currently is Legislative Assistant to Prime Minister Trudeau, and largely drafted the Arctic Waters Pollution Prevention Act.

114. *Id.* at 218-26. *Cf.* BLUM, *supra* note 105, 335-38.

115. Head, *supra* note 113, at 208-10; Pharand, *Innocent Passage in the Arctic*, 6 CAN. Y.B. INT'L L. 3, 51-52 (1968).

116. Reprinted in 9 INT'L LEGAL MATERIALS 607 (1970). The relevent passage is as follows:

> With respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian. While Canada would be pleased to discuss with other [sic] stated international standards of navigation safety and enviornmental protection to be applicable to the waters of the Arctic, the Canadian Government cannot accept any suggestion that Canadian waters should be internationalized. *Id.* at 613.

117. 114 H.C. DEB. 5955 (April 16, 1970) quoting from a press conference the preceding day, reprinted in 9 INT'L LEGAL MATERIALS 600, 601 (1970). Bilder, *supra* note 97, at 7 n.21, gives a short complete discussion of the complexities of the latest Canadian claim. *See also* Legault, *The Freedom of the Seas: A License to Pollute?* 21 U. TORONTO L.J. 211, 219 (1971). Mr. Legault is the head of the Law of the Sea Section, Legal Operations Division, Canadian Department of External Affairs.

where it isn't ambiguous. Perhaps Canada's claim is better than any counter claim.[118] One might just as easily, however, invoke the doctrine that claims in derogation of general law are viewed with disfavor and must be strictly proven by the one so claiming.[119] Even in a rare case where the "historicity" of a claim is beyond question, serious criticisms have been leveled at the doctrine of historic title.[120] Some see it as a device for older nations to gain advantages not available to newer nations,[121] while others see in it a means of validating titles derived from obsolete, even medieval, theories of law which can only perpetuate conflict. In short, the doctrine sanctifies ritual over policy, form over substance.

A different use for history in assessing the validity of asserted titles is that of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*.[122] The court used history to test the particular application of general international law rather than to show an exceptional right which violates general norms of international law. This premise was adopted with regard to straight baselines in the Territorial Sea Convention: "[A]ccount 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."[123] Viewed in this light, strict proof of effective claims is not necessary. Substance, a close link between the surrounding land and the water areas claimed

118. Head, *supra* note 113, at 216-18. That this is all one must show is supported by Legal Status of Eastern Greenland Case (Denmark v. Norway), [1933] P.C.I.J., ser. A/B, No. 53 at 46; Island of Palmas Case (United States v. Netherlands (1), 2 U.N.R.I.A.A. 829 (Perm. Ct. Arb. 1928).

119. *See, e.g.*, Case Concerning Right of Passage over Indian Territory (merits) (Portugal v. India), [1960] I.C.J. 6, 39-43; Colombian-Peruvian Asylum Case, [1950] I.C.J. 266, 276-77. *See also* BLUM, *supra* note 105, at 238-40; BOUCHEZ, *supra* note 106, at 281-82; *but see* Judge Alvarez's separate opinion in the *Anglo-Norwegian Fisheries Case*, where he says, "[C]omparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved." Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 152. *See also* MCDOUGAL & BURKE, *supra* note 88, at 572.

120. BLUM, *supra* note 105, at 338-40, and MCDOUGAL & BURKE, *supra* note 88, at 357-59.

121. *E.g.*, Statement of Bulgaria, [1960] Second United Nations Conference on the Law of the Sea, Official Records 113.

122. Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 125-26, 134-39.

123. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 4(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. art. 7(6), which excepts historic bays from the normal rules applicable to bays and specifically refers to straight baselines under art. 4.

as shown by long usage, becomes relevant to the decision. It is precisely such long usage which is lacking with respect to Canadian claims. The waters of the region are just now opening up for use, and such limited prior uses as whaling were not exclusively local.[124] Even now the local population will receive only a small portion of the benefits of the proposed new uses of the water or the wealth being found in the region. Still, if past Canadian economic interests are minimal, there are virtually no vested conflicting interests in the waters of the area. In this sense, Canadian rights might still be given special weight. In the large water areas involved, *i.e.,* in Hudson Bay, in the archipelago, and in the Arctic Ocean, innocent passage would not exist if an historic title were recognized.[125] Uniquely Canadian interests would probably not be great enough to result in general recognition of historic title by international decision makers, except possibly with respect to Hudson's Bay which could not be used as an international navigation route.

D. Contiguous Zones.

The recent Arctic Waters Pollution Prevention Act prohibits pollution within 100 nautical miles of the Canadian Arctic coast (north of 60° N) and in waters above the Canadian Arctic continental shelf.[126] Prime Minister Trudeau denies that this is an assertion of sovereignty.[127] It is, rather, an assertion of control which would appear to be a new contiguous zone beyond Canadian territorial waters. Contiguous zones have a long and troubled history.[128] They are an assertion of control beyond the marginal belt of territorial waters

124. HACKWORTH, *supra* note 112.

125. BLUM, *supra* note 105, at 296-307. This position can be traced back to colonial days in Canada. La Forest, *Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident*, 1 CAN. Y.B. INT'L L. 149, 150-52 (1963). The absence of a right of innocent passage is the principle distinction between internal waters and territorial sea. COLOMBOS, *supra* note 99, at 78; MCDOUGAL & BURKE, *supra* note 88, at 64, 121; and OPPENHEIM, INTERNATIONAL LAW, 460-61, 581-82 (8th ed. 1955).

126. Arctic Waters Pollution Prevention Act §§ 3, 4(1), 18-19 Eliz. 2, c. 47 (Can. 1970), reprinted in 9 INT'L LEGAL MATERIALS 543 (1970), and 69 MICH. L. REV. 38 (1970).

127. 114 H.C. DEB. 5955 (Apr. 16, 1970), *supra* note 117.

128. *See, e.g.,* MASTERSON, JURISDICTION IN THE MARGINAL SEA (1929), for a study of the special jurisdiction for customs purposes. *See also,* COLOMBOS, *supra* note 99, at 136-46; MCDOUGAL & BURKE, *supra* note 88, at 75-81, 565-729.

in order to protect the coastal state from specific injuries by acts occurring on the high seas.[129] Such specific controls are often preferable to extensions of the territorial sea, an "unnecessarily blunt and rigid instrument . . . unreasonably restricting the equally legitimate inclusive interests of the rest of the world."[130] The validity of such assertions has been judged by a standard of reasonableness. This requires a multifactorial analysis weighing the protection of the contiguous state's interest against the cost to the interests of all other states.[131] This is an imprecise measure of validity whose very imprecision tends to encourage conflict. In an apparent attempt to clarify the rights of both contiguous and noncontiguous states, Article 24 of the Territorial Sea Convention[132] was drafted. It prescribes that contiguous zones may be established for customs, fiscal, immigration, or sanitary regulations but that such zones may not extend beyond twelve miles from the baseline of the territorial sea. These and other limitations in Article 24 have not been accepted in practice. Contiguous zones continue to be used for other purposes[133] and well beyond the twelve mile limit.[134]

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129. Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804).

130. Feliciano, *Comments on the Territorial Waters of Archipelagos*, 1 PHIL. INT'L L.J. 157, 164 (1962).

131. MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 578-81 (1962), gives a thorough analysis of this process.

132. Geneva Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

133. An example of such other purpose is exclusive fishing zones 16 U.S.C. §§ 1091-94 (1970). This is so despite the inclusion of freedom of fishing as one of the freedoms of the high seas in art. 2 of the Geneva Convention on the High Seas, *opened for signature* April 29, 1958, 15 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. An additional common use is for security zones. FRIEDMAN, LISSITZYN, & PUGH, INTERNATIONAL LAW 615-16 (1969). Control of pirate broadcasting is another use. Hunnings, *Pirate Broadcasting in European Waters*, 14 INT'L & COMP. L.Q. 410 (1965); Van Panhuys & Van Encle Boas, *Legal Aspects of Pirate Broadcasting : A Dutch Approach*, 60 AM. J. INT'L L. 303 (1966). *Cf.* MCDOUGAL & BURKE, *supra* note 131, at 608-21; Oda, *The Concept of a Contiguous Zone*, 11 INT'L & COMP. L.Q. 131 (1962).

134. The unreality of a narrow, sharply defined limit for such zones has been commented upon by many. *See, e.g.*, 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 462 (2d ed. 1945); MCDOUGAL & BURKE, *supra* note 131, at 606-07; Gottlieb, *supra* note 85, at 59-67; Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234, 244 (1959); and Legault, *supra* note 117, at 219. Zones more than 12 miles wide measured from the baseline of the territorial sea may well be inherent in the acceptance of the 12 mile territorial sea. Comment, *The Canadian Arctic Waters Pollution Prevention Act: An Analysis*, 31 LA. L. REV. 632, 642 n.71 (1971).

Canada has long had contiguous zones for control of smuggling.[135] Canada also played a leading role in the development of exclusive fisheries jurisdiction beyond the territorial sea.[136] Both of these claims, along with prior pollution laws, asserted authority only over waters up to twelve miles from Canadian coasts. Canada, however, joined with the United States in establishing an Air Defense Identification Zone (ADIZ)[137] over the high sea approaches to North America well beyond the twelve miles.[138] Canada has not bound itself to Article 24 even as a matter of customary law.[139] Neither is the United States (at present the principal counterclaimant) well placed to invoke Article 24. In instituting ADIZ, the United States established a contiguous zone well beyond twelve miles from its shore. Its hovering acts still reach for customs purposes to 62 miles from shore.[140] In the case of fishery zones, the United States protested Canada's enactment of a nine mile fishery zone in 1964 but followed suit two years later. Thus far the United States has extended its general pollution control authority only over a contiguous zone out to twelve miles.[141] With pressure building up from the environmental lobby, it would not be surprising if the United States also emulates the Canadian Arctic pollution example. In this regard, much will depend on what happens at the upcoming Stockholm and Geneva Conferences.

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135. This originated in the "hovering acts" of the various colonies before federation, preserved by the British North America Act, 30 Vict., c. III, § 122, (1867) and consolidated and extended by Acts of the Canadian Parliament in 1877, 1883, 1886, and 1906. MASTERSON, *supra* note 128, at 166-68. This was re-enacted in the Customs Act of 1937, CAN. REV. STAT. c. 58 (1952). *See also* Croft v. Dunphy, [1933] A.C. 156 (P. C. 1932).

136. Treaty of London, signed Oct. 20, 1818 by the United States and the United Kingdom, 8 Stat. 248, T.S. No. 112 (1819). This eventually gave rise to the North Atlantic Coast Fisheries Arbitration, [1916] Hague Court Reports (Scott) 141 (Perm. Ct. Arb. 1910). Finally, broad fishing zones were established. Order in Council of Dec. 26, 1970, 104 Can. Gazette, No. 52, reprinted in 10 INT'L LEGAL MATERIALS 438 (1971). *See generally* Gottlieb, *supra* note 85.

137. Hereinafter referred to as ADIZ.

138. 4 WHITEMAN, *supra* note 109, at 495-96; McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 677 (1955).

139. *Cf.* North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and the Netherlands), [1969] I.C.J. 3, reprinted in 8 INT'L LEGAL MATERIALS 340 (1969).

140. 19 U.S.C. § 1701 (1970). For a discussion of the events leading to this law, enacted in 1935, see 4 WHITEMAN, *supra* note 109, at 489-93.

141. 33 U.S.C. §§ 1161(a)(9), (b), 1162 (a) (1970). *See generally* Healy & Paulsen, *Marine Oil Pollution and the Water Quality Act of 1970*, 1 J. MARITIME L. & COMMERCE 537 (1970).

The effect of such claims as precedent for other more exclusive claims underlies most opposition to them. Overlapping contiguous zones established for various purposes tend to coalesce into territorial sea or historic water claims.[142] Single contiguous zones have become the basis for subsequent territorial claims.[143] Even where the nation making the claim clearly intends only a limited and justified interference in the freedom of the seas, it finds its limited claim cited as precedent for unreasonably broad claims by others.[144]

Narrowly viewed, the Canadian precedent is not alarming. The Canadians seek to regulate waters along their coast in order to prevent a serious threat to their environment. There is strong international precedent for regulation of pollution, particularly oil pollution. The Canadian action merely goes one step further.[145] The Canadian claim is presented in a particularly appealing context.[146] There is very little traffic, and even this traffic is a recent development. On the other hand, the damage from even a single accident would be catastrophic. Whatever traffic develops must be dependent on expensive and extensive cooperation from Canadian authorities. Other Canadian interests may be as nascent as the international interests, but they can only add weight on Canada's side of the balance. With Canadian interests being maximal and world community interests in the waters minimal,[147] the Canadian claim may be accepted.

142. *See, e.g.*, SYATAUW, SOME NEWLY ESTABLISHED ASIAN NATIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 196-97 (1961); Dellapenna, *supra* note 92, at 58. *See also* MCDOUGAL & BURKE, *supra* note 131, at 621-30; Comment, *supra* note 134.

143. An example is the Russian territorial claim. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS 3-6, 28-31 (1967). This has been called "Craven's Law of Creeping Jurisdiction." *See* Comment, *supra* note 134, at 648.

144. *See* Canadian Note of April 16, 1970, reprinted in 9 INT'L LEGAL MATERIALS 607, 609 (1970). *See generally* Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 25-27 (1970); Ratiner, *United States Ocean Policy: An Analysis*, 2 J. MARITIME L. & COMMERCE 225, 227-32 (1971).

145. Wilkes, *International Administrative Due Process and Control of Pollution—The Canadian Arctic Waters Example*, 2 J. MARITIME L. & COMMERCE 499, 503-07 (1971).

146. Bilder, *supra* note 144, at 23, suggests that the Canadians chose the Arctic in order to be sure of getting acceptance of a precedent which could later be extended to other coasts. *Cf.* Legault, *supra* note 117, at 219-20.

147. To the extent government owned ships are in fact exempted from the application of the Arctic Waters Pollution Prevention Act, which is possible by order of the Governor in Council (§ 12(2)), the principal present non-Canadian use of the waters (largely submarine navigation) would not even be affected by the asserted Canadian control, particularly as the waters

Other states have sought to prevent a race to appropriate the seas by asserting, or accepting, only carefully circumscribed claims to the sea. What becomes precedent, however, is the doctrinal basis for the claim and not the details of the particular claim accepted.[148] The basis asserted for this type of action is far more alarming than the claim itself. The Canadians assert that the action is in self-defense.[149] This is the oldest and broadest basis for interference with free passage. If this is accepted, any passage which threatens pollution cannot be innocent.[150] This gives a new, somewhat artificial meaning to self-defense in a context where it has been used to mean military threats. It would be a doctrinal basis for virtually destroying innocent or free passage on the high seas over vast areas of water because of the threat of pollution affecting some contiguous state.[151] To accept this expanded definition is to accept the demise of freedom of the seas.

Accepting the claim while rejecting its basis[152] does not entirely solve the problem. Any unprecedented claim of coastal-state discretion to define its power in contiguous seas becomes precedent for claims of complete unilateral discretion to do so. This is more clearly so when the action runs counter to a recent codification of international law which established

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would remain high seas where submarines would be entitled to navigate submerged. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 14(6), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

148. Ratiner, *supra* note 144, at 227-29. This analysis particularly focuses on the problems which ensued from the United States continental shelf which soon mushroomed into claims of epicontinental seas or even assertions that coastal states have unlimited discretion to define their own territorial seas. *See, e.g.*, The Declaration of Montevideo, *supra* note 84.

149. Canadian Note, *supra* note 144, at 610. *See also* Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MARITIME L. & COMMERCE 1, 8 (1971); Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. MARITIME L. & COMMERCE 13, 36 (1971); Legault, *supra* note 117, at 219-20.

150. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 14(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. *See also* Legault, *supra* note 117, 219-20.

151. *See* Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break— International Law?*, 65 AM. J. INT'L L. 131, 133-34 (1971). This is not necessarily defined by 100 mile limits as Canada did. In the Arctic, 100 miles may not actually be sufficient protection, Wilkes, *supra* note 145, at 510. Other attempts at defining limits for functional zones have, up to now, failed. *See* Friedmann, *Selden Redvivus—Towards a Partition of the Sea*, 65 AM. J. INT'L L. 757 (1971); Gottlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law*, 2 CAN. Y.B. INT'L L. 55, 65 (1964). See MCDOUGAL & BURKE, *supra* note 131, at 187-269, for an exhaustive treatment of the policies relevant to denying passage off one's coast.

152. *Cf.* Gold, *supra* note 149, at 37.

clear and well defined rules concerning the issues at hand.[153] That the failure of this codification was evident long before the Canadian action does not prevent the action from becoming a bad precedent. The freedom of the seas is under attack.[154] No nation which strongly champions that freedom can be expected to embrace the Canadian action. The power realities of the situation dictate acquiescence in the enforcement of the claim even while formally protesting it. Simply by withholding its cooperation, Canada can make navigation in most of the affected waters virtually impossible. Even the lives of the crews would be endangered. Navigation for commercial purposes—at present, conventional surface navigation —is only possible in these waters on terms acceptable to Canada. These realities require the recognition of a Canadian National Sea Route, at least until international processes afford protection to the interests involved. The concept of a national sea route was originated by the Soviets with reference to their Arctic waters.[155] It appears to be a species of sovereignty akin to historic title but also reflecting the unusual geographical and climatic conditions. Such assertions treat directly the problems posed—ships must be led through the passage while their presence threatens to pollute the waters and adjacent lands. Canada need not lead such ships unless they accept reasonable conditions set down by Canada. As expressed in the Canadian note to the United States, "While the Canadian Government is determined to open up the Northwest Passage to safe navigation, it cannot accept the suggestion that the Northwest Passage constitutes high seas."[156]

E. Straight Baselines

Prior to World War II, the baseline from which the territorial sea was measured was almost invariably the actual coastline of the claimant state. An effort by various scholars to suggest a different baseline for mid-ocean archipelagos

153. Bilder, *supra* note 144, at 26-30.

154. For a short reasoned development of this attack see Christy, *Marine Resources and the Freedom of the Seas*, 8 NATURAL RESOURCES J. 424 (1968).

155. BUTLER, *supra* note 143, at 81-85. For the *Northwind Incident* see Pharand, *supra* note 115, at 15-16. *See* note 198 *infra*.

156. Canadian Note, *supra* note 144, at 611.

received almost no political support. It was not incorporated into the 1930 Draft Convention on the Law of the Sea.[157] Not even scholars seemed concerned with islands which merely formed a fringe along the coast of a continental nation. All this changed with the *Anglo-Norwegian Fisheries Case.*[158]

The *Fisheries Case* involved a dispute which arose when Norway sought to exclude foreign fishermen from its territorial sea measured from straight baselines drawn between islands, rocks or low tide elevations off its mainland. Although this system had some nineteenth century antecedents, it was first completely expressed in a 1935 decree. The baselines, stretching in total about 600 miles, ranged in length from about 100 yards to 44 miles. No baseline was more than 15 miles from land.[159] Some of these waters were bays which could have been enclosed under traditional historic waters doctrine. Other water areas were not bays but, nonetheless, were historic waters. Still other water areas constituted new claims. The claim thus presented "an ill-defined geographic whole."[160] The International Court of Justice had little difficulty deciding that the Norwegian claim was valid,[161] perhaps influenced by the meagerness of actual Norwegian gains over what they would have had under the strictest application of traditional norms.[162] The court indicated three criteria to be considered when judging the validity of any particular system of baselines.[163] First, the baselines must not depart to any appreciable extent from the general direction of the coast. Second, the sea areas so limited must be sufficiently

157. For a brief outline of these attempts see MCDOUGAL & BURKE, *supra* note 131, at 415-16. Of course, most such island groups were then colonies, and the colonial powers necessarily favored the maximum possible high seas area without any need to bother about the possible benefits such a norm might have for the natives. For a discussion of this problem with regard to the Philippines see Dellapenna, *The Philippines Territorial Water Claim In International Law*, 5 J. LAW & ECON. DEV. 45, 53-54 (1970). See SYATAUW, *supra* note 142, at 170-72 for a discussion of the problem with regard to Indonesia.

158. [1951] I.C.J. 116.

159. Anglo-Norwegian Fisheries Case, I.C.J. Pleadings 86-89 (1951). But Boggs, *Delimitations of Seaward Areas Under National Jurisdiction*, 45 AM. J. INT'L L. 240, 249 (1951) asserts that the furthest distance from land was five miles.

160. Anglo-Norwegian Fisheries Case, *supra* note 159, at 141.

161. The vote was 10-2 on the principle and 8-4 on the particular baselines used.

162. Boggs, *supra* note 159, at 249.

163. Anglo-Norwegian Fisheries Case, *supra* note 158, at 133.

linked to the land as to be subject to the regime of internal waters. This rule is to be liberally applied to coasts as jagged as that of Norway. Third is the reality of economic interests peculiar to the region, the importance of which is evidenced by long usage. These criteria were embodied in Article 4 of the Territorial Sea Convention[164] with certain modifications. Article 5(2) introduced a substantial change: innocent passage is preserved in waters which were not historically internal. This results in an assimilation of such waters to the territorial sea. The baseline no longer will mark the limit between territorial waters (where passage is a right) and inland waters (where passage is at sufferance).

Canada has apparently asserted an archipelago claim to the waters between its Arctic islands in a recent note to the United States.[165] The nature and extent of this claim is unclear. No straight baselines have been established in the area.[166] The Arctic Waters Pollution Prevention Act can even be seen as a weakening or abandonment of such a claim.[167] There is statutory authority for establishing such baselines.[168] There has been some political[169] and scholarly[170] support for such a move. It seems unlikely for at least the immediate future. Such a move is possible if Canada cannot get acceptance of its contiguous zone or if resources in the water become exploitable. Such a comprehensive assertion of authority would provide sufficient control to prevent pollution in much

164. Geneva Convention on the Territorial Sea and the Contiguous Zone, arts. 4(1), 4(2), 4(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

165. *See* quoted material note 116 *supra.*

166. This is in contrast with the proclamation of fishery closing lines farther south (on Dec. 26, 1970). *See* note 136 *supra.*

167. *See, e.g.*, the remarks of Mr. Stanfield, 114 H.C. *DEB.* 5941-43 (Apr. 16, 1970).

168. The Territorial Sea and Fishing Zones Act, 13 Eliz., c. 22, § 5 (Can. 1964).

169. See Bilder, *supra* note 144, at 7 n.21, for a summary.

170. *See, e.g.*, Pharand, *The Waters of the Canadian Arctic Islands*, 3 OTTAWA L. REV. 414 (1969). His proposal that the island be treated as two archipelagos separated by the Parry Channel with a strip of high seas through the channel (*id.* at 429-32), is meaningful only if Canada had retained a three mile wide territorial sea; having gone to a 12 mile territorial sea, there would remain no continuous strip of high seas even under Pharand's proposal. The elimination of this alternative excuses a discussion of the complex question of whether the same rules apply to mid-ocean archipelagos as apply to coastal ones. *Id.* at 427-29. *See also* MCDOUGAL & BURKE, *supra* note 131, at 411-19; Morin, *Les progres technique, la pollution et l'evolution recente du droite de la mer au Canada, particulierement a'l'egard de l' Artique*, 8 CAN. Y.B. INT'L L. 158, 239-43 (1971).

the same manner as a 12 mile territorial sea does. It would not, however, limit resources exploitation to Canadians, as most fishing would probably occur outside the archipelago. It would also be highly controversial since none of the other Arctic states accept such baselines except in the most exceptional circumstances.[171]

Unfortunately, criteria derived from customary law or the Territorial Sea Convention for judging the validity for such claims do not realistically reflect the interests of the claimant states. Thus, that the baselines not depart from the general direction of the coast is a subjective decision.[172] The general direction varies with the scale of map used and with one's interpretation of the concept.[173] Thus Donat Pharand's argument that the general direction of the Canadian Arctic Coast is east-west, from which baselines including the Queen Elizabeth Island would depart,[174] is true only if one is looking at a large scale map and considering only the mainland. In contrast, the International Court in the *Anglo-Norwegian Fisheries Case* considered the islands themselves to be the actual Norwegian coast.[175] The idea inartfully expresses that the enclosed waters should be closely related to the adjacent land. Put another way, the baselines should not stray too far from land.[176] This does not require that there be a maximum length to baselines.[177] If a mathematical formula were to be

171. For the United States position see 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 274-307 (1965).

172. MCDOUGAL & BURKE, *supra* note 131, at 408-11; Pharand, *supra* note 170, at 422-23. *But see* Evensen, *The Anglo-Norwegian Fisheries Case and Its Legal Consequences*, 46 AM. J. INT'L L. 609, 629 (1952). Evenson, counsel for Norway in that case, concludes that this is the only principal of general value as a guide to conduct. *See also* 4 WHITEMAN, *supra* note 171, at 173.

173. Contrast the interpretations of the Philippines found in Dellapenna, *supra* note 157, at 59-61 with SYATAUW, *supra* note 142, at 188, and Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L.J. 200, 219 (1963).

174. Pharand, *supra* note 170, at 430.

175. [1951] I.C.J. 116, 127.

176. A similar policy is embraced in the Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 4(3), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. This prohibited the use of low-tide elevations as basepoints. This also makes basepoints always visible so navigators can ascertain where they are. MCDOUGAL & BURKE, *supra* note 131, at 400-01.

177. The contrary statement is uncomfortably common. Thus the I.L.C.'s Committee of Experts recommended to 10 miles maximum length. MCDOUGAL & BURKE, *supra* note 131, at 403-04. At the 1958 Conferences a majority, but less than two thirds, voted in favor of a 15 mile limit. *Id.* at 406. *See also* 4 WHITEMAN, *supra* note 171, at 167-68; Pharand, *supra* note 170, at 430.

adopted, it might better refer to a maximum distance of the baseline from land.[178] As it stands, this criterion remains vague and abstract.

The second criterion is that the waters be sufficiently and closely linked to the adjacent land as to be subject to the regime of internal waters. While this is also a vague and imprecise phrase, it apparently was used in the *Fisheries Case* to mean that the coastal state ought to be entitled to complete control of access to these waters by all shipping, even if in innocent passage.[179] Although this criterion is repeated in the 1958 Convention,[180] that same convention provides for the preservation of innocent passage in such internal waters which were not historically internal.[181] This not only assimilates the waters in question to the territorial sea, it renders this criterion meaningless. It amounts to a recognition that, generally speaking, these controversies have been over resources, not over control of passage. In Canada's case, however, precisely the opposite is true. Only by insisting that the *Fisheries Case,* and not the Convention, represents the current state of customary law,[182] can Canada give content to this criterion and gain absolute control of access to these waters by instituting territorial sea straight baselines.

The third criterion—long established local economic interests—focuses on the point primarily at issue in most disputes. Curiously, whereas the International Court required such interests to justify baselines,[183] the Convention down-

178. *See* Dellapenna, *supra* note 157, at 60. MCDOUGAL & BURKE, *supra* note 131, at 404, describes the failure of the I.L.C. to propose that baselines be no more than two miles from the coast. The longest Canadian fisheries closing line is 97 miles long and up to 48 miles from the nearest land. *See* Order in Council, *supra* note 136.

179. MCDOUGAL & BURKE, *supra* note 131, at 120-25, 410. *See also* the statements of Lauterpacht and Franscois in 1954 Y.B. INT'L L. COMM. 67, 196-97.

180. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 4(2), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

181. *Id.* art. 5(2). This point is occasionally overlooked. *E.g.*, Comment, *International Law: Implications of the Opening of the Northwest Passage,* 75 DICK. L. REV. 678, 688-90 (1970).

182. This alone binds Canada. *See* Geneva Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. *Cf. North Sea Continental Shelf Cases, supra* note 139, at 42-46.

183. *Anglo-Norwegian Fisheries Case, supra* note 175, at 133. *See also* Evenson, *supra* note 172, at 613.

graded them to something of which "account may be taken."[184] Thus the only criterion which had any real relevance to the questions then in issue was relegated to a purely secondary role. This is to Canada's advantage for she has no such economic interests. To rely on the Convention would require an acceptance of innocent passage in these waters. To rely on the *Fisheries Case* as stating the applicable law would require proof of long established local economic ties which simply do not exist. This poses a dilemma, the avoidance of which perhaps explains Canada's reluctance to assert such a claim.[185]

The many uncertainties which appear upon careful examination of the superficially definite body of norms governing resort to such baselines move some commentators to fall back on a general notion of reasonableness.[186] While this reasonableness test can be said to underlie all law, it hardly produces sufficient guidelines to minimize conflict. Such a test or the ambiguous criteria used in the International Court or the Convention could only be tolerable if there was a neutral third party to whom resort for prompt decision were possible. With the structural defects in the jurisdiction of the International Court, this is problematical at best. Canada has effectively precluded this by adding a new exception to its acceptance of the optional compulsory jurisdiction of the court. This would probably cover Arctic straight baselines. It clearly covers contiguous zones for fishing and conservation.[187] In

184. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 4(4), *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

185. This dilemma exists unless all passage threatening pollution, i.e., all passage, is non-innocent. *See* notes 149-51 *supra* and accompanying text.

186. Pharand, *supra* note 170, at 425. McDougal sees reasonableness as the summation of all law of the sea. McDougal, *The Hydrogen Bomb Tests and The International Law of the Sea*, 49 AM. J. INT'L L. 356, 359 (1955); McDougal & Schlei, *supra* note 138, at 660 (1955). The predictive value of such a norm is not explored.

187. The exception reads:

> [O]ther than . . . disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.

Reprinted in 9 INT'L LEGAL MATERIALS 598-99. *See* statements of the Prime Minister with regard to the declaration. *Id.* at 602-04. *See also* MacDonald, *The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 8 CAN. Y.B. INT'L L. 3.

view of the difficulties surrounding such claims and of Canadian reluctance to trust such questions to the court, an even more explicit exception may be expected if it were felt that the present exception was unclear with regard to archipelagic claims.

F. Sectors

A theory of territorial sovereignty which is practically unique to the Arctic is the sector theory.[188] This theory accords territorial sovereignty over the sector marked off by the north coast of each Arctic state and the longitudes at each extremity of that base up to the pole. Only the Soviets seem to have expressly adopted this theory.[189] In practice it seems to be accepted by all with regard to land discovered within each country's sector, although no more such discoveries are likely. Even this is relatively recent. Canada's sovereignty over Sverdrup Island in the Canadian sector was disputed by Norway as recently as 1930,[190] while Canada claimed sovereignty over Wrangel Island in the Soviet sector until 1924.[191] Attempts to apply the theory to ice or water have been much more controversial in theory. In practice it seems never to have been tried.

The theoretical difficulties center around the problem of the juridical nature of the Arctic pack ice. Many older theorists, envisoning a stable, permanent, immobile block of ice covering the entire polar region, asserted that it should be treated as land, not sea.[192] More recent scholars have generally

188. Attempts to extend it to the Antarctic have been almost universally rejected. *See* COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 130-31 (6th ed. 1967); Note, *Polar Problems and International Law*, 52 AM. J. INT'L L. 746, 755-59 (1958).

189. Butler, *supra* note 143, at 79-85; COLOMBOS, *supra* note 188, at 29-130; Lakhtine, *Rights over the Arctic*, 24 AM. J. INT'L L. 712 (1930).

190. Lawford, *Canadian Practice in International Law during 1963*, 2 CAN. Y.B. INT'L L. 271, 284 (1964); 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 463 n.72 (1940).

191. Head, *supra* note 173, at 208.

192. *E.g.*, Balch, *The Arctic and Antarctic Regions and the Law of Nations*, 4 AM. J. INT'L L. 265 (1910); Head, *supra* note 173, at 220-24; Lakhtine, *supra* note 189, at 712.

recognized that the ice is in fact mobile.[193] Occupation must generally be quite temporary. While long-term occupation of the ice is possible, the freedoms recognized in the high seas[194] are generally exercisable in the Arctic Ocean as well. Navigation of sorts is generally possible. Overflight is the most easily and commonly exercised freedom.[195] Fish are not yet generally available in commercial quantities despite their gradual northward movement. The laying of cable or pipelines is at least possible. An undersea pipeline has even been suggested as the remedy for the problem of access to the north slope oil. Scientific research, while not an enumerated freedom, is also freely carried on in the Arctic. Most of those activities which give the high seas their peculiar juridical character pertain to the Arctic Ocean as well as to temperate seas. It is difficult to see any merit in a claim that the Arctic Ocean is juridically more akin to land than to water. Moreover, the entrances to the Arctic are not so narrow as to preclude nonadjacent states from access. Neither geography nor practice suggests that the Arctic be treated as a closed sea to be partitioned among the adjacent states.[196]

In practice all the Arctic states treat most of the Arctic Ocean as high seas. The Americans, the Canadians and the Soviets have all drifted ice flows well outside their respective sectors.[197] Submarines also navigate without regard to sectors. Surface navigation is similarly treated. The celebrated *Northwind Incident* involved a strait less than 24 miles wide rather than the open seas.[198] Overflight by Arctic and even non-

193. *E.g.*, Clute, *The Ownership of the North Pole*, 5 CAN. BAR REV. 19 (1927); 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 348 (2d. ed. 1945); Pharand, *Freedom of the Seas in the Arctic Ocean*, 19 U. TORONTO L.J. 210, 233 (1969); TARACOUZIO, SOVIETS IN THE ARCTIC 349-59 (1938).

194. Geneva Convention on the High Seas, art. 2(1), *opened for signature* April 29, 1958, 15 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

195. No right of innocent overflight exists in the territorial sea MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 1099-1100 (1962).

196. For general discussions of this theory see COLOMBOS, *supra* note 188, at 191-96; 4 WHITEMAN, *supra* note 131, at 189-92. BUTLER, *supra* note 143, at 19-24, 79-85, 93-94, discusses this theory of Soviet publicists as to closed seas which would in their view include the Arctic seas close to the U.S.S.R.; but Barents and Bering Seas are considered open as is the Arctic Ocean proper.

197. Head, *supra* note 173, at 222 n.119; Pharand, *supra* note 193, at 229.

198. Here the Soviets forced two United States Coastguard cutters to turn back from an attempt to use the Northeast passage. *See* BUTLER, *supra* note 143, at 84; Pharand, *supra* note 193, at 229.

Arctic states also pays no attention to sectors, although it may be affected by special contiguous zones (ADIZ). While the other freedoms have only been experimentally exercised, if at all, all the adjacent states have denied that they have ever applied the sector theory to the Arctic waters.[199] The conclusion seems inescapable that the sector theory would not be accepted by international decision makers if Canada were to attempt to assert it with respect to Arctic waters.

IV CONCLUSION

With the opening of the Arctic to navigation, the adjacent coastal states have to face the threat of serious environmental degradation. The Canadian government has asserted a functional jurisdiction to an arbitrarily determined limit in the form of a 100 mile contiguous zone. Such zones historically have tended to ripen into territorial seas. As such, the claim would be internationally unacceptable. Even without such an evolution, the assertion of a broad contiguous zone tends to encourage other, usually far less reasonable, contiguous zones which probably would ripen into territorial sea claims. On the other hand, conventional surface navigation is impossible along a route several thousand miles long without the active cooperation of the Canadian government. This makes the situation in the Canadian Arctic unique. The normal application of doctrines usually asserted with regard to the high seas is not suitable. This Canadian national sea route must be closely regulated by Canada. Preferably, this should be part of a comprehensive international regulation of the Arctic. Such cooperation in the past has not occurred. Nothing in recent international experience suggests a change in this pattern. The novelty of some of the claims Canada is making, *e.g.*, to prescribe ship construction standards for ships which will never enter Canadian territorial waters, appears to cast doubt on the validity of at least part of her claims.[200]

199. For the clearest disclaimer by Canada see the statement of the Minister of Northern Affairs and National Resources Lesage, 7 [1956] H.C. DEB. 6955.

200. *Cf.* Henkin, *supra* note 151, at 132-33. Wilkes, *International Administrative Due Process and Control of Pollution—The Canadian Arctic Waters Example*, 2 J. MARITIME L. & COMMERCE, 499, 507-10, 536 (1971) suggests other grounds for questioning its validity, but generally concludes that it is valid.

Canada's claims would be less dangerous to the United States and other adverse nations if asserted on less broad bases. Reliance on a 12 mile wide marginal belt for control would be inadequate for specific navigational controls[201] along its national sea route. Historic waters come much closer to achieving the goals of the Canadian government, while stressing the unique nature of the Canadian claim. Weaknesses in the theory of historic title and the vagueness of the territorial limits of such a claim make action under it doubtful. Neither of the two traditional claims generally recognized in the sea will assure achievement of Canadian claims.

Of the more innovative territorial claims, the sector theory sweeps too broadly. Not only would it be bad precedent for other seas, but it would seriously interfere with aviation and nonconventional and submarine navigation. These need not burden the Canadian government. They do not now. The straight baselines (archipelagic) approach comes closest to achieving what contiguous zones achieve. It broadly asserts jurisdiction over the conventional surface navigation routes without sweeping far out into the Arctic Ocean. It particularly protects the most vulnerable area of the Canadian Arctic—the complex of islands and shallow, narrow seas off its north coast. What is lost by abandoning the territorial sweep of the contiguous zone are the waters where environmental crisis is less likely to occur. This is more than compensated for by the greater certainty of the claim and strong trend in favor of straight baselines to consolidate uncertain historic title, or complex coastal features, into manageable legal regimes in the sea. It would not spawn a new doctrinal basis for extreme claims in the sea. A system of straight baseline running along the outer edges of the Canadian mainland and islands as limited by the Convention on the Territorial Sea would be a more reasonable, but still effective, solution to the Canadian anxiety over the Arctic environment and control of their national sea route.

201. An example would be specific sea lanes outside the marginal belt.