

Jonathan I. Charney*

The Maritime Boundaries of Québec

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Introduction

I have been asked by The Secretariat of the Committees on the Process for Determining the Political and Constitutional Future of Québec of the Québec National Assembly to provide a legal opinion on the maritime boundaries of Québec if it were to become a sovereign state independent of Canada. In particular, I was asked to respond to the following five questions:

a) *What is the current legal status under international law of the Gulf of Saint Lawrence, James Bay, Hudson Bay, Hudson Strait and Ungava Bay?*

b) *Would there be any change in the legal status of these waters should Québec attain sovereignty, given that the territorial sea off Québec's shores comes actually under the jurisdiction of the federal government of Canada?*

c) *On the day Québec attains sovereignty, could it lay claim, in the new state's coastal waters to:*

- . a territorial sea?*
- . a continental shelf, and what would be its extent?*
- . an exclusive economic zone, and what would be its extent?*
- . other maritime areas provided under the international law of the sea?*

d) *Would the Isles de la Madeleine, islands belonging to Québec in the middle of the Gulf, benefit from the addition of maritime areas provided for under international law?*

e) *Assuming the Gulf of St. Lawrence, James Bay, Hudson Bay, Hudson Strait and Ungava Bay are Canadian waters, what would be the effect of Québec's secession on the legal status of these waters?*

The response to these questions is provided in the following memorandum. It is based upon an analysis of the applicable law and does identify areas of uncertainty and matters that might be resolved through negotiations with Canada. As a consequence of the questions asked of me as an expert in international law including the law of the sea, the memorandum assumes that Québec would become an independent state. The memorandum does not and is not intended to express an opinion on the political question of whether Québec should become independent of Canada.

1. The Legal Setting

At the present time Québec is a province of Canada. As a sovereign state, Canada has legal authority in the maritime areas adjacent to its land territories. This authority is defined by international law. International law provides for a number of zones of coastal state jurisdiction.

These are: internal waters, territorial sea, contiguous zone, fishery zone/exclusive economic zone, and continental shelf. The international law defines the areal extent of these zones and the nature of the authority held by the coastal state in them. All states have the right to claim such zones in the maritime areas adjacent to their land territory within the limits specified by international law.

Canada has acquired authority in these maritime zones. It claims as internal waters water areas landward of its baseline as defined by international law. That line is the mean low water line along the shore, closing lines of 24 nautical mile bays (juridical bays) and river mouths, the limits of historic waters and bays, and systems of straight baselines. Canada has claimed a 12 nautical mile territorial sea¹. Systems of straight baselines have been established on the coasts of Canada (other than Québec)². Continental Shelf sovereign rights have been claimed to the depth of 200 meters and the depth of exploitation³. Fishing Zones have been claimed in certain waters as well as a 200 nautical mile zone in the Atlantic, Pacific and Arctic⁴.

The territorial sea boundary between Canada and France (St.-Pierre and Miquelon) was settled by treaty⁵. The dispute over the seaward boundary in that area is now in international

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1. Act to Amend the Territorial Sea and Fishery Zones Act (26 December 1970), R.S.C., Ch. 45 (1st Supp.), Sec. 3.(1).
 2. Territorial Sea and Fishing Zones Geographical Coordinates (Areas 1, 2 and 3) Order-in-Council P.C. 1967-2025 (26 October 1967), U.N. St./Leg./Ser.B/15, p. 54; Territorial Sea and Fishing Zones Geographical Coordinates (Areas 4, 5 and 6) Order-in-Council P.C. 1969-1109 (29 May 1969), U.N. St./Leg./Ser.B/16, p. 6. These straight baselines were revised in 1972. Territorial Sea Geographical Coordinates Order-in-Council P.C. 1972-966 (Areas 1-6) (9 May 1972) *Canada Gazette*, Part II of 24 May 1972, MCRM, p. 2-70; Territorial Sea Geographical Coordinates (Area 7) Order-in-Council P.C. 1985-2739 (10 September 1985), *Canada Gazette*, Part II, of 20 Oct. 1985, MCRM, p. 2-82. These boundaries are illustrated in *Atlas of the straight baselines* 93-98 (T. Scovazzi, G. Francalanci, D. Romanò, S. Mongardini eds. 1989).
 3. Oil and Gas Production and Conservation Act (June 1969), R.S., c. 0-4, s. 3(b).
 4. Order-in-Council P.C. 1971-366 (Zones 1, 2, and 3) (25 February 1971) (Bay of Fundy, Gulf of St. Lawrence, Queen Charlotte Sound, Dixon Entrance, and Hecate Strait); Order-in-Council P.C. 1977-1 (Zones 4 & 5), *Canada Gazette*, Part II, vol. 111, No. 1, p. 115 (1 January 1977); Order-in-Council, P.C. 1977-379 (Zone 6), *Canada Gazette*, Part II, vol. 111, No. 5, p. 652 (24 Feb. 1977).
 5. The Agreement between Canada and France on Their Mutual Fishing Relations, into force 27 March 1972, *International maritime boundaries*, Report Number 1-2 (J. Charney & L. Alexander eds. publication expected 1992) [hereinafter, *International maritime boundaries*].

arbitration⁶. Its continental shelf boundary with Denmark (Greenland) has been settled by treaty⁷. The maritime boundary with the United States in the Gulf of Maine was established by a judgment of the International Court of Justice⁸.

The international law for identifying the baseline used to delimit the internal waters and territorial sea has changed substantially over the past 100 years. While the use of a line approximating the mean low water line has remained, other rules have increasingly moved the baseline seaward. Thus, early law limited juridical bay closing lines to six nautical miles. It moved progressively to 10 nautical miles, 12 nautical miles, and now 24 nautical miles. Other liberalizations have occurred. Coastal states are permitted to establish systems of straight baselines along coastlines that are deeply indented or fringed by islands. Archipelagic states are now permitted to draw archipelagic baselines⁹. The international law permits coastal states to establish extraordinary jurisdiction over waters based upon the maturation of historic water claims.

There is no doubt that Canada as a nation-state has certain elements of authority provided by international law over all the waters adjacent to the Province of Québec. At a minimum, Canada has internal water jurisdiction over all waters landward of the normal baseline for measuring the territorial sea (the mean low water line, 24 nautical mile bay closing lines, and river closing lines). While a 12 nautical mile territorial sea measured from this baseline would not encompass all these waters, the 200 nautical mile line used to measure the seaward limit of the exclusive economic zone would do so. This is true even in the extremely large Hudson Bay where 200 nautical mile arcs drawn from the mean low water line along the mainland and all of the islands would completely overlap. As a maximum claim, it can be asserted that the entire water areas of Hudson Bay, Hudson Strait, the Gulf of Saint Lawrence and subsidiary water bodies are the internal waters of Canada based upon historic water status or established systems of straight baselines.

As a matter of theory, the difference between the various zones of coastal state jurisdiction in maritime areas may be great. In many respects, however, the substantive differences are rather small. Thus, regardless of whether the maritime areas are internal waters, territorial sea or

6. See McDorman, «The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon», 84 AM. JOUR. INT'L. L. 157 (1990).

8. *International maritime boundaries*, *supra* note 5, Report Number 1-1.

9. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, *International maritime boundaries*, *supra* note 5, Report Number 1-3.

9. 1982 Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122 (1982), 21 INT'L. LEG. MAT. 1261 (1982) [*hereinafter*, "1982 LOS Convention"], Arts. 3-14, 47.

exclusive economic zone the coastal state has virtually complete control over economic development and scientific research, and substantial authority with regard to environmental protection¹⁰. While foreign vessels and aircraft have high seas freedoms beyond the territorial sea and qualified rights of passage in the territorial sea, the coastal state has environmental protection authority in all its maritime zones. This authority increases in scope as the distance from the shore decreases and the dangers increase. Furthermore, vessels calling on the coastal state's ports must have the consent of that state. That consent may be conditioned by environmental rules¹¹.

Since control over all economic development of the maritime areas adjacent to the Province of Québec is within the authority of Canada as a nation-state, it is within the right of Canada to allocate or not allocate this authority to Québec. Canadian domestic law determines how authority over these maritime areas is divided between the Canadian government and the provinces. This allocation is not completely settled for all matters. There have been four important decisions by Canadian courts on this matter, none are directly binding on the Province of Québec: *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*¹²; *Reference re Offshore Mineral Rights of British Columbia*¹³; *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*¹⁴; and *Reference Re Mineral and other Natural Resources of the Continental Shelf*¹⁵.

I am no expert on domestic Canadian law and would defer to others more qualified to interpret these decisions. For the purposes of the instant memorandum, I have interpreted these opinions as follows. In general, the territorial sea and continental shelf of Canada as defined by international law is held by Canada as a function of its external sovereignty. The territory of the provinces is presumed to comprise the land territory included in their boundary descriptions and all waters included within inland waters as that is defined by the common law, particularly the case of *R. v. Keyn*¹⁶. The realm ended under the common law at the low-water mark and the closing lines of bays and rivers within the body of the land, including bays that were *inter fauces terrae* and those that were part of the realm as a result of historical usage. Any waters

10. 1982 LOS Convention, Arts. 2, 55-59, 77.

11. 1982 LOS Convention, Arts. 17-32, 34-45, 52, 58, 59, 78.

12. 1984 S.C.R. 388 [*hereinafter*, «1984 Strait of Georgia Reference»].

13. 1967 S.C.R. 792, 62 W.W.R. 21 (1967) [*hereinafter* «1967 Offshore Reference»].

14. 5 D.L.R.(4th) 385 (1984) [*hereinafter*, «1984 Newfoundland Continental Shelf Reference»].

15. 145 D.L.R. 3d 9 (Nfld. Ct. App. 1983) [*hereinafter*, «1983 Newfoundland Continental Shelf and Territorial Sea Reference»].

16. 2 Ex. D. 63 (1876).

or submerged lands seaward of the line drawn by the common law are held by Canada. A province may have rights in areas seaward of the common law line if prior to joining the confederation it had established sovereign rights in such areas before union and retained those rights by terms of the union¹⁷. A province may also obtain rights in such areas by legislative grant from the Government of Canada.

Where do these opinions leave Québec? Although it is not bound by them, it would appear that they do provide the legal context in which the question of Québec's maritime areas must be examined. Based on the above-identified cases, it appears that Québec did not hold rights in the territorial sea, continental shelf, or exclusive economic zone prior to joining Canada and that no agreement specially preserving those areas for Québec was made. Furthermore, none of the boundary descriptions of Québec expressly grant it extraordinary maritime jurisdiction beyond the common law line. The boundaries in Hudson Bay and Hudson Strait expressly run along the shore. Those in the Gulf of Saint Lawrence do not suggest a different result. Of course, if the kind of detailed examination by Canadian law experts given to the descriptions of the British Columbia boundaries in the 1984 *Strait of Georgia Reference* was made of the Québec boundary descriptions, it is certainly possible that different conclusions would be reached.

Assuming no unusual grant to Québec, one might argue that some or all of the large water bodies adjacent to it are inland waters under the common law definition. That definition allows for inclusion of waters made part of the realm by historic usage. Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence might qualify on this basis for inclusion within provincial boundaries under the common law test. It would appear to be difficult to argue on this basis that Hudson Bay and Hudson Strait were thereby included within the province of Québec even if the historic usage under the common law test were proven since the description of the Québec

17. 1983 Newfoundland Continental Shelf and Territorial Sea Reference, *supra* note 15. This special status was recognized by the Supreme Court of Newfoundland in regard to the territorial sea adjacent to Newfoundland. Prior to joining Canada it was found to have held a territorial sea as an independent state which was preserved upon joinder. A similar exceptional argument might be made by Québec on the basis of its French origins. Unlike the common law, French law may have recognized the colonies rights to the territorial sea. This right may have been retained by Québec. See F. Lorient, *Le régime juridique de la région du Golfe St-Laurent et la théorie des eaux historiques*, 169-70 (Doctoral Thesis, Université de Droit, d'Économie et des Sciences Sociétés de Paris, 1971).

boundary in these areas calls for it to run along the shore¹⁸. In the Gulf of Saint Lawrence the boundary is not that restrictive but the historic usage argument is particularly weak¹⁹.

We now reach the question whether the independence of Québec would produce different results. Viewed at one level the results would be the same. If the waters adjacent to Québec are Québec's while it is within the Confederation, they would remain with Québec upon independence. If these maritime areas are not Québec's they might be acquired by Québec at independence. This acquisition might take place by agreement with Canada or automatically by force of law. Since the Canadian government could transfer authority over adjacent maritime zones to the Province of Québec at any time, a similar transfer of rights could take place by agreement between the independent nation-states of Canada and Québec. But what if no agreement could be reached and the maritime zones were left undefined? Would the independent nation-state of Québec have a right under international law to the maritime areas now held by Canada adjacent to Québec?

In theory, all coastal states have the inherent right to territorial seas, contiguous zones, exclusive economic zones and continental shelves. This is generally recognized in the relevant codifications of the international law²⁰ and is also recognized by Canadian courts²¹. Québec, as an independent state, would be presumed to have such rights. The question arises, however, whether due to its special geographical circumstances there is no geographical area over which Québec could exercise rights in water areas adjacent to its land territories. Thus, it may be argued that the geographical description of Québec limits its seaward extent to the low water line and the limit of internal waters *inter fauces terrae*²². All the waters outside of those lines could

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18. An Act respecting the north-western and north-eastern boundaries of the Province of Québec, (1898) 61 *Victoria* c.3 (U.K.); and Act to extend the boundaries of the Province of Québec (1912) 2 *George V*, c.45 (U.K.). There are, however, real property authorities that would support the view that such boundary descriptions would include the adjacent waters to the middle or the thalweg. See G.W. Warvelle, *I A treatise on the American law of vendor and purchaser of real property* 463 (1902).
 19. See discussion below at Parts V.A.2.b., V.B.2, and V.C.2.
 20. See 1982 LOS Convention, Arts. 2, 55, 77.
 21. See 1967 Offshore Reference, [1967] S.C.R. at 817, 821, 62 W.W.R. at 44-45, 50; and 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.(4th) at 396, 405.
 22. For example, in the Hudson Bay and Hudson Strait the 1912 boundary of Québec is described as running along the shore. Since by that date 10 mile bays were closed one could presume that the line crosses 10 mile bays and river mouths. At the time of *R. v. Keyn*, 1876, only three mile bays were closed. Québec has argued for a 10 mile rule. See note attached to letter from René Dussault, Deputy Minister of Justice, Government of Québec to Roger Tassé, Deputy Attorney of Canada dated 21 Dec. 1977. No agreement with Canada on the question exists.

be considered Canadian and might remain so even upon the independence of Québec. Québec would retain only the territory now within the Province of Québec. The waters of Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence apparently would be excluded.

This argument would be particularly strong if it were found that these waters are internal waters of Canada. In the case of territories bounded by water bodies that are internal waters, it is presumed that the boundary states share such waters. Thus, the boundary would run through the geographical middle of the water body (equidistant line) or, if there is a navigable channel, run along the middle of the principal channel (thalweg). The boundary may, however, take a different course, such as the shoreline or lines that are specially constructed. Internal waters are considered to be the subject of complete sovereignty as are dry lands, lakes and rivers. If a boundary is clearly established to run along the shore and to exclude the adjacent waters, there would be no legal requirement that rights in the internal waters beyond the shore would be transferred to the territory upon secession.

If, however, some or all of these areas are territorial sea, exclusive economic zone, or continental shelf arguments can be made that the coastal state's rights in those areas are inalienable, or at least not alienable absent a knowing, voluntary and express agreement at or after secession. The agreement of secession might expressly delimit boundaries that allocate the maritime areas with Canada. It could also transfer these maritime areas to the independent state of Québec. While Québec could be found to hold no maritime zones, absent a clear agreement or boundary description to the contrary, international law would strongly presume that a new independent state would have a normal complement of maritime zones if it has a coastline²³.

Another line of argument could also start from the position that the maritime areas that are today adjacent to Canada are Canadian but reach the conclusion that the maritime areas adjacent to Québec would automatically transfer to Québec upon independence absent an agreement to the contrary. Perhaps the strongest argument supporting this outcome is based upon the fact that the government of Canada acquired these areas under international law on behalf of all the provinces of Canada²⁴. It was a manifestation of external sovereignty on behalf of the

23. An argument could be made that these zones are inalienable. The coastal states rights over the continental shelf have been described by the ICJ as existing *ipso facto* and *ab initio*. North Sea Continental Shelf Cases, 1969 I.C.J. REP. 3, 22. The greater rights held in nearer shore zones would be even more strongly protected from alienation. I know of no case where a coastal state has surrendered all of one or more of its maritime zones to another state. On the other hand, transfers of minor portions are common, especially in the case of the seaward portions of maritime boundary delimitations. The value placed by international law and relations on navigational access to the sea for states would disfavor results that create a coastal state that is essentially in a position of a landlocked state.

24. See Offshore Mineral Rights Reference of 1967, 62 W.W.R. at 44, 45, 50, and 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.(4th) at 396, 405.

provinces²⁵. In fact, the acquisition of particular maritime areas was and continues to be attributable to the authority of Canada over the adjacent land territory. So long as the unity of Canada remains, the Canadian government retains an undivided authority over these areas.

Secession of any particular province changes the situation. With the loss by Canada of the land territory, Canada has lost the foundation upon which authority over the adjacent maritime areas may be based. As an attribute of the adjacent land territory, the maritime zones run with the land and become an attribute of the newly independent nation state of Québec. This argument is particularly easy to make in regard to normal zones of maritime jurisdiction that are based upon distances measured from the territorial sea baseline, such as the territorial sea and exclusive economic zone. The same is true for the continental shelf which has been historically classified as a projection of the adjacent land territory²⁶. Just as the colonies of Britain obtained rights to their offshore areas upon independence, the independence of a Canadian province would produce the same result²⁷.

A similar argument supports the transfer of authority with regard to historic internal waters, as might be the case for Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence. Authority over such waters are not as expressly linked to the adjacent land territory. Certainly, the adjacent land territory is a *sine qua non* for the historic water status. Not only must the claiming state have sovereignty over the adjacent land territory to make the claim, but it must exercise the necessary degree of authority by activities that will be based in the adjacent land territory (e.g. resource development and regulation). Equally on point is the argument that the actions of the Canadian government that established the historic water status were taken on behalf of the provinces as a matter of external affairs. Secession of a province necessarily requires that the seceding province take with it the portion of historic rights acquired by the Canadian government on its behalf. This portion necessarily pertains to adjacent water areas.

In Hudson Bay the offshore islands appear to be held by Canada in the Northwest Territories. While Québec argued for their acquisition at an early date, their apparent retention by Canada was based upon external relations reasons²⁸. Interestingly, the waters of Hudson Bay and

25. See 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.(4th) at 398-99.

26. North Sea Continental Shelf Cases, 1969 I.C.J. REP. 3, 22 (para. 19).

27. See 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.(4th) at 399-400.

28. Nicholson explains why the boundary ran along the shore even though Québec sought to have the offshore islands included within its boundaries. He wrote : «no coastal islands were included in any of the three provincial extensions. One reason was the difficulty of giving a description of such islands that would be sufficiently definite. Another was that the islands might be necessary for federal purposes in connection with navigation and defence.» N. Nicholson, *The boundaries of the canadian confederation* 144-45 (1979). Canada, House of Commons, debates,

Hudson Strait, including those of James and Ungava Bays, are by statute neither included in the territory of Québec nor the Northwest Territories. They are federal only. The Northwest Territories Act²⁹ defines the Territories in section 2 as follows:

- (i) «Territories» means the Northwest Territories which comprise
- (i) all that part of Canada north of the Sixtieth Parallel of North Latitude, except the portions thereof that are within the Yukon Territory, the Province of Québec or the Province of Newfoundland, and
- (ii) the islands in Hudson Bay, James Bay and Ungava Bay, except those islands that are within the Province of Manitoba, the Province of Ontario or the Province of Quebec.

Since paragraph (ii) would be redundant unless the word «territories» excluded the water areas of Hudson Bay, James Bay and Ungava Bay, it would appear that these waters are outside of the Northwest Territories. These water areas are, however, within Canada being held for the benefit of the nation as a whole. Secession by one province may provide a legal basis for it to take away a share of that common area.

Even though it is said that the Québec boundary does not include the islands of Hudson Bay and Hudson Strait, this statement is not necessarily dispositive of all the islands if that term is meant to include all land areas that are surrounded by water at high tide. Islands may be *inter fauces terrae* under the common law definition. That might include tightly interwoven islands fringing the true mainland shore. Thus, such islands may be considered to be so integrated into the land domain that they must be considered part thereof³⁰. One might go further and argue that offshore islands held by the Government of Canada outside of the territory of any province (such as those in the Northwest Territories) are also held for the benefit of the provinces as an element of external sovereignty. Upon the independence of a province islands adjacent to that province might shift to it as it leaves the confederation. This argument could support the inclusion of some islands in Hudson Bay and Hudson Strait and those in subsidiary water bodies in the territory of an independent Québec.

The logic of this argument is further supported if one were to assume that all the provinces of the Canadian confederation became independent, similar to what recently took place in the Soviet Union. Clearly, rights held by the center would not remain in that disembodied government separated from the authority over the adjacent land territory. Rather, these areas would run with the land. If and when portions of the confederation become separated from the center, the

1912, col. 5270.

29. R.S., 1952, Chapter 331.

30. United States v. Louisiana et al (Louisiana Boundary Case), 394 U.S. 11, 64-66 (1969). Québec has sought a demarcation of its boundary to include certain offshore islands as *inter fauces terrae*. See letter from René Dussault, supra note 22.

associated water (and perhaps adjacent island) areas might follow. Thus, even though the Province of Québec may have no direct authority over adjacent water areas and islands of Canada, independence may transfer such areas to the new nation-state. This result could be further supported by arguments based upon equity and the normal assumption that a coastal state has authority under international law over the adjacent maritime zones.

On the other hand, unlike the case of the Soviet Union, secession of Québec would not be expected to be tied to a break up of the entire Canadian confederation. Canada would remain and retain its land and maritime jurisdiction. A seceding province may have no right to areas held by the Canadian government for the benefit of the nation which will continue to exist. The Canadian government could also argue that the acquisition of maritime zones has been the result of Canadian federal efforts³¹ and equity argues for the fruits of those efforts to remain with Canada. This view is further supported if one were to conclude that the waters in question are internal waters under international law and not territorial sea, exclusive economic zone or the like³². Internal waters are the subject of complete state sovereignty. They are absolutely indistinguishable, as a matter of law, from land territory except that they contain fluid at the surface. International boundaries on lakes and rivers may run along the shoreline, giving only one state rights in the waters and not the other³³. As sovereign territory of Canada, these internal waters would remain with Canada unless transferred by treaty to another state. Absent an agreement, Québec would have no legal right under Canadian or international law to a transfer of Canadian waters or land territory outside of the defined boundaries of Québec which do not expressly include the areas in question.

In conclusion, it is hard to reach a definitive answer regarding the maritime areas that would automatically, by operation of general international and/or Canadian domestic law, appertain to an independent nation-state of Québec. Certainly, it would have sovereignty over its internal waters as included within its defined boundaries, but the limits of those internal waters are not settled. Strong legal and equitable arguments can be made for the broader maritime jurisdiction of Québec seaward to the opposite and adjacent boundaries generated from the Canadian land territories that would remain. While the answer to this issue could be obtained by adjudication, this matter is equally amenable to settlement by agreement between Québec and Canada. As the next section of this paper argues, settlement by agreement may be preferable.

31. Offshore Mineral Rights Reference of 1967, 62 W.W.R. at 44, 45, 50.

32. Such a conclusion is reached below with respect to Hudson Bay and perhaps Hudson Strait, but not the Gulf of Saint Lawrence.

33. A.O. Cukwurah, *The settlement of boundary disputes in international law* 45-49, 67-70 (1967).

2. *Limits to the Territorial Solution*

The previous section of the paper has discussed, in general terms, the legal context within which a resolution of the maritime zones of Québec must be considered. There is sufficient domestic and international law to settle the question of how much of the waters adjacent to Québec would appertain to an independent state of Québec. Although the outcome cannot be predicted with any degree of certainty. The uncertain results and the interests involved argue strongly for serious consideration of a negotiated resolution to this matter. Due to the political situation it may, of course, be difficult to resolve these issues by agreement. If, however, these maritime boundary issues were left unresolved or even if they were the subject of adjudication many difficult problems would remain.

International law is predicated on the assumption that, excluding the high seas and perhaps Antarctica, the globe is divided among separate territorial entities called states. Boundaries are drawn to delimit these territories and the sovereign authority exercised by their governments. International law provides rules for delimiting maritime boundaries, although they are not very clear or easily applied. Nevertheless, such boundaries could be drawn, even in the waters adjacent to Québec. Experience has shown that it is rare, however, that the delimitation of maritime boundaries solves all important problems.

In the areas adjacent to Québec, in particular, it is clear that such delimitations would not be the end of the matter. The shores of Québec face on the relatively closed water bodies of Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence. Delimitation would fix which state has authority to prescribe behavior in particular geographical locations. Interests in these water areas are, however, not so easily divisible. Fish are not immobile and are likely to traverse maritime boundaries. Coordination and cooperation between Québec and Canada in fisheries management will be required to maintain these resources. While hard mineral resources may not move, liquid mineral resources, such as hydrocarbons, do migrate. Unitization and joint development arrangements are often necessary in boundary areas³⁴. Even the exploitation of hard minerals may require development of large areas that would only be economically feasible if transboundary sites are developed. Due to the fluidity of water, the protection of the marine environment definitely requires cooperation of states bordering on closed waters. Solutions to these problems would argue for a negotiated settlement that would, at a minimum, put in place the structures necessary for appropriate coordination³⁵.

The navigation interests of Québec argue strongly for a negotiated settlement with Canada. An independent Québec will want to engage in substantial international transportation of cargo and

34. See, Lagoni, «Oil and Gas Deposits Across National Frontiers», 73 AM. JOUR. INT'L. L. 215 (1979).

35. For a full discussion of the value of functional solutions to maritime boundary questions, see D. M. Johnston, *The theory and history of ocean boundary-making* (1988).

passengers. If it were found that Hudson Bay, Hudson Strait, the Gulf of Saint Lawrence and associated subsidiary waters are internal waters of Canada, Québec would be a landlocked state. It could only reach the open sea by passing through the territory of Canada or the United States. Ships navigating to and from Québec would be required to traverse a variety of Canadian maritime zones. Aircraft would have the option of overflying United States land territory. Ground transportation would be required to pass through Canada or the United States.

Canada has been jealous of its right to control foreign navigation in its adjacent waters. When the United States sought to navigate through the Northwest Passage the Canadian reaction was extremely adverse, leading to a serious controversy between the two countries and new and expanded claims of Canadian authority in the area³⁶. Even though innocent passage applies in the territorial sea, Canada sought to maximize its control over foreign traffic. Thus, Mr. Beesley, who was Legal Adviser to the Canadian Department of External Affairs and Ambassador to the Law of the Sea Conference, stated, «in the normal course, in the law as defined in the Geneva Conventions [on the law of the sea], there is no right of innocent passage in internal waters [...] historic waters which are internal waters are not subject to the right of innocent passage [...]»

Canada has taken the position publicly that it does not consider that a passage through any body of water by a ship giving rise to a danger of pollution is an innocent passage. Such a ship is an inherently dangerous object. It represents a threat to the security of the state....Is there nonetheless the right of passage because it is a strait? Our answer...is that it can only have the status of an international strait either by customary development of the law or by conventional law. Under customary development of the law there has been no passage, no usage which would have developed the body of water as an international strait³⁷.

In 1975 the Secretary of State for External Affairs, Allan J. MacEachen expressed the same view that Canada sought the strictest controls over navigation through territorial sea straits and that transit passage through the Northwest Passage would not be recognized, «as Canada's northwest passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the regime of transit does not apply to the Arctic»³⁸.

To avoid any adjudication of Canada's claimed rights to the Arctic waters and the Northwest Passage, Canada withdrew its consent to jurisdiction of the International Court of Justice over

36. See, D. Pharand, *Canada's arctic waters in international law* (1988).

37. House of Commons, 2d Session, 28th Parliament, Standing Committee on External Affairs and National Defence, Tuesday, 7 April 1970, p. 25:19.

38. Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence, House of Commons, 1st Session, 30th Parliament, Issue No. 24, 22 May 1975, 22-5-1975, p. 24:6.

such matters at the time it established a system of straight baselines around the area³⁹. An independent nation-state of Québec could expect similar treatment in its attempts to navigate through the Canadian waters adjacent to its shores absent a binding international agreement on the subject.

While international law does provide certain rights of transit for landlocked states, the exercise of these rights is not fully protected and depends very much on international agreements with the state that must be transited for access to the open sea. The view that landlocked states have a customary law right of transit is found in the early writings of Grotius⁴⁰. More modern scholars maintain that such a right exists, but it is imperfect and unenforceable⁴¹.

Multilateral conventions provide support for this view. The Covenant of the League of Nations contained a general provision on transit and communication⁴². The Barcelona Convention provided foreign state parties with the right of freedom of rail and waterway transit in international trade⁴³. But the limitations left the right far from perfect, permitting the denial of transit rights for almost any reason and suspension to protect legitimate national interests⁴⁴. The General Agreement on Tariffs and Trade (GATT) protects members rights of freedom of transit passage for goods (including baggage) including vessels and aircraft carrying such items. Non commercial items and passengers may not be so protected⁴⁵. Certain regulations and charges may be imposed so long that they do not exceed national treatment. In the first

39. Statement of Mr. Joe Clark, Secretary of State for External Affairs, House of Commons Debates, 1st Sess., 33rd Parliament, 34 Eliz. II, vol. V, 10 September 1985, p. 6464.

40. H. Grotius, *The freedom of the seas* 9-10 (R. Van Mangoffin trans. 1916).

41. Lauterpacht, *Freedom of Transit in International Law*, in *Transactions of the Grotius society* 311, 320 (1958-59); J. Merryman & E. Ackerman, *International law, development and transit trade of landlocked states* 54 (1969); Wani, *An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States*, 22 VA. J. INT'L. L. 627 (1982).

42. League of Nations Covenant, Art. 23(e), printed at George, Crafton, Wilson, *The first year of the league of nations* 57 (1921).

43. Convention and Statute on Freedom of Transit, Done 20 April 1921, Art. 2, 7 L.N.T.S. 11, 27.

44. *[F]or passengers whose admission into its territories is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public health or security, or as a precaution against diseases of animals or plants.... Id.*, Arts. 5 & 7. See Sinjela, «Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law», 12 *Ga. J. Int'l. & Comp. L.* 31, 36 (1982).

45. Art. V, opened for signature 30 Oct. 1947, 61 U.S. STAT. A3 (pt. 5), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1950).

convention that specifically addressed the rights of landlocked states, an interpretive note in the Havana Charter permitted exceptional arrangements (free of most favored nation or national treatment) to be made for transit by landlocked states⁴⁶.

Beginning in the 1950's the right of transit by landlocked states to and through maritime zones was taken up by the Law of the Sea Conferences. The 1958 Convention on the High Seas provides that landlocked states «should have free access to the sea»⁴⁷. This access is to be accomplished by agreement «on the basis of reciprocity»⁴⁸. Only in the 1965 Convention on Transit Trade of Landlocked States is transit by landlocked states denominated as a right⁴⁹. But the exercise of that right is also to be accomplished by agreement between the landlocked and transited state⁵⁰. It does require the facilitation of this transit⁵¹. But the transit state may proscribe transit by certain persons or goods «on grounds of public morals, public health or security, or as a precaution against diseases of animals or plants or against pests»⁵². Few states are parties to this convention»⁵³.

The 1982 Convention on the Law of the Sea is the most recent international agreement to address this question, although it is not yet in force. Article 125 states that [l]and-locked States shall have the right of access to and from the sea [...] [t]o this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport." This right arguably remains imperfect because the «terms and modalities for exercising freedom of transit» are to be determined by agreement between the landlocked state and the transited state⁵⁴. Furthermore, Article 125(3) protects the transited states rights «to take all measures necessary» to protect their «legitimate interests». While the transit rights of the landlocked state may be amenable to compulsory dispute settlement under Part XV of the Convention, the

46. *United Nations conference on trade and development, final act and related documents*, U.N. Doc. A/Conf.2/78, Annex P (Interpretive Notes) Art. 33, para. 6. See Sinjela, *supra* note 44 at 38.

47. Art. 1, done 29 Apr. 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

48. *Id.*, Art. 5.

49. Convention on Transit Trade of Landlocked States, Preamble & Art. 2, done 8 July 1965, 597 U.N.T.S. 42, 44.

50. Preamble, Principle III. See Wani, *supra* note 41 at 634.

51. Convention on Transit Trade of Landlocked States, *supra* note 49 at Arts. 4 & 7.

52. *Id.*, Art. 11(1).

53. Wani, *supra* note 41 at 43.

54. 1982 LOS Convention, Art. 125(1).

imperfect nature of the right gives the landlocked states little solace. The history is clear that transit states have often used their favorable position against the interests of the landlocked state⁵⁵.

If the GATT remains in force and Québec becomes a party to the agreement the freedom of transit for Québec's commercial merchandise will be largely protected. Even under that regime the transit rights would be subject to certain Canadian regulation which may be more intrusive than under the regime of the high seas or even transit or innocent passage through straits.

The assurance of free and safe transit to and from an independent nation-state of Québec (if it is landlocked) will require cooperative arrangements between Québec and Canada. While these arrangements could be reached subsequent to independence, it may be preferable to resolve the transit issues at an earlier stage. Obstacles to transit in the early days of an independent Québec could be critical.

Of course, it is not necessary that Québec will be found to be a landlocked state. If, as I conclude below, the Gulf of Saint Lawrence is not internal waters, access to international ocean navigation for Québec would be assured through the eastern portion of the Gulf and Cabot Strait. If the territorial sea in the Gulf is limited to the normal distance of 12 nautical miles from the normal baseline, areas beyond the territorial sea would be found in the Gulf that would give Québec a corridor beyond its own territorial sea in which the high seas freedoms of navigation and overflight would exist. If the area beyond Québec waters were Canadian territorial sea the rights of innocent passage and innocent passage through straits would assure ocean navigation. Overflight through the Canadian territorial sea outside of straits used for international navigation would require the permission of Canada. There is a good possibility that Cabot Strait could be subject to the regime of transit passage thus requiring freedom of overflight and further limiting Canada's authority to interfere with navigation. The transit passage regime of the 1982 LOS Convention applies to territorial sea straits that are used for international navigation. Passage through the territorial sea of another state, particularly in straits, does, however, place some burdens on the transiting state not found where the high seas freedom of navigation exists⁵⁶.

An alternative, although far less desirable passage may be found in the Hudson Strait area. If the Strait is historic Canadian waters and Ungava Bay were considered to be Québec waters, it may be possible to establish a closing line of Hudson Strait sufficiently to the west of its natural entrance points to provide a corridor of access for Québec to the east. Such a closing line would be possible if established by agreement with Canada. Due to the northern location of these waters, however, this route to the high seas would provide only limited value to Québec.

55. See M. Glassner, *Access to the sea for developing land-locked states* 132 (1970); Merryman & Ackerman, *supra* note 41 at 63; and Sinjela, *supra* note 41 at 31.

56. See 1982 LOS Convention, Arts. 18-32, 39-42.

These circumstances argue for caution on the part of Québec regarding its maritime claims. Its position *vis-a-vis* Canada may be strengthened if it were found that no extraordinary Canadian maritime jurisdiction exists in Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence. In this way the normal maritime regimes generated by coastal geography would attract offshore jurisdiction to Québec unencumbered by historic actions of Canada. Furthermore, the more limited the Canadian jurisdiction in these waters would leave to Québec greater rights of navigation and overflight. The recognition of special Canadian historic rights in these waters might allow Québec to claim some of these rights, but the greater authority of Canada in these waters would necessarily give Canada, which stands between Québec and the open sea, substantial leverage over Québec's access to the sea.

Since control over economic development of resources in all of these waters is in the coastal states regardless of the legal regime, it would appear that special historic status for these waters provides Québec with little real additional value. On the other hand, if special status were combined with a permanently binding agreement between Canada and Québec that gives Québec authority over defined maritime areas adjacent to it and fully protected freedoms of navigation and overflight, Québec would have the best of all possible solutions.

3. International Law Rules for Maritime Boundary Delimitation

In the instant section, the international law regarding maritime boundaries between independent sovereign nation-states is reviewed. An application of those rules follows in the next section of the memorandum.

3.1 The Baseline

As mentioned above, many of the maritime zones of states are measured seaward from a baseline. The customary international law rules for drawing that baseline are codified in the 1982 Convention on the Law of the Sea⁵⁷. Basically, the baseline uses the line of mean low water along the shore of the mainland and islands, closing lines of juridical bays which can be closed by a line or lines totaling 24 nautical miles, closing lines of river mouths, and low tide elevations within 12 nautical miles of the previously described baseline.

A juridical bay is closed by a line drawn between its natural entrance points. Such a bay must be a well-marked indentation containing landlocked waters, meet the semicircle test, and be able to be closed by a line or series of lines that do not exceed a total of 24 nautical miles in length⁵⁸. The codifications of this law found in the 1982 Convention on the Law of the Sea

57. Articles 3-15.

58. 1982 LOS Convention, Art. 10.

and the 1958 Convention on the Territorial Sea and the Contiguous Zone apply juridical bay status to «bays the coasts of which belong to a single state»⁵⁹. No provision for multiple state juridical bays is present and the codification appears to be a comprehensive treatment of the baseline rules. The only exceptions allowed are in regard to historic bays and systems of straight baselines⁶⁰.

If a water area meets all the tests for a juridical bay (single coastal state, well-marked indentation, landlocked waters, and semi-circle test) but its natural entrance points cannot be connected by a line or lines not exceeding 24 nautical miles, a 24 mile baseline may be delimited in the bay to enclose a maximum area of waters⁶¹. This is sometimes called the «fall-back line».

Questions have arisen as to the exact location of the closing lines for rivers and juridical bays. One must locate the natural entrance points to these internal waters between which the closing line is drawn. This is usually based upon coastal geography found by an examination of nautical charts of the areas in question⁶². One seeks to determine the line that delimits the entry into the geographical area. One objective test that I find particularly attractive and helpful is the, so-called, forty-five degree test which identifies the point on the shore at the entrance where the general trend of the coastline faces more on the interior water body than the exterior waters. This test, *requires that two opposing potential...headland points be selected and a closing line drawn between them. Another line is then drawn from each selected headland to the next landward headland on the same side. If the resulting angle between the initially selected closing line and the line drawn to the inland headland is less than 45 degrees, a new inner headland is selected and the measurements repeated until both [...] headlands pass the test*⁶³.

59. 1982 LOS Convention, Art. 10.1; 1958 Convention on the Territorial Sea and the Contiguous Zone, *opened for signature*, April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, Art. 7.1.

60. 1982 LOS Convention, Art. 10.6. Nevertheless, Bouchez has argued in favor of juridical bay status for multi-state bays. L.J. Bouchez, *The regime of bays in international law* 198 (1964). He admits, however, that the majority of writers are opposed. *Id.* at 174. Strohl proposed a revision of the juridical bay article to include the closure of two or more state bays by agreement of the bay states. This attracted no attention when the matter was revisited in the negotiations leading to the 1982 LOS Convention. M. Strohl, *The international law of bays* 405 (1963).

61. 1982 LOS Convention, Art. 10.

62. See A. Shallowitz, *I shore and sea boundaries* 218-225 (1962); 4 WHITEMAN'S DIGEST 209-213 (1965).

63. United States v. Maine et al (Rhode Island and New York Boundary Case), 469 U.S. 504, 522 n. 14, 105 S.Ct. 992 n. 14, 1003 (1985). See P. Beasley, *Maritime limits and baselines: a guide to their delineation* 16-17 (The Hydrographic Society Special Publication No. 2 1977); R.

In addition, to the normal baseline a coastal state may establish a system of straight baselines connecting points on the normal baseline if the coast is deeply indented or fringed by islands⁶⁴.

Another method for defining the baseline is by use of the doctrine of historic waters. If historic internal water status is established the territorial sea will be measured seaward from the closing line of the water body. This doctrine permits a coastal state to establish as internal waters a water body that would not satisfy the normal rules for internal water status. For this to be accomplished under international law proof must be made that the coastal state has: (1) claimed and effectively exercised sovereignty over the area as internal waters, (2) exercised that authority continuously over a substantial period of time, and (3) obtained the acquiescence or tolerance of the claim by the international community of states. A state may, alternatively establish historic waters as territorial sea, not internal waters. While in internal waters foreign states must always obtain permission to navigate, in territorial seas the right of innocent passage applies⁶⁵. Whether the historic status is territorial sea or internal waters depends on the nature of the claim and the jurisdiction exercised pursuant to that claim⁶⁶.

Hodgson and L. Alexander, *Towards an objective analysis of special circumstances* 10 (Law of the Sea Institute Occasional Paper No. 13, 1972). I conceived this test while working on the United States Baseline Committee delimitation of the United States baselines and territorial sea in the early 1970's. The Geographer of the United States State Department, Dr. Robert Hodgson, put it into practice in this exercise.

64. 1982 LOS Convention, Art. 7.

65. See statement of Mr. Trudeau, House of Commons Debates, 7 March 1969, 1st Session, 28th Parliament, 17 ELIZ. II, Vol. VI, p. 6339.

66. The literature on historic bays and waters is extensive. See *Juridical Regime of Historic Waters including Historic Bays*, U.N. Doc. A/CN.4/143 (1962); N. Barrie, «Historic Bays», 6 *Comp. & L. J. So. Africa* 39 (1973); L. Goldie, «Historic Bays in International Law», 11 *Syr. J. Int'l. & Comm.* 211 (1984); Strohl, *supra* note 60; Bouchez, *supra* note 60; *Historic Bays, Memorandum by the Secretariate of the United Nations*, U.N.Doc. A/Conf.13/1 (1957). Some of this literature has included lists of historic waters. See Strohl, *supra* at 253-68; Bouchez, *supra* at 215-37; I *United Nations conference on the law of the sea* 3-8 (1958); 4 *Whiteman's digest* 233-58 (1965). Prescott has argued that these lists are not persuasive. J.R.V. Prescott, *The maritime political boundaries of the world* 61 (1985). Judicial opinions on historic waters include: *Direct U.S. Cable Co. v. Anglo-American Cable Co.*, 2 *App. Cas.* 394 (P.C. 1877) (Conception Bay); *North Atlantic Coast Fisheries Case* (Gr.Brit. v. U.S.), *Hague Ct. Rep.* (Scott) 141 (Perm.Ct.Arb. 1916)(Canadian North Atlantic Coast); *The Fisheries Case* (U.K. v. Norway), 1951 I.C.J. REP. 116 (Norwegian straight baselines); *U.S. v. Alaska*, 422 U.S. 184 (1975) on remand 519 F. 2d 1376 (1975) (Cook Inlet); *Stetson v. United States* (The Alleganean), (Second Court of Commissioners for Alabama Claims, 1882) in J. Moore, *IV Intl. Arbs. To which the U.S. has been a party* 4332 (1898)(Chesapeake Bay); *Alabama and Mississippi Boundary Case*, *United States v. Louisiana et al*, 470 U.S. 93 (1985) (Mississippi Sound).

While a juridical bay may only be closed if it is within the coasts of a single state, it is not clear that such a limitation exists for historic waters. It is true that virtually all such waters are found along the coasts of a single state. However, the Award in the case of the *Gulf of Fonseca* before the Central American Court upheld the historic territorial sea status of the Gulf even though it lies within the coasts of El Salvador, Honduras, and Nicaragua⁶⁷. Since there are few determinations by international tribunals on historic waters this award is particularly salient⁶⁸. The area surrounding the Gulf of Fonseca was originally held by a single state, Spain and then the Federal Republic of the Center of America, which established the historic waters status of the Gulf. When the Republic was divided the historic rights were implicitly transferred to the three states as a community beyond a three mile marginal belt. Despite Nicaragua's attempt to unilaterally change the legal relationship by granting the United States the right to establish a naval base on the Nicaragua portion of the Gulf, the Court affirmed the co-ownership of the three states, thus requiring agreement to effectuate any changes⁶⁹.

Historic water status is a form of international prescription and the proponent of such exceptional status has a heavy burden of proof. The putative international commons is displaced by the coastal state jurisdiction through the establishment of a new *status quo* which becomes accepted by the international community. A wrongful taking at the beginning becomes legal and rightful through the workings of prescription, usage, and estoppel. Certainly, the claim of sovereignty must be public and objectively available to foreign states potentially interested in the maritime area. Actual proof of knowledge is not required. Thus, the United Kingdom was presumed to know of the Norwegian system of straight baselines based upon the international notoriety of the claims⁷⁰. Effective exercise of the requisite quantum of coastal state authority by public officials over time is required in order to establish the new *status quo* and to effectively communicate this to the international community⁷¹. The length of time must be historic. No specific time period has been fixed but the period must be substantial. Strohl wrote in 1963 that the claim to historic waters status of Peter the Great Bay was the shortest length of time that had

67. The Republic of El Salvador v. The Republic of Nicaragua, 11 AM. JOUR. INT'L. L. 700-717 (1917). This finding may have been unnecessary. See Blum, *Historic titles in international law* 308, 309 (1965).

68. Arguments that the case is an anomaly have been made by Gidel, *Le droit international public de la mer, le temps de paix*, t.3/II, Librairie Édouard Duchermin 626, 627 (1981).

69. For brief analyses of this case see Bouchez, *supra* note 60 at 209-213; Strohl, *supra* note 60 at 376-380; and 4 *Whiteman's digest* 235-36 (1965).

70. The Fisheries case, *supra* note 66 at 134, 138.

71. See The Juridical Regime of Historic Waters, *supra* note 60 at paras. 85-86; Bouchez, *supra* note 66 at 214.

been credibly alleged. That assertion dated back to 1872⁷². Bouchez, who takes a liberal view on all bay claims, argues that the period of time is relative to the circumstances of international communications, the claim, the exercises of sovereignty, and the evidence of acceptance by the international community. He might permit a somewhat shorter period of time in otherwise stronger cases⁷³.

Effective protest by members of the international community will prevent an historic waters claim from being perfected. Some have argued that mere paper objections are not sufficient and that all available means must be brought to bear to prevent perfection⁷⁴. Such a rule would, of course, encourage physical conflict which is discouraged, if not forbidden by international law⁷⁵. However, the communication of a protest followed, if necessary, by conduct consistent with the protest even if it avoids actual conflict would be effective⁷⁶. Vital interests of the coastal state in the waters would help to supplement the proof but will not provide an independent basis for historic water status⁷⁷.

The geographical configuration of the water area has been viewed as a relevant factor. Thus, in the *North Atlantic Coast Fisheries case*, Dr. Drago argued in dissent, *that a certain class of bays, which might be properly called historic bays...form a class distinct and apart and undoubtedly belong to the littoral country, whatever their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension*⁷⁸.

72. Strohl, *supra* note 60 at 392-93.

73. Bouchez, *supra* note 60 at 256-57.

74. Pharand, *Canada's Claim to Sovereignty over the Arctic, in Conflict resolution and the future of nato: the Canada - United States experience* 43, 44 (D. Dallmayer ed. 1989).

75. Charter of the United Nations, 59 U.S. STAT. 1031, T.S. 993, 3 BEVANS 1153, Arts. 2.3, 2.4. 33.

76. Bouchez, *supra* note 60 at 278.

77. J. Spinnato, «Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra», 13 *Ocean dev. & Int'l. L.* 65, 79 (1983); *The Juridical Regime of Historic Waters*, *supra* note 66 at para. 140; M. Bourquin, *Les baies historiques* 151 (1952); D. Pharand, *supra* note 36 at 103 (1988). *Contra* Francioni, «The Status of the Gulf of Sirte in International Law», 11 *Syr. J. Int'l. L. & Com.* 307 (1984).

78. *North Atlantic Coast Fisheries case* (Gr. Brit. v. U.S.), Hague Ct. Rep. (Scott) 141, 195, 199-200 (Perm.Ct.Arb. 1916)(Drago, L., Dissenting).

The geographical location and configuration was used by the United States Supreme Court in the Mississippi Sound decision to support historic bay status.

*Mississippi Sound historically has been an intercoastal waterway of commercial and strategic importance to the United States. Conversely, it has been of little significance for foreign nations [...] It is a cul de sac, and there is no reason for an ocean going vessel to enter the Sound except to reach the Gulf ports [...] [It was historically important] to vital interests of the United States [...]*⁷⁹

However, in the previous Cook Inlet decision the *cul de sac* nature of Cook Inlet did not lead to a conclusion that Cook Inlet was an historic bay⁸⁰.

The International Court of Justice judgment in the *Fisheries Case* focuses upon the economic relationship of the population along the shore and the claimed water area to support an historic water status⁸¹.

3.2 *The Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf*

Seaward from the baseline are a variety of special zones over which the coastal state has authority. International law presumes that all states have a right to such zones. The first such zone is the territorial sea which may extend from the baseline to a maximum of 12 nautical miles. In that area the coastal state has sovereignty⁸². Navigation by innocent passage of foreign vessels is protected in the territorial sea⁸³. A territorial sea strait will be subject to innocent passage through straits⁸⁴. A strait used for international navigation will be subject to transit passage according to the 1982 Law of the Sea Convention, Articles 37-44. But questions exist whether transit passage is a rule of customary international law outside of the

79. Mississippi Boundary Case, *supra* note 66 at 102.

80. United States v. Alaska, *supra* note 66.

81. Fisheries case, *supra* note 66 at 133.

82. 1982 LOS Convention, Arts. 2 & 3.

83. 1982 LOS Convention, Arts. 17-26.

84. 1982 LOS Convention, Art. 45.

Convention⁸⁵. A state may establish a greater area of territorial sea jurisdiction over a water body as historic territorial sea waters.

Beyond the territorial sea a coastal state also may claim a contiguous zone reaching seaward a maximum of 24 nautical miles from the baseline. Within that zone a coastal state may enforce laws and regulations to protect customs, fiscal, immigration and sanitary interests of the coastal state⁸⁶.

Beyond the territorial sea a coastal state may claim an exclusive economic zone (or fisheries zone) which may reach seaward a maximum of 200 nautical miles from the baseline. Within that zone the coastal state has jurisdiction over all resource development activities, scientific research, and protection of the environment. The rights of navigation and overflight as found on the high seas are protected in that area beyond the territorial sea⁸⁷. The sovereign rights of the coastal state to explore and exploit the resources of the continental shelf begin at the seaward edge of the territorial sea and run to the limits of the continental margin or the 200 mile limit, whichever is further⁸⁸.

3.3 *Maritime Boundaries Between Opposite and Adjacent States*

Since states are not isolated and maritime zones extend for some distance offshore, potential maritime claims of adjacent and opposite states often overlap. In those circumstances international law determines the location of the maritime boundary. That law calls for states to settle their maritime boundaries by agreement. In the absence of agreement the law will determine the location of the line but here has been much dispute over the substance of the rule.

In theory, all maritime boundaries already exist and all that is required is to locate them⁸⁹. In fact, in the absence of an existing delimitation the decision-maker must construct a line for the first time.

85. See Charney, «The United States and the Law of the Sea after UNCLOS III - The Impact of General International Law», 46 *L. & contemp. Probs.* 37, 44-48 (1983).

86. 1982 LOS Convention, Art. 33.

87. 1982 LOS Convention, Arts. 55-75.

88. 1982 LOS Convention, Arts. 76-85.

89. North Sea Continental Shelf Cases, (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969 I.C.J. REP. 3, 23; The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 *Int'l. Leg. Mat.* 398, 422-23 (para. 78) (1979).

3.3.1 Relevant Conventions

The 1958 Convention on the Territorial Sea and the Contiguous Zone specifies a rule that is applicable to the territorial sea:

Where the coasts of two States are opposite or adjacent to each other, neither of the States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision⁹⁰.

Canada is not a party to this convention.

The Convention on the Continental Shelf specifies rules for the delimitation of maritime boundaries over the continental shelf (Art. 6):

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land⁹¹.

90. (into force 10 Sept. 1964), 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, Art. 12. 1.

91. (into force 10 June 1964), 499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. 5578, Art. 6.

Canada is a party to this convention with reservation and statement. In 1969 the International Court of Justice specifically held that the rule found in the Continental Shelf Convention did not then reflect customary international law⁹².

The 1982 Convention on the Law of the Sea is the most modern effort to codify the maritime boundary law in an international agreement. The Convention has not entered into force for any nation. Canada signed that Convention on 10 December 1982 but has not yet submitted an instrument of ratification. The relevant provisions of the 1982 Law of the Sea Convention, are as follows:

Article 15

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Article 74

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the [third party dispute settlement] procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in the spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

92. North Sea Continental Shelf Cases, 1969 I.C.J. 3 at 45.

Article 83

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the [third party dispute settlement] procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in the spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

3.3.2 The Case Law

Canada was a party to the *Gulf of Maine* case before the International Court of Justice⁹³. The other modern international law cases on maritime boundaries include: *North Sea Continental Shelf Cases*⁹⁴; *The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf*⁹⁵; *Case Concerning the Continental Shelf*⁹⁶; *Case Concerning the Continental Shelf*⁹⁷; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf*⁹⁸; and *Maritime*

93. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246.

94. Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969 I.C.J. REP. 3.

95. Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398 (1979).

96. (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. REP. 18.

97. (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13.

98. (Tunisia/Libyan Arab Jamahiriya), 1985 I.C.J. REP. 192.

*Boundary between Guinea and Guinea-Bissau*⁹⁹. There is a substantial literature on maritime boundary law¹⁰⁰.

3.3.3 The Norm

A brief, non-technical, statement of the modern ocean boundary law might be as follows. International law does not require that maritime boundaries be delimited in accordance with any particular method, rather, it requires that they be delimited in accordance with equitable principles taking into account all of the relevant circumstances of the case in order to produce an equitable result¹⁰¹. The equitable principles are very indeterminate and the relevant circumstances are theoretically unlimited. The indeterminacy of the legal rule was most graphically stated in the result oriented words of the International Court of Justice in the *Case Concerning the Continental Shelf*:

It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term «equitable principles» cannot

99. 15 INT'L. LEG. MAT. 252 (1986).

100. Much of that literature is listed in T. McDorman, K. Beauchamp, D. Johnston, *supra* note 35. See also P. Weil, *Perspectives du droit de la délimitation maritime* (1988) [in English, *The law of maritime boundaries - reflections* (1989)]; S.P. Jagota, MARITIME BOUNDARY (1985); *International maritime boundaries*, *supra* note 5. Writings on this subject by the instant author include: «The Delimitation of Ocean Boundaries», 18 *Ocean dev. & Int'l. L.* 497 (1987), and in *Rights to oceanic resources* 25 (D. Dallmeyer and L. De Vorsey, Jr. eds. 1989); «Ocean Boundaries Between Nations: A Theory for Progress», 78 AM. JOUR. INT'L. L. 582 (1984); «The Offshore Jurisdiction of the States of the United States and the Provinces of Canada--a Comparison», 12 *Ocean dev. & Int'l. L.* 301 (1983), and in *The law of the sea and ocean industry: new opportunities and restraints* 426 (D. Johnston and N. Letalik eds. 1984); and *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AM. JOUR. INT'L. L. 28 (1981).

101. *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. REP. 18, 59-60; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, 1984 I.C.J. REP. 246, 293, 299, 339. *Maritime Boundary between Guinea and Guinea-Bissau*, 15 INT'L. LEG. MAT. 252, 289 (para. 88) (1986); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. REP. 13, 38.

*be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result*¹⁰².

In the subsequent judgment in the *Case Concerning the Continental Shelf*, the Court seemed to indicate that it was backing away from this extremely result oriented approach:

*Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application*¹⁰³.

Notwithstanding these assurances writers are still of the view that the application of maritime boundary law to any particular circumstance is relatively indeterminate¹⁰⁴. Nevertheless, there appears to be a pattern of analysis that has developed in the treatment of maritime boundary cases, regardless of whether they involve the delimitation of a continental shelf boundary only, or the delimitation of a single boundary for the 200 mile zone and the continental shelf¹⁰⁵.

This pattern may be described, more or less, as follows: First, the tribunal describes generally the area in which the boundary dispute arises. Second, it searches the record to determine whether the parties have agreed to a specific boundary, either in a binding international agreement or in practice. If that fails, the tribunal proceeds, in the third step, to state the rule of law for maritime boundary delimitations when there is no agreed delimitation. That rule is variously described as requiring that the boundary is to be delimited by practical methods in accordance with equitable principles (or criteria) taking into account the relevant circumstances (or factors) in order to produce an equitable result. Fourth, the tribunal reviews all the arguments of the parties in order to determine what relevant circumstances are to be considered. By the end of this third step, it finds, inevitably, that all circumstances other than the geography of the shoreline are not relevant.

102. (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. REP. 18, at 59. *See also* Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 290, 312-13.

103. (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13 at 39.

104. Weil, «Geographical Considerations in Maritime Delimitation», in *International maritime boundaries*, *supra* note 5.

105. *See* Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 326; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13, 46.

Having limited the relevant circumstances to geography, the tribunal proceeds to the fifth step during which it simplifies the geographic circumstances and produces a geometric construct of the area and the shoreline related to the boundary dispute. In the sixth step, the tribunal uses this geometric construct and various mathematical computations to generate a provisional boundary line. Seventh and lastly, that line is checked against the many circumstances that were initially rejected and the rule of proportionality to see if the proposed line is not inequitable. Small islands or the proportionality test might give rise to some mathematically computed adjustments of the line. Other non-geographic facts appear to be unable to mandate an adjustment¹⁰⁶.

3.3.4 *The Equidistant Line as a Rule of Law*

3.3.4.1 *The 1958 Conventions and Subsequent Cases*

There is no requirement that any boundary be delimited in accordance with the rule of equidistance. The 1958 Conventions were often assumed to require a preference for the equidistant line¹⁰⁷. This preference, however, has not been generally applicable, particularly when both parties are not bound by the 1958 Conventions. The international tribunals have been very resistant to stating a rule that places equidistance in a preferred place. Thus, in the *North Sea Continental Shelf Cases*, the Court found that the equidistant rule found in the 1958 Conventions had not emerged as customary international law¹⁰⁸. It declared that in the instant case the boundary might appropriately diverge from that line¹⁰⁹. In the *Anglo/French* case the 1958 conventions were binding for most of the boundary but the tribunal found a unified equidistance/special circumstances rule which gave no particular preference to equidistance¹¹⁰. In the *Libya/Tunisia* case, the International Court of Justice took special pains to disparage the

106. See *The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf*, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 455 (para. 248) (1979).

107. See *North Sea Continental Shelf Cases*, 1969 I.C.J. REP. 3 at 20, 24-25, 28-45; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. REP. 18, at 78-79; and *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, 1984 I.C.J. REP. 246, at 297, 300-303.

108. *North Sea Continental Shelf Cases*, 1969 I.C.J. REP. 3, at 45.

109. *Id.* at 49-54.

110. *The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf*, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 420-21 (paras. 65-69) (1979).

equidistant rule¹¹¹. And in the *Gulf of Maine* case the chamber of the Court wrote that proximity which is at the foundation of equidistance, is not to be preferred as a basis for delimitation¹¹².

3.3.4.2 *The 1982 Convention on the Law of the Sea*

One critical evidence of the movement away from the equidistance principle is the text of the 1982 Convention on the Law of the Sea. If the maritime boundary provisions in that convention are compared to those found in the 1958 conventions, one will note that the equidistance principle was found in the 1958 conventions' provisions on boundaries in the territorial Sea and those on boundaries over the continental shelf. The 1982 LOS Convention retains the inferred preference for equidistance in the provision on the territorial sea boundary, but it is intentionally omitted in the provisions on the boundaries in the exclusive economic zone and the continental shelf. The records of the Law of the Sea Conference show that the change was a result of pressure from a significant group of states that were hostile to the equidistant line. The reference in those articles to rules of international law may, however, neutralize the provision and may provide a reference back to the equidistance principle.

3.3.4.3 *Equidistance in Modern Cases and Practice*

Despite these developments, modern international boundary law clearly places a higher regard for the equidistant line in two geographical circumstances: areas close to the coasts of states, and boundaries that are between opposite states. In the narrow territorial sea the equidistant line provides its key advantage of allocating to the coastal states the areas that are more proximate to their land territory. In these narrow zones there is less of a risk that great distortions will occur in the boundary line due to some small geographical projection of one state or another¹¹³. Furthermore, security interests of the coastal states in near shore areas place a premium on keeping foreign territorial waters as distant as possible. The equidistant line assures each state that this distance is realized¹¹⁴.

111. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. REP. 18, at 78-79.

112. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 296-300.

113. See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 302.

114. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13, 52-55; Maritime Boundary between Guinea and Guinea-Bissau, 15 INT'L. LEG. MAT. 252, 302 (para. 124) (1986).

Recent cases appear to have strengthened the view that the equidistant line is more likely to be found appropriate in the case of boundaries in which the disputing states' coastlines are opposite rather than adjacent¹¹⁵. Thus, the admitted starting point for the delimitation of the opposite boundary situations in the Gulf of Maine and in the boundary between Libya and Malta was the equidistant line, although in both cases the final line in those areas was modified somewhat¹¹⁶. No rule for distinguishing between opposite and adjacent coasts has been established, although the courts have classified coasts in specific cases¹¹⁷.

Among the most recent International Court of Justice maritime boundary judgments is the *Libya/Malta* case. It seems to have enhanced the appropriateness of equidistance. The Court suggested that proximity (equidistance) is particularly appropriate in situations where the contesting states are separated by a distance less than 400 nautical miles. In those areas the authority of the coastal state is derived from the regime of the exclusive economic zone which is based strictly upon the distance criteria¹¹⁸.

As the distance from land increases and the boundary area appears to be one more of adjacency than oppositeness, there is a greater risk that the equidistant line would create a boundary that is viewed as inequitable. This is particularly true when the coastline is irregular due to convexities, concavities, offshore islands, or offshore low tide elevations. Accordingly, one sees less willingness on the part of decision makers to articulate any preference to equidistance in such circumstances. They may ultimately find, however, that the objectivity of equidistance,

115. North Sea Continental Shelf Cases, 1969 I.C.J. REP. 3, at 45.

116. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 325, 333-337; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13, 47, 51, 55. See also The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 424-25, 453 (paras. 87, 239) (1979); Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. REP. 13, 47-53; and Maritime Boundary between Guinea and Guinea-Bissau, 15 INT'L. LEG. MAT. 252, 290 (para. 91) (1986).

117. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 445 (para. 204) (1979); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. REP. 246, 325, 331.

118. 1985 I.C.J. rep. 13, 46-47.

the value of a division in accordance with proximity, and a relatively equal sharing of the areas makes the use of equidistance or an approximation thereof particularly appropriate¹¹⁹.

International practice appears to support the use of the equidistant line. The International Court of Justice pointed out in its 1969 Judgment in the *North Sea Continental Shelf Cases* that most ocean boundary agreements known at the time of that case used the equidistant line¹²⁰. Tribunals have referred to maritime boundary agreements. While some have found that the equidistant line predominates, others have found it on the wain. None have found that there is state practice that has established it as a norm¹²¹.

International ocean boundary agreements by coastal states have recently been comprehensively collected and analyzed in *INTERNATIONAL MARITIME BOUNDARIES* (J. Charney and L. Alexander eds. publication expected 1992). This study confirms the conclusion based upon state practice that there is insufficient evidence to conclude that the use of the equidistant line is mandated by international law¹²². It does demonstrate, however, that the quantitative predominance of equidistance has continued.

3.3.5 Non-Geographic Considerations

In the first modern maritime boundary case, the International Court of Justice declared that in a maritime boundary delimitation many facts were appropriate to take into account.

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the

119. See *The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf*, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 443-44, 455 (paras. 196-99, 248-49) (1979); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, 1984 I.C.J. REP. 246, at 333, 329-30, 335-39.

120. *North Sea Continental Shelf Cases*, 1969 I.C.J. REP. 3, at 43-45.

121. *The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf*, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 424 (para. 85)(1979); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. REP. 13, 38.

122. See Charney, «Introduction and Conclusions», in *International maritime boundaries*, supra note 5; and Legault and Hankey, «Method, Oppositeness and Adjacency, and Proportionality in Maritime Delimitation», in *International maritime boundaries*, supra note 5.

*balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others*¹²³.

In the *North Sea* cases the Court also identified a number of specific considerations:

. The geology of the shelf «in order to find out whether the direction taken by certain configurational features should influenced delimitation because, in certain localities, they point up the whole notion of the appurtenance of the continental shelf to the state whose territory it does in fact prolong»¹²⁴.

. The geographical configuration of the coastline¹²⁵. In particular, the use of equidistance line leads to unreasonable results when the coastline is concave or convex. «So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity»¹²⁶.

. The unity of any deposits in order to avoid uncoordinated exploitation of the continental shelf resources by two states¹²⁷.

. A reasonable degree of proportionality between a state's coastline and the extent of the continental shelf appertaining to it¹²⁸.

This open ended list of relevant circumstances led litigants to devote considerable attention to non-geographic factors. In the *Anglo/French* case a seabed trench was argued to be relevant, as well as navigation for military and economic reasons¹²⁹. In the *Libya/Tunisia* case the litigants devoted much attention to geological and geomorphological arguments, as well as the

123. North Sea Continental Shelf Cases, 1969 *I.C.J. rep.* 3 at 50. See The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 *Int'l. Leg. Mat.* 398, 421 (para. 70) (1979).

124. North Sea Continental Shelf cases, 1969 *I.C.J. rep.* 3 at 51.

125. *Id.* at 51.

126. *Id.* at 49.

127. *Id.* at 51-52.

128. *Id.* at 52.

129. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 *Int'l. Leg. Mat.* 398, 428, 437-38, 439, 442, 444-445 (paras. 106-09, 161-66, 171, 185, 188, 197-202) (1979).

to history of fishing and petroleum development in the area¹³⁰. In the *Gulf of Maine* case, the United States relied heavily on geomorphological, fishing resource and environmental facts, while Canada focused on economic arguments¹³¹. Economic, geologic, and security interests were presented in the *Case Concerning the Continental Shelf* without success¹³². The same is true in *Maritime Boundary between Guinea and Guinea-Bissau*¹³³. While these arguments may have played some role in the decisions, a review of all of them will show that the decision-makers did not admit to their usefulness and in some cases disregarded them totally.

No decision completely forecloses the arguments as potentially relevant in some future case. But advocates may have to carry the burden of proving that the boundary which was determined on the basis of geographic facts was «radically inequitable»¹³⁴. Non-geographic factors may be almost completely irrelevant in all cases of boundary delimitations within 200 nautical miles from the coastline¹³⁵. These arguments, however, are still made in order to enhance a case for the equity of a party's position, not as a primary basis for the delimitation.

The INTERNATIONAL MARITIME BOUNDARY study established that no pattern or practice in the negotiated maritime boundary agreements could be found to support the utilization of any non-geographic factor as a matter of law¹³⁶. Kwiatkowska did demonstrate, however, that these factors have not been totally ignored and they do play a useful role in some circumstances¹³⁷.

130. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 *I.C.J. rep.* 18, 50-58, 73-74.

131. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 *I.C.J. rep.* 246, 273-74, 276-78, 327, 329, 340-44.

132. (Libyan Arab Jamahiriya/Malta), 1985 *I.C.J. rep.* 13, 34, 40-42.

133. 15 *Int'l. Leg. Mat.* 252, 289-90, 299-300, 302 (paras. 89, 115, 122, 124) (1986).

134. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 *I.C.J. rep.* 246, 342.

135. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 *I.C.J. rep.* 13, 33, 55.

136. Charney, «Introduction and Conclusions», in *International maritime boundaries*, *supra* note 5.

137. Kwiatkowska, «Economic and Environmental Considerations in Maritime Boundary Delimitations», in *International maritime boundaries*, *supra* note 5.

3.3.6 Tacit Agreement, Estoppel, Acquiescence, and Modus Vivendi Line Considerations

The *Libya/Tunisia* Judgment emphasized the role that may be played by past behavior of the contesting states. In that case, the Court relied heavily on a so-called *modus vivendi* line which it found in the history of the boundary dispute. The Court identified a series of actions by the sovereigns over a long period of time which appeared to use lines in approximately the same location for the unofficial boundary. The Court did not find that the history established the boundary as a matter of contract, tacit agreement, estoppel, or acquiescence. Rather, it found that the history identified a circumstance which showed an equitable location of the line¹³⁸. Even when Tunisia went back to the Court to show that the Court had been mistaken about the locations of some of the historically used lines, the Court stuck with its decision on the ground that the general implication of all the lines showed the equitableness of its delimitation¹³⁹.

A similar argument was made by Canada in the *Gulf of Maine* case based on statements and actions of some United States government officials and private companies exploring the area. This argument was not successful in that case largely because the circumstances relied upon took place shortly before the litigation and were short lived¹⁴⁰.

3.3.7 Geographical Circumstances

3.3.7.1 The Inequities of an Equidistant Line

The question thus arises, how does one argue on the basis of geography that an area appertains to one coastal state rather than another. One factor is proximity and this is captured by the pure equidistant line.

The principal problem with the equidistant line is the fact that there may be geographical circumstances in which proximity to the coastline creates inequities (or special circumstances). Such a situation is presented when a small offshore island or protrusion causes the equidistant line to curve substantially in one direction to the great disadvantage of the state that does not

138. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 *I.C.J. rep.* 18, 65-77, 83-86.

139. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf, (Tunisia/Libyan Arab Jamahiriya), 1985 *I.C.J. rep.* 192.

140. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 *I.C.J. rep.* 246, 280-88, 303-312.

have sovereignty over that island or protrusion¹⁴¹. Another classical situation is presented when the coastline is generally concave such that a state in the middle of the concavity is squeezed by the convergence of equidistant maritime boundaries drawn between the state in the middle and the states on each side. This is exacerbated when the coastlines of the states on the sides are convex. As a result of such a delimitation, the state in the middle will find itself with little or no offshore area¹⁴². Clear inequities of the equidistant line may be presented in other geographical situations¹⁴³.

When these circumstances are found to be present the decision-makers have used other methods of construction or modified the equidistant line in order to diminish the effect of the circumstance. Thus, the effect of islands have been halved¹⁴⁴. Fictitious coastlines have been constructed and the boundary delimited on the basis of that construction¹⁴⁵.

141. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 INT'L. LEG. MAT. 398, 454-456 (paras. 243-253) (1979); Case Concerning the Continental Shelf, (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. rep. 13, 48, 50-53; Maritime Boundary between Guinea and Guinea-Bissau, 15 Int'l. Leg. Mat. 252, 293 (para. 98) (1986).

142. North Sea Continental Shelf Cases, 1969 I.C.J. rep. 3, at 49; Maritime Boundary between Guinea and Guinea-Bissau, 15 Int'l. Leg. Mat. 252, 294-95 (paras. 102-04) (1986). See also The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 Int'l. Leg. Mat. 398, 422, 424, 426 (paras. 76, 86, 95) (1979); Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. rep. 13, 44.

143. See Weil, «Geographical Considerations in Maritime Delimitation», in *International maritime boundaries*, supra note 5; Bowett, «Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations», in *International maritime boundaries*, supra note 5.

144. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 Int'l. Leg. Mat. 398, 455 (para. 251) (1979); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. rep. 246, 336-37.

145. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. rep. 18, 88-90; Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 I.C.J. rep. 246, 333; and Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. rep. 13, 51-52.

3.3.7.2 Proportionality

One of the considerations that often is taken into account in these maritime boundary delimitations is the result of the, so-called, proportionality test. That test traditionally compares the ratios of the areas allocated to the contesting states by a potential maritime boundary to the ratios of the coastlines of the relevant states in the boundary area. If the ratios are not comparable, the potential maritime boundary may be suspect. Alternative boundaries which better satisfy the proportionality test may be given further consideration¹⁴⁶.

Recent decisions have used a variant on the traditional proportionality rule when dealing with open areas. After the ratio of the relevant coastlines was calculated they used linear measurements to judge the appropriateness of the division. Thus, in the *Libya/Malta* case the linear measure was based on a line drawn between the coastline of the two opposite states and the point that the potential boundary line crossed that line. The lack of proportionality was used as a justification for a shift in the boundary line¹⁴⁷. Similarly, in the *Gulf of Maine* case a line was drawn between the headlands of the Gulf and the point that the potential boundary line crossed that line. Again, the lack of appropriate proportionality justified a shift in the boundary line¹⁴⁸.

4. The Delimitation of Québec's Maritime Zones

In the previous sections of this paper I have reviewed the general legal context within which the maritime boundaries of Québec would be established. It is the purpose of this section to address in more detail the geographical extent of the potential maritime boundaries of Québec. This section will address the three regions in which Québec may have maritime jurisdiction, the Gulf of Saint Lawrence, Hudson Bay and Hudson Strait.

146. North Sea Continental Shelf Cases, 1969 *I.C.J. rep.* 3, 52; Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 *I.C.J. rep.* 18, 91; Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 *I.C.J. rep.* 246, 322, 323, 334-337; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 *I.C.J. rep.* 13, 44-45, 49.

147. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 *I.C.J. rep.* 13, 52.

148. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States), 1984 *I.C.J. rep.* 246, 335-36.

4.1 The Gulf of Saint Lawrence

4.1.1 Description of the Québec Boundary

There is no clear statutory description of the boundary of Québec in the Gulf of Saint Lawrence. The Royal Proclamation of 7 October 1763 proclaims that the boundary of the Government of Québec in this area,

*[...] passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John*¹⁴⁹.

This boundary closes the mouth of the Saint Lawrence River on the western side of Anticosti Island with a line of two segments totalling in length approximately 75 nautical miles. The Gulf of Saint Lawrence is east of those closing lines.

The 1851 Act of the Imperial Parliament delimiting the boundary of Québec in the Bay of Chaleurs area described the boundary as: *[...] down the centre of the Stream of that River [Mistouche]; to the Restigouche; thence down the centre of the Stream of the Restigouche to its mouth in the Bay of Chaleurs; and thence through the Middle of that Bay to the Gulfs of the St. Lawrence; the Islands in the said Rivers Mistouche and Restigouche to the Mouth of the latter River at Dalhousie being given to New Brunswick*¹⁵⁰.

This boundary runs through the middle of the Bay of Chaleurs and appears to stop at its mouth, before entering the Gulf of Saint Lawrence. A line of approximately 25 nautical miles would close the Bay. Québec would receive the northern half of it. The Gulf, of course, is outside of the Bay to the east.

The Act respecting the north-western, northern and north-eastern boundaries of the province of Québec of 13 June 1898 describes the boundary running south from the westerly boundary of Newfoundland, «and thence southerly along the said boundary to the point where it strikes the north shore of the Anse Sablon, in the Gulf of St. Lawrence [...]»¹⁵¹

149. Royal Proclamation, by King George, 7 Oct. 1763. See W.P.M. Kennedy, *Documents of the canadian constitution 1759-1915* at 18 (1918); Nicholson, *supra* note 28 at 21.

150. 14 & 15 VICT., c. 63 (Imp.); Poole, «The Boundaries of Canada», 42 *Canadian b. Rev.* 100, 127 (1964); Nicholson, *supra* note 28 at 94.

151. 61 Vict. 49.

The Islands of Anticosti and Madeleine are within the Province of Québec¹⁵².

4.1.2 *Legal Status of the Gulf*

4.1.2.1 *The Normal Baseline*

The Gulf of Saint Lawrence as a whole cannot be enclosed by the normal baseline due to its size. A river closing line would be drawn at the mouth of the Saint Lawrence River. Similarly, there are small juridical bays along the Québec shore that may be closed by lines of 24 nautical miles in length or less. One might conceive of the Gulf as an over large bay permitting the coastal state to elect to place a fall-back line of 24 miles of length in the Gulf to enclose additional waters¹⁵³. Canada has not drawn a system of straight baselines along any shore of the Gulf and it is not likely to be justified under modern international law since the coastline is not deeply indented or fringed by islands as required by the codification of the international law¹⁵⁴. Some coastal states have, however, abused the rule and drawn baselines in areas such as this¹⁵⁵. The normal baselines, including bay closing lines, would be applied to the mainland shore as well as to islands in the Gulf, including the Isles de la Madeleine.

Unless the historic water status of the Gulf of Saint Lawrence is established, the territorial seas of the coastal state(s) in the area would be measured from the above-identified normal baseline. Since the distances between the baseline on the coasts of Québec and the other baselines in the area are less than 400 nautical miles, the entire Gulf beyond the territorial sea would be included in the 200 mile economic zone. Maritime boundaries would be required to divide the areas.

If the Gulf is historic waters (either territorial or internal) and Québec were found to have jurisdiction in those waters, maritime boundaries would have to be established. The delimitation rules would be the same if it were an exclusive economic zone.

152. Act for establishing Courts of Judicature in the Island of Newfoundland and the Islands adjacent, and for re-annexing Part of the Coast of Labrador and the Islands lying on the said Coast to the government of Newfoundland, (49 GEORGE III, c. 27 (1809) (U.K.); Act to provide for extension of Feudal and Seignorial Rights and Burthens on Lands, Sec. IX, 6 George IV, c. 59 (1925) (U.K.).

153. 1982 LOS Convention, Art. 10.5.

154. 1982 LOS Convention, Art. 7.

155. See Smith, «Global Maritime Claims», 20 *Ocean dev. & Int'l. L.* 83, 87-90 (1989).

4.1.2.2 Historic Waters

A review of the historic data and literature on the subject makes it unlikely that historic water status could be established for the Gulf of Saint Lawrence.

The early history of the Gulf does not support an historic water status. In the Treaty of Utrecht of 1713 France relinquished Hudson Bay, Hudson Strait, and Newfoundland to England¹⁵⁶. While the agreement specifically purports to transfer rights over the waters of Hudson Bay and Hudson Strait, no reference is made to the transfer of rights in the Gulf of Saint Lawrence. Article XIII expressly recognizes the rights of the French to fish in the area west of Newfoundland.

The Treaty of Paris between the United Kingdom and France of February 1763, Article 5, renews the rights found in Article XIII of the Treaty of Utrecht, but also asserts British jurisdiction over the waters of the Gulf to three leagues from the coasts and islands in the Gulf belonging to Britain, leaving the French free to fish in the substantial waters beyond¹⁵⁷. Thus, Britain did not claim the waters of the Gulf at this date. Article VI of the Treaty of Versailles of 1783 continues the rights of the French to fish in the Gulf of Saint Lawrence found in Article V of the Treaty of Paris¹⁵⁸. In Article III of the Treaty of Paris of 1783 Britain «agreed that the people of the United States shall continue to enjoy unmolested the right to take fish [...] in the gulf of St. Lawrence [...] [They] also...shall have liberty to take fish [...] on the coasts, bays, and creeks of all other of his Britannic Majesties dominions in America [...]»¹⁵⁹

The Convention of London of 1818 between the United Kingdom and the United States similarly recognized in Article I the right of United States inhabitants to fish in these waters to «within three marine miles of any of the coasts, bay, creeks, or harbours»¹⁶⁰.

In 1906, when Newfoundland asserted authority over the Gulf beyond three nautical miles, the United States expressly protested¹⁶¹. The 1910 Award of the *North Atlantic Coast Fisheries*

156. *Documents illustrative of the canadian constitution* 3 (W. Houston ed. 1891).

157. *Documents illustrative of the canadian constitution* 61 (W. Houston ed. 1891).

158. *Documents illustrative of the canadian constitution* 267 (W. Houston ed. 1891).

159. *Documents illustrative of the canadian constitution* 267, 268 (W. Houston ed. 1891).

160. *Documents illustrative of the canadian constitution* 285, 286 (W. Houston ed. 1891). The authority of Britain within the three marine mile limit was enacted into law and made applicable to all foreign ships. 59 GEORGE III, C. 38 (1819).

161. Morrisette, «Le statut du Golfe du Saint-Laurent en droit international et en droit interne», 16 *Rev. Gen. De droit* 273, 298-99 (1985); Lorient, *supra* note 17 at 239-40.

Arbitration between the United States and Great Britain found that the baseline for the measurement of this three mile limit would be based upon ten mile closing lines of bays and closing lines of historic bays. Bay closing lines were specifically delimited for bays within the Gulf of Saint Lawrence (Chaleurs Bay, Egmont Bay, and Miramichi Bay). The Gulf as a whole was not closed¹⁶².

It has been argued that this early history should be viewed as a period in which the coastal authorities in the Gulf maintained exclusive control pursuant to which they granted rights to foreign nations¹⁶³. While this position is not without merit, it is incompatible with the expressed and long held positions of the United States and the rationales of awards issued by tribunals on the subject.

In 1936 the Canadian Customs Act was amended to specifically state that «Canadian waters shall not extend beyond the limits of exclusion recommended in the North Atlantic Fisheries Award answer to question V [...]»¹⁶⁴. An Order-in-Council of 1937 defined the Canadian Customs Waters as running seaward from Canadian Waters. It specified numerous closures of bays and other water bodies, including Hudson Strait. In the Gulf of Saint Lawrence, however, the closing line was drawn in the interior at Anticosti Island. Thus, even though this Order may support claims of Canadian waters in other areas, it is clearly inconsistent with such claims in the Gulf¹⁶⁵.

Westlake expressed the opinion in 1904 that the Gulf of Saint Lawrence was an open sea¹⁶⁶. Balch wrote in 1912, «the freedom of the Gulf of Saint Lawrence and the right of American

162. North Atlantic Coast Fisheries case (Gr.Brit. v. U.S.), , Hague Ct. Rep. (Scott) 141, 186-90 167 (Perm.Ct.Arb. 1916). Bouchez, *supra* note 60 at 207-208. For maps illustrating the closing lines at these bays within the Gulf of Saint Lawrence, see *Atlas of the straight baselines supra* note 2 at 21.

163. Rigaldies, «Le statut du Golfe en droit international public», 23 *Ann. Can. De droit int'l.* 80 (1985).

164. An Act to amend the Customs Act, 1 Edward VIII, c. 30 (1936). It established an additional nine mile Canadian Customs Waters which appear consistent with international law. *Id.* at sec. (v). Authority to plot the baselines on a map or chart to be approved by the Governor in Council as conclusive evidence of their location was provided. *Id.* at (iv). Apparently, these maps were never prepared for this area due to the onset of the War. See Morin, «Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Arctique», 8 *Ann. Can. De droit int'l.* 158, 166, 183-4 (1970).

165. Order-in-Council P.C. 3139, 18 Dec. 1937.

166. Westlake, *International law* (1904), Vol. I, p. 193.

fishermen to catch fish in that gulf or inland sea has been recognized by implication in the treaties of 1783 and 1818 between the United States and Great Britain»¹⁶⁷.

The 1956 case of *Gavin v. The Queen*¹⁶⁸, by the Prince Edward Island Supreme Court provides support for the view that the Gulf of Saint Lawrence is not historic waters of Canada. In the course of reversing the conviction of fisherman for breach of regulations applicable to lobster catches in off-shore areas of the Gulf Campbell, C.J., for the majority wrote: *despite the entry of Newfoundland into Confederation, and the consequent practical surrounding of the Gulf of St. Lawrence by Canadian lands, I take it to be conceded by the respondent that the Gulf is still an external sea, and is not a bay, gulf, or estuary which might fall within the doctrines relating to waters «inter fauces terrae» (whether, or not, these doctrines have an application to an objection such as the present)*¹⁶⁹.

He went on to discuss *R. v. Keyn*¹⁷⁰ and to find that although international law permits a coastal state to extend its jurisdiction beyond the low-water mark for certain purposes, «the Parliament of Canada has not directly passed any legislation fixing a relevant limit for fishing operations in the locality concerned»¹⁷¹.

In 1957 the question of the status of the Gulf of Saint Lawrence arose in the House of Commons. The Minister of Northern Affairs and National Resources answered,

On February 8, 1949, shortly before the union of Newfoundland with Canada, the then prime minister...made the following statement (Hansard-p. 368): *we intend to contend and hope to be able to get acquiescence in the contention that the waters west of Newfoundland constituting the gulf of St. Lawrence shall become an inland sea. We hope that, with Newfoundland as part of Canadian territory, the gulf of St. Lawrence west of Newfoundland will all become territorial waters of Canada, whereas before there would be only the usual off-shore portion that would thus become part of the territorial waters. Of course that is a matter which is not governed by statutes; it is governed by the comity of nations. It is our hope that it will be recognized as a valid contention.*

167. Balch, «Is Hudson Bay a Close or Open Sea?», 6 *AM. jour. Int'l. L.* 407, 457 (1912).

168. 115 *Can. Crim. Cases* 315 (1956).

169. *Id.* at 321.

170. *Supra* note 16.

171. *Id.* at 322-23.

The government sees no reason for departing from the principle enunciated in this statement¹⁷².

This response contrasts sharply with the affirmative declarations with respect to Hudson Bay and Strait that they are historic inland water of Canada¹⁷³. In 1963 and 1969 American Government officials took exception to Canadian views that the Gulf was closed¹⁷⁴.

In 1964 responding to complaints regarding alleged butchering of baby seals in the Gulf of Saint Lawrence and off the Isles de la Madeleine Minister of Fisheries, Robichaud responded that «this comes under international regulations and we have no jurisdiction to go further than we do at the present time»¹⁷⁵.

In the same year the Secretary of State for External Affairs, Paul Martin reported that «Canada has never published official charts showing the present baselines, but for at least parts of our coast the baselines follow the sinuosities of the shore»¹⁷⁶. He was speaking in favor of the impending adoption of a system of straight baselines on parts of Canada's coasts and the extension of a fishing zone to 12 miles. He reported on negotiations with foreign powers regarding the straight baselines on the basis of recommendations to close the Gulf of Saint Lawrence as well as Hudson Strait and Bay¹⁷⁷. A member of the opposition, Mr. MacLean, opined that good legal ground supported the view that these waters were national waters belonging to Canada¹⁷⁸. Mr. Crouse, another member of the opposition, argued that closing of the Gulf of Saint Lawrence to foreign fishing would benefit the living resources of the area¹⁷⁹. The expectation that the Gulf of Saint Lawrence would be closed by the system of straight baselines and then become internal waters of Canada was again expressed at the Standing

172. House of Commons Debates, 23rd Parliament, 6 ELIZ. II, vol. II, 1957-58, p. 1169.

173. See discussion below at Sections V.B.2. and V.C.2.

174. *La Presse*, Montréal, 6 March 1963, p. 1; *The Globe and Mail*, Toronto, 6 June 1969, p. B-5.

175. House of Commons Debates, 2d sess., 26th Parliament, 13 ELIZ. II, vol. II, 1964, p. 1248.

176. House of Commons Debates, 2d sess. 26th Parliament, 13 ELIZ. II, Vol. IV, 1964, 20 May 1964 p. 3409.

177. *Id.* at 3412.

178. *Id.* at 3415.

179. *Id.* at 3654.

Committee on Marine and Fisheries on 22 June 1964¹⁸⁰. Despite urgings from the opposition the Government did not take a clear position on the matter.

A letter dated 30 September 1969, to Francois Lorient, Legal Advisor to the Commission d'étude sur l'intégrité du territoire du Québec, from Mr. Bernard H. Oxman of the United States Department of State Office of the Legal Adviser reports that the United States considers «that the Gulf of St. Lawrence comprises high seas beyond three nautical miles from the baselines from which the territorial sea is measured»¹⁸¹.

In response to questions by members of the Standing Committee on Fisheries and Forestry Secretary of State for External Affairs, Mitchell Sharp, testified in 1970 with regard to the Gulf of Saint Lawrence and the Bay of Fundy,

*they are not Canadian territorial waters. If we had wanted to make them Canadian territorial waters, we would introduce different legislation. What we are asking here is that these be exclusive fishing zones [...]*¹⁸²

He went on to refer to the rights of American fishermen to fish in these waters. He also stated that the Government had «been somewhat deterred by the inadvisability of drawing baselines...in the Gulf of St. Lawrence» in order not to prejudice future potential claims¹⁸³. While Canada did delimit systems of straight baselines on the eastern coasts of Newfoundland, Labrador, and

180. House of Commons, 2d Sess, 26th Parliament, p. 198. The Under Secretary of State for External Affairs, Wershof, took the position that closing lines of the Gulf would have to be promulgated before they would become internal waters of Canada. *Id.* 1964, vol. 4, pp. 205-206. See also the statement of the Minister of External Affairs of 7 May 1964. Proceedings of the Standing Committee on Banking and Commerce. Vol. No. 1, p. 20.

181. Commission d'étude sur l'intégrité du territoire du Québec, *Rapport, La frontière dans le Golfe du St-Laurent*, vol. 7.3.4., book 1, Feb. 1972, p. 677.

182. House of Commons, 2d sess, 28th Parliament 1969-70, 21 April 1970, p. 16: 12-13.

183. *Id.* at 16:26. See also, House of Commons Debates, 2nd sess., 28th Parliament, 19 ELIZ. II, vol. VI, 1970, pp. 5953-6018. Arguments in favor of the internal water status of the Gulf of Saint Lawrence were examined by Morin, *supra* note 161. each took the position that the Gulf was not internal waters of Canada at the time of the study, but that it might become so if actions were taken by Canada. One writer concluded in 1985 on the basis of a study of international law that the Gulf is internal waters of Canada, Rigaldies, *supra* note 163. Rigaldies conclusions are not unqualified. While historic evidence of claims and control were marshalled, two significant gaps were also reported. This includes the substantial period 1867-1949 and the period subsequent to 1970. Rigaldies called for a clear formal claim of internal waters status, but recognized that the functional regimes of fisheries, pollution, navigation, and overflight probably have protectec the Canadian interest.

Nova Scotia, none of those lines have closed any entrance to the Gulf of Saint Lawrence, nor have they been delimited within the Gulf.

In 1971 Canada did establish a fishing zone with closing lines for the Gulf of Saint Lawrence¹⁸⁴. The outer limit of the Fishing Zone in the Gulf was delimited by closing lines drawn across Cabot Strait (between Cape Ray, St. Paul Island, and Money Point) and the northern entrance to the Strait of Belle Isle (between Double Island, a point off of Belle Isle, and White Island). Maps were issued depicting these closing lines¹⁸⁵. This was viewed as the first implementation of the objective stated in 1949 to make the Gulf Canadian water¹⁸⁶. However, the very act of including the Gulf in the Canadian Fishing Zone appears to have excluded that area as territory of Canada. The legislation applies this zone to regions of the sea which are distinct from the territorial sea of Canada¹⁸⁷.

During this same period Canada issued maps depicting the baseline for measurement of the territorial sea and the outer limit of the territorial sea. Bay and river closing lines were shown. The depiction of these lines stopped at points seaward of the entrances to the Gulf of Saint

184. Order-in-Council P.C. 1971-366 (Zone 1). See Appendix, Promulgation of Fisheries Closing Lines, House of Commons Debates, 3rd sess, 28th Parliament, 19 ELIZ. II, vol. II, 1970, 18 déc. 1970, pp. 2244-45.

185. See Chart Illustrating the Fishing Zones of Canada as Determined by Order-in-Council P.C. 1971-366, Canada Gulf of St. Lawrence, Zone 1, Cabot Strait, No. 408, Canadian Hydrographic Service, Marine Sciences Branch, Department of Energy, Mines and Resources; Chart Illustrating the Fishing Zones of Canada as Determined by Order-in-Council P.C. 1971-366, Canada Gulf of St. Lawrence, Zone 1, Strait of Belle Isle, No. 409, Canadian Hydrographic Service, Marine Sciences Branch, Department of Energy, Mines and Resources.

186. Standing Committee on Fisheries and Forestry, House of Commons, 4th sess. 28th Parliament, 1972, Issue No. 7, 4 May 1972, p. 7:5. At the time of its enactment it was clear that exclusive fishing zones could exist beyond the territorial sea. The limit of the distance seaward was a matter of controversy. Some states claimed the right to exclusive jurisdiction over fisheries to a distance of 200 nautical miles from the coastline. By the mid 1970's it was clear that a 200 mile exclusive fishery zone (or exclusive economic zone) was established in international law. Thus, the location of exclusive fishing jurisdiction in the waters of the Gulf of Saint Lawrence alone is not necessarily probative of territorial or internal waters status of the Gulf.

187. Law Concerning the Territorial Sea and the Fishery Zones of Canada, R.S.C. ch. 22, secs. 4 and 5. See M. Sharp, Ministry of Exterior Affairs, Debates of the House of Commons, 17 April 1970, vol. VI, p. 6016; M. Sharp, House of Commons, Standing Committee on Fisheries and Forests, 21 April 1970, sec. 16, p. 18; and Lorient, *supra* note 17 at 194-96.

Lawrence. There were no baselines shown across the seaward entrances to the Gulf, nor were there lines depicting the outer limits of the territorial sea in the Gulf or at its entrances¹⁸⁸.

In 1972 the Legal Adviser to the Department of External Affairs, Mr. J. A. Beezley, testified before the House of Commons Standing Committee on Fisheries and Forestry. He reported that the Canadian efforts to close the Gulf by a system of straight baselines had been protested by a number of states. He admitted that the Canadian position was controversial. The United States, France, Britain, Denmark, and Norway were identified particularly because they had been conducting fishing operations in the Gulf. Negotiations with those states were being undertaken¹⁸⁹.

A letter dated 17 December 1973 from the Canadian Bureau of Legal Affairs listed the bays which, in accordance with the 1910 *North Atlantic Coast Fisheries Arbitration*, Canada recognized as internal waters. The list included bays within the Gulf of Saint Lawrence. Thus, by implication denying the internal water status of the Gulf. The letter suggested that it was Canada's intention to establish it as an inland sea¹⁹⁰.

188. See Chart illustrating Territorial Sea of Canada as determined by Order-in-Council P.C. 1972-966, Published under authority of the Territorial Sea and Fishing Zones Act, Canada South and East Coasts of the Island of Newfoundland, No. 402, Canadian Hydrographic Service, Department of Fisheries and the Environment (1972, reprinted 1977); Chart illustrating Territorial Sea of Canada as determined by Order-in-Council P.C. 1972-966, Published under authority of the Territorial Sea and Fishing Zones Act, Canada South and East Coasts of Nova Scotia, No. 401, Canadian Hydrographic Service, Department of Fisheries and the Environment (1972); and Chart illustrating Territorial Sea of Canada as determined by Order-in-Council P.C. 1972-966, Published under authority of the Territorial Sea and Fishing Zones Act, Canada Coast of Labrador, No. 403, Canadian Hydrographic Service, Marine Sciences Branch, Department of the Environment (1972); Chart Illustrating the Fishing Zones of Canada as Determined by Order-in-Council P.C. 1971-366, Canada Gulf of St. Lawrence, Zone 1, Cabot Strait, No. 408, Canadian Hydrographic Service, Marine Sciences Branch, Department of Energy, Mines and Resources; and Chart Illustrating the Fishing Zones of Canada as Determined by Order-in-Council P.C. 1971-366, Canada Gulf of St. Lawrence, Zone 1, Strait of Belle Isle, No. 409, Canadian Hydrographic Service, Marine Sciences Branch, Department of Energy, Mines and Resources.

189. Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry, House of Commons, 4th Sess., 28th Parl., 4 May 1972, pp. 7:4-6.

190. 12 *Ann. Can. De droit int'l.* 277-78 (1974).

On 6 March 1975 the Department of External Affairs made a clear statement that the Government considers the Gulf as historic internal waters¹⁹¹. This was repeated on 7 March 1975 by Secretary of State for External Affairs, Allan J. MacEachen¹⁹². But on 8 March 1979, the Minister of Fisheries and Environment testified that the right of innocent passage applied and the Fisheries act gave him no «power to stop a vessel from sailing on the Gulf of St. Lawrence or in other areas in the 200-mile zone»¹⁹³.

In 1978 shipping regulations were made applicable to the Gulf. As a consequence, it has been argued that Canada claimed control over navigation in the Gulf as if it were internal waters, not territorial sea or high seas. This argument is based on the view that the effect of these regulations was to deny innocent passage in the Gulf¹⁹⁴. A denial of innocent passage is significant evidence in support of an historic internal waters claim. On the other hand, this argument presents some difficulties. First, the regulations may apply to Canadian fishing zones which are beyond the internal waters of Canada. Second, no evidence of actual enforcement in the Gulf in the nature of a denial of innocent passage is known. Third, this alleged claim of authority is relatively recent for historic waters purposes.

Canadian air control regulations also apply to the Gulf¹⁹⁵. Assertion of control over overflight is a necessary element in proof of historic water status. The control of airspace, however, applies to land territory, internal waters, and territorial sea. Thus, such control does not necessarily support internal waters arguments. A published map shows that the Canadian airspace regulations under discussion appear to be applied to areas clearly on the high seas and thus may not reflect sovereign claims of exclusive authority. Consequently, they provide ambiguous support for special status to the Gulf.

The Act to Amend the Canada Shipping Act of 1970 authorizes regulations adopted pursuant to the Act to be made applicable to the Gulf of Saint Lawrence as one of the fishing zones of

191. See Press Communiqué dated 6 March 1975, reproduced in 14 *Ann. Can. De droit int'l.* at 324 (1976).

192. House of Commons Debates, 1st sess. 30th Parliament, 24 ELIZ. II, vol. IV, 1975, p. 3884.

193. House of Commons Debates, 4th Sess., 30th Parliament, 28 ELIZ. II, vol. IV, 1979, p. 3943.

194. Rigaldies, *supra* note 163 at 131-37.

195. Rigaldies, *supra* note 163 at 140-143.

Canada¹⁹⁶. The Act authorizes a wide variety of regulations relating to navigation, operations, equipment discharges, and personnel of ships in these areas¹⁹⁷.

The legal status of the Gulf of Saint Lawrence remained in question even through 1987. In that year the case of *R. v. Juge Yvon Mercier and Paul Pezwick*¹⁹⁸ was decided by the Superior Court of Québec. Pezwick was an American citizen accused of intimidating seal hunters in the Gulf. In order for the prosecution to proceed the court found that the Criminal Code required that the illegal act take place in the internal waters of Canada. The prosecutor produced a certificate by the Secretary of External Affairs, Allan J. MacEachen, in which he declared, «that the waters of the Gulf of St. Lawrence are considered by the Government of Canada to be historic Canadian waters, and that as such they are internal waters of Canada and the laws of Canada apply to them»¹⁹⁹.

In the course of the judgment the Court examined the international law of historic waters, the facts relevant to the historic waters claim to the Gulf, and the opinions of writers on the subject. Based upon the uncertain and inconclusive government statements combined with the limited evidence and conflicting literature, the Court refused to find the Gulf to be internal waters of Canada necessary for the prosecution. It also determined that legislative authority would be required before the Government could establish the internal waters status of the Gulf that would be necessary for prosecutions such as the instant matter.

The *Pezwick* case resulted in legislation that authorizes the issuance of a certificate by the Canadian government. Such a certificate would be conclusive proof in legal or other proceedings that a specified geographical location is within the internal waters or territorial sea

196. R.S.C. 1970, Ch. 27 (2d Supp.), Sec. 727 (2).

197. The 1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 24, permitted the establishment of a contiguous zone out to the 12 mile limit for, among other reasons, sanitary regulations. As with the fisheries zone, the right of coastal states to take environmental protection actions beyond the territorial sea and contiguous zone was in dispute in the early 1970's with a variety of claims made by coastal states. By the middle of that decade rights in the 200 mile zone included environmental protection. Questions do remain, however, whether the Canadian 1970 shipping law is within the permissible scope of coastal state jurisdiction permitted by the 1982 LOS Convention in the exclusive economic zone. To the extent that it does exceed such authority this act may support some extraordinary jurisdiction in the Gulf.

198. *R. v. Juge Yvon Mercier and Paul Pezwick*, 110-38-000001-849, Superior Court, 11 March 1987 (the appeal was discontinued).

199. Pezwick, Judgment, *supra* note 198 at 18.

of Canada or in or above the continental shelf or exclusive economic zone of Canada²⁰⁰. The first certificate issued to that effect was on 16 August 1991 which declared that the waters of the Gulf of Saint Lawrence are internal waters of Canada²⁰¹. It was issued in the context of a narcotics prosecution²⁰². This is the clearest official assertion of a claim to the Gulf to date, but it is less than a direct legislative claim that may be necessary. Nor is the claim made in the course of international affairs.

The Canada Shipping Act of 1990 defines «inland waters of Canada» to include the mouth of the Saint Lawrence River but not the Gulf of Saint Lawrence itself²⁰³. The Shipping Act applies pollution control regulations in Canadian fishing zones which include the Gulf of Saint Lawrence²⁰⁴. The definition of «inland waters» may suggest that the limit of internal waters of Canada for international law purposes stop at that line also. As the Supreme Court of Canada pointed out in its 1984 *Strait of Georgia Reference* these terms are used interchangeably²⁰⁵. This definition may also be relevant to the limits of Québec under Canadian law. But it is just as possible that this definition is unique to the instant law. The Territorial Sea and Fishing Zones Act, defines the «internal waters of Canada» as «any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada²⁰⁶. In 1990 this act was amended to add, «In respect of any area not referred to in subsection (2), baselines are the outer limits of any area, other than the territorial sea of Canada, over which Canada has a historic or other title of sovereignty»²⁰⁷. Thus, statutorily «inland waters» and «internal waters» are treated differently. I have not seen any baselines for the measurement of the territorial sea closing the Gulf drawn by Canada in this area.

200. An Act to apply federal laws and provincial laws to offshore areas and to amend certain Acts in consequence thereof, 39 ELIZ. II c. 44. The Secretary of State for External Affairs, Barbara J. McDougall, delegated this authority to certain officials in External Affairs. Instrument of Delegation, Canadian Laws Offshore Application Act, Section 10 (16 August 1991).

201. This certificate was issued on 16 August 1991 by the Director of the Legal Advisery Division, Department of External Affairs, Donald W. Smith, and has not yet been published in the *Canadian Gazette*.

202. See Letter to M. Louise Villemure from D.W. Smith, 16 August 1991.

203. R.S., chap. S-9, secs. 1 & 2.

204. *Id.* Sec. 655(1).

205. [1984] 1 R.C.S. at 396-397.

206. R.S.C. 1985, c. T-7, s. 1 ; R.S. 1964-65, c. 22, s. 1., Sec. 3(2).

207. R.S., c. T-8 (1990).

I have not made a thorough examination of foreign navigation in the Gulf of Saint Lawrence. My inquiries to the United States Government regarding its navigation in Hudson Strait produced evidence that these vessels also navigated through the Gulf of Saint Lawrence on their way to or from Hudson Strait in 1948²⁰⁸. No Canadian consent appears to have been requested or obtained. Other records of foreign passage through the Gulf may be found upon further research. Most navigation would be to and from Canadian ports or waters (such as the Saint Lawrence River) which would require the agreement of Canada. Foreign fishing had been conducted in the Gulf by many foreign nationals through the 1970's. Many of those were pursuant to historic treaties. They are generally viewed as recognizing the freedom to fish in those waters, although they could be construed as a grant by the coastal state of a right of foreigners to fish there. These foreign fisheries have been phased out, largely by agreement with Canada consistent with the developing 200 nautical mile exclusive economic zone under international law.

Based on the above information that I have studied, it would be difficult to conclude that as a matter of international law today the Gulf of Saint Lawrence is historic waters completely within the internal waters or territorial sea of Canada. Prior to the union of Canada and Newfoundland in 1949, two states held the shores of the Gulf and no evidence exists to suggest joint claims or actions directed towards such a claim. The short period subsequent, may itself present a bar to proof of historic water status. Even after 1949 there is no evidence of a clear international claim to the waters of the Gulf. In fact, in 1970 the Secretary of State for External Affairs publicly testified that the Gulf was not Canadian. No system of straight baselines or other territorial baselines lines have been established to close the Gulf. The various domestic statutes asserting elements of jurisdiction are ambiguous at best and have not effectively communicated a claim to the international community. Only in 1975 did Canadian Government officials begin to make clear statements asserting historic water status. All but two of these assertions were made before domestic legislative bodies. Another was made in litigation and was rejected by the Court. The other was made for the purpose of a domestic prosecution pursuant to general legislative authority. It was issued less than a year ago and is yet to be published. Foreign ships have navigated and fished in these waters under claims of rights incompatible with historic water status and recent Canadian court decisions have not accepted the claims to unusual status of these waters. As a consequence, it appears that the normal baseline is applicable to the Gulf.

Beyond the normal baseline there exists a twelve mile territorial sea. Seaward of that lies the Canadian exclusive fishery zone. Of course, additional information or developments in the future might change this conclusion.

208. The USS Edisto on 15-18 July 1948, Fax from Cdr. Stu Marsh, Ice Operations Division, US Coast Guard, G-N10 to Jonathan Charney, Vanderbilt Law School, dated 21 Feb. 1992, Report of Task Force Eighty, Summer Arctic Operation 1948, CTF 80/A4-3/A9/rs, Serial 025 (12 Nov. 1948) Annex 1-(c) p. 1; The USCGC Eastwind on 16-18 July 1948, *id.* Annex 1-(d) p. 1; The USCGC Eastwind on 16-18 Sept. 1948, *id.* Annex 1-(d) p. 9.

Exits from the Gulf of Saint Lawrence to the open ocean are found at Cabot Strait and the Strait of Belle Isle. Cabot Strait is 60 nautical miles wide with St. Paul Island located 14 nautical miles off of the southern shore. Bands of twelve mile territorial seas would not close the Strait. Thus, high seas rights to navigate and overfly the Strait would exist. It serves as the prime navigation route to the open ocean for Québec. The Strait of Belle Isle narrows to ten nautical miles. Thus, twelve mile territorial seas would overlap. If the Gulf is not internal waters, the right of innocent passage through Belle Isle Strait would apply and perhaps the right of transit passage.

4.1.3 Maritime Boundaries in the Gulf

4.1.3.1 The 1964 Interprovincial Boundary Agreement in the Gulf of Saint Lawrence

As discussed above, the Canadian Government maintains that no province has territorial or administrative jurisdiction over the waters seaward of the shoreline established by the common law. All of the Maritime Provinces (Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island) and Québec have opposed the Canadian Government's claim of jurisdiction in the seabed of the territorial sea, exclusive fishery zone/economic zone, and continental shelf. The question of the seaward jurisdiction of the provinces has been pursued for some time. In 1964 a conference was held between the Premiers of four Maritime Provinces and the Prime Minister of Canada. The submission of the maritime premiers sought federal recognition of their provinces' offshore jurisdiction. Attached to the submission was an agreement reached by the four premiers and adhered to by Québec by telegram to the Chairman of the Maritime Premiers Conference which delimited the maritime boundaries of these five provinces in the areas of the Bay of Fundy, the Gulf of Saint Lawrence and their adjacent waters²⁰⁹. While the submission called for federal legislation implementing this agreement, none was forthcoming.

A subsequent effort to resolve the federal-provincial dispute was made in 1977. Prime Minister Trudeau proposed a division of revenues and administrative responsibilities based upon lines drawn in the offshore waters. The resulting Memorandum of Understanding, signed by Prime Minister Trudeau and the Prime Ministers of Nova Scotia, Prince Edward Island and New Brunswick expressly used the 1964 interprovincial maritime boundary lines for these

209. *Submission On Submarine Mineral Rights* by the Province of Nova Scotia, Province of New Brunswick, Province of Prince Edward Island, Province of Newfoundland to the Federal Provincial Conference, October 1964. Telegram to Hon. R.L.S. Standfield, Premier of Nova Scotia, from Jean Lesage (No. RAA 268-BA XA208 46)(date appears to be June 7, 1964).

purposes²¹⁰. It was expected that this understanding would ultimately form the basis for legislative action²¹¹. This did not take place²¹².

On 2 March 1982 Canada and Nova Scotia entered into an Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing. Schedule I defined the «area covered by this Agreement. The schedule is a small scale map which shows boundary lines between Nova Scotia, Prince Edward Island, and portions of Québec and Newfoundland. This line appears to be identical to the 1964 Interprovincial Agreement Line.

Québec has consistently pursued in its claims and has utilized the 1964 Agreement. This boundary line is depicted on official maps of Québec²¹³.

The prior discussion leads to four conclusions. First, the maritime provinces and Québec appear to be generally agreed as to the location of the boundaries between their maritime claims in the Gulf of Saint Lawrence area. Second, the legal status of this agreement is questionable because it has never been legislatively implemented by Canada and the Canadian government denies these provinces' jurisdiction over most, if not all, of the area of interest. Third, even though this agreement is probably not directly enforceable in a court of law it appears to represent an understanding among the relevant provinces. Fourth, since considerations of equity, prior practice, and estoppel are relevant to the location of a maritime boundary line the 1964 Agreement may have some weight in considering the location of a maritime boundary in the Gulf of Saint Lawrence.

210. See Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces (1 February 1977).

211. See Press Briefing Package from the Resource Management Branch of the Canadian Department of Energy Mines and Resources.

212. Whether or not the provinces could establish new boundaries on their own is questionable. Nicholson writes: [once a province has been created, its boundaries cannot be changed by the federal Parliament without the consent of the province concerned, for the 1871 Act [Imperial Acts 34-35, Vict., Ch. 28] (The British North American Act, 1871)] states that: [the Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province] [...] Nicholson, *supra* note 28 at 174. A delimitation of an otherwise imprecise boundary may or may not fall within the scope of this provision. The practice reported in the Nicholson book implies that such a delimitation would be covered by the Act.

213. See *Le Québec*, Réalisée par le Service de la cartographie, Diffusée par le Centre d'information géographique et foncière, Ministère de l'Énergie et des Ressources (terres) Québec 1987. See also *Rapport de la commission d'étude sur l'intégrité du territoire du Québec, La Frontière dans le Golfe du Saint-Laurent*, ch. 7.1, para. 29 (March 1972).

4.1.3.2 Maritime Boundaries in the Gulf

As discussed above, the international law of maritime boundaries takes into consideration numerous factors. Prime among them is coastal geography. While this consideration is readily accessible to this author, most of the others are not. Accordingly, the following discussion focuses primarily on the nature of the line suggested by the geographical context. That context shows that the boundary in question would arise in a relatively closed water body. While the area is not insubstantial, the distances between the coastlines in question are substantially less than 400 nautical miles. No geological or geomorphological factors appear to be present that would influence the boundary location.

For the purposes of this analysis I will assume that the coastline of Québec is the normal baseline as provided for in international law. Québec is located on the north and west side of the Gulf (with the exception of the Isles de la Madeleine). This coastline begins at the north in the Strait of Belle Isle and runs south westerly along the north-eastern coast of the Gulf crossing river mouths and juridical bays by closing lines. It crosses the mouth of the Saint Lawrence River past the western end of Anticosti Island in accordance with the Royal Proclamation of 1763. It then proceeds along the coast of the Gaspé Peninsula, closing river mouths and juridical bays to the closing line at the mouth of Chaleurs Bay. It proceeds along that closing line until the middle is reached and then runs into the bay through the middle of the bay as described in the 1851 Act. On the Isles de la Madeleine the coastline would follow the low water line. Closing lines may be drawn across the mouths of bays but they would have little influence on the location of the maritime boundary line.

Four other provinces have coastlines on the Gulf of Saint Lawrence. On the east is Newfoundland, and on the south are New Brunswick, Nova Scotia, and Prince Edward Island. Québec's coastline comprises roughly 40% of the shore of the Gulf. Another 30% is held by Newfoundland with the remaining 30% is divided among New Brunswick, Nova Scotia, and Prince Edward Island.

Due to the configuration, the small area, and the nature of the coastlines, the equidistant line would present itself as an appropriate line to consider. Three islands in the Gulf might provide situations that would argue against the equidistant line or an adjustment thereof: Québec's islands of Anticosti and Madeleine, and Prince Edward Island. In my opinion, Anticosti and Prince Edward Island do not present a strong case for use of a line other than equidistance. They are relatively large islands, close to the shore, and well integrated therein. The projection to the east from Newfoundland containing Cape Saint George might also suggest an inequitable situation, but it is balanced off by Anticosti Island near the Québec shore.

The Isles de la Madeleine present a more serious situation. They are small islands which are located relatively far from the coastline. It is particularly significant that they are located further from the coastline of Québec than from Newfoundland, Nova Scotia, and Prince Edward Island. The literature often focuses upon which side of the equidistant line, drawn without regard to the

island in question, such an island is located²¹⁴. In this case, the islands are clearly located on the far side of the line relative to the mainland of Québec.

Arguably, the use of these islands as a baseline for the generation of the equidistant line attracts maritime area in excess of the island's geographical significance. The area influenced by the Isles de la Madeleine is very substantial if they are utilized. Thus, it may be argued that to give them full effect in delimiting the boundary line would be inequitable to the other territories facing the Gulf. Arguments in favor of their use would be based upon the integrated relationship of the Isles de la Madeleine to the rest of Québec and compensation to Québec for the lack of an open shore on the Atlantic Ocean available to the coastlines of Nova Scotia and Newfoundland. While there is no situation that is closely comparable, a number of existing maritime boundary agreements appear to support some diminution of the effect of islands in roughly comparable situations²¹⁵. Others support the opposite result²¹⁶. Some agreements support an argument in favor of a coastal state's access to the middle of a water body despite a concave situation²¹⁷.

If it is decided that the Isles de la Madeleine are not to be given full effect in generating the maritime boundary line, a multitude of alternative delimitation lines are possible. A likely solution would be to delimit the boundary on the basis of an equidistant line that does not utilize these islands. Then one would delimit an enclave around the Isles de la Madeleine of a fixed distance from the coastline of the islands (such as twelve nautical miles) limited by the location of the equidistant lines drawn between the islands and the Newfoundland, Nova Scotia, and Prince Edward Island shores. The consequence would be the opening of an area between the Isles de la Madeleine and Anticosti Island that would be not be within Québec's maritime

214. See Bowett, *supra* note 143.

215. See in *International maritime boundaries*, *supra* note 5: the Kenya-Tanzania Maritime Boundary, Report No. 4-5; Burma-India Maritime Boundary, Report No. 6-3; the Qatar-U.A.E. (Abu Dhabi) Maritime Boundary, Report No. 7-9; Continental Shelf Boundary, Libya Malta, Report No. 8-8; Continental Shelf Boundary, Libya Tunisia, Report No. 8-9; Continental Shelf Boundary, France-United Kingdom, Report No. 9-3(a); Maritime Boundary, Iceland-Norway, Report No. 9-4.

216. See in *International maritime boundaries*, *supra* note 5: Italy-Spain Continental Shelf Boundary, Report No. 8-5. See generally Bowett, *supra* note 143.

217. See in *International maritime boundaries*, *supra* note 5: the France-Monaco Territorial Sea and Maritime Boundary, Report No. 8-3; Continental Shelf Boundary, Denmark-Federal Republic of Germany, Report No. 9-8; Continental Shelf Boundary, Denmark-United Kingdom, Report No. 9-10; Continental Shelf Boundary, Federal Republic of Germany-United Kingdom, Report No. 9-12.

jurisdiction. There is precedent for such a solution in the *Anglo/French* case in regard to the Channel Islands²¹⁸.

4.1.3.3 *Analysis of the 1964 Agreement Delimitations*

As discussed above, the 1964 Agreement line might influence the maritime delimitation in this area. Accordingly, the logic of the line is worthwhile to consider. The text of the 1964 Agreement, sets out the four principles that were used as a basis for the delimitations described in the text.

The basis on which the following boundaries to mineral rights are suggested may be outlined as follows:

. Mineral deposits under shelf waters between Provinces pertain to one or another Province.

. Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas.

. Mineral right boundaries are so drawn to join median points between prominent landmarks selected so far as possible along parallel shores.

. In cases where three Provinces meet but boundaries for one pair would overlap on the third, a N-S or other prime directional line is used to connect the closest point definable from the considerations in paragraph 3 above to the conflicting boundary.

It appears that the 1964 Lines were based primarily on «selective» equidistance in which only particular islands and headlands were utilized. For much of their distance they closely track the true equidistant line. In a few places there is as much as a three nautical mile gap. One gap reaches 12 nautical miles. These larger gaps are found in the more open waters²¹⁹. Such a simplified equidistant line is very common in the international practice²²⁰.

218. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of 30 June 1977, 18 *Int'l. Leg. Mat.* 398, 88-97 (paras. 180-203) (1979).

219. See e.g. the Baie Verte area.

220. See Legault and Hankey, *supra* note 122.

a) The 1964 Québec-New Brunswick Line

The Agreement treats the Québec boundaries in detail. A principal portion of the Québec - New Brunswick boundary runs through the Bay of Chaleurs which is clearly internal waters. The remainder is located in the Gulf of Saint Lawrence, the juridical status of which is discussed above.

The Act of the Imperial Parliament of Great Britain of 1851 sought to settle the boundary dispute between the Provinces of Canada (Québec, Ontario and New Brunswick). A portion of that description appears to apply to the New Brunswick boundary with Québec: *down the Centre of the Stream of the Restigouche to its mouth in the Bay of Chaleurs; and thence through the Middle of that Bay to the Gulf of the Saint Lawrence; the Islands in the said Rivers Mistouche and Restigouche to the Mouth of the latter River at Dalhousie being given to New Brunswick*²²¹.

The 1964 Agreement delimits Québec - New Brunswick maritime boundary at pages 4 and 5 as follows: *starting at the mouth of the Matapedia River opposite Dalhousie, easterly to the midpoint between Heron Island and Carleton Point; thence easterly to the midpoint between Little Belledune Point and a point south-east of New Richmond; thence south of east to the midpoint between Green Point and Bonaventure Point; thence southeasterly to the midpoint between Bonaventure Point and the entrance to Bathurst Harbour; thence northeasterly to the midpoint between Paspebiac Point and Maisonnnette Point; thence northeasterly to the midpoint between Birch Point and C. d'Espoir; thence due east a distance equal between Birch Point and C. d'Espoir; thence due east of south to the midpoint between Miscou Island (N.B.) and Deadman Island (Magdalen Islands), at which point is a corner common to N.B., P.E.I. and P.Q.*

There are three segments to this boundary as described in the 1964 Agreement. The first segment in Chaleurs Bay closely tracks the true equidistant line in this area. The shorelines are opposite and the historic boundary description calls for a line down the center of the bay. The second segment is the area seaward of the closing line of the Bay to the point at which the boundary line is deflected southward as a result of the influence of the Isles de la Madeleine. That segment presents an adjacent situation in which both states have similarly shaped coastlines. This is a traditional situation for the application of the equidistant line. The equidistant line in that area is relatively straight for nearly sixty nautical miles. The 1964 Line does not take advantage of this situation and zig-zags across the equidistant line. The net area effect is to diminish New Brunswick's water area somewhat.

The third segment is seaward of the second and runs to the trijunction with the Nova Scotia and the Prince Edward Island boundaries. This segment represents a boundary between the New

221. 14-15 VICT. 1851, ch. 63; Poole, *supra* note 150 at 127; Nicholson, *supra* note 28 at 94.

Brunswick mainland and Québec's Isles de la Madeleine. As reported above, all islands are given full effect for locating this selective equidistant boundary line. Since the Madeleines are situated near the center of the Gulf and are given full effect, Québec receives a very large percentage of the area. Once it is accepted that the Islands would have full value, the Québec boundary throughout the Gulf appears to be reflective of a simplified equidistant line which produces, on balance, the same net areal division.

b) The 1964 Québec-Nova Scotia Line

Nicholson does not describe the water boundary between Québec and Nova Scotia and provides no reference to an official description. The 1964 Agreement delimits the Québec - Nova Scotia maritime boundary. It begins at the point where an east-west line intersects, *the midpoint between Cable Head and South Cape, which line defines in part the boundary between P.E.I. and Québec.*

From the above point the boundary with Québec runs northeasterly to the midpoint between the south-east corner of Amherst Island and White Capes; thence northeasterly to the midpoint between Cape St. Lawrence and East Point; (Magdalen Islands); thence northeasterly to the midpoint between St. Paul Island and East Point; thence northeasterly to the Newfoundland-Québec boundary at the midpoint between Cape Anguille and East Point²²².

The maritime boundary between these two provinces begins at the trijunction with the Prince Edward Island boundary line and ends at the trijunction with the Newfoundland boundary line. This boundary represents a simplification of an equidistant line between the Nova Scotia shoreline on Cape Breton Island and the Québec shoreline on the Isles de la Madeleine. While the Cape Breton Island may be technically an island its separation from the mainland is so narrow compared to its size that it could be considered as mainland. The opposite situation between the Isles de la Madeleine and Nova Scotia produces a balanced situation which would justify the use of equidistance. As discussed above, the Isles de la Madeleine, on the other hand, are sufficiently small and distant from the mainland that they are truly islands and may justify some diminution of value in this delimitation if viewed in isolation. The 1964 Agreement gives the Isles de la Madeleine full effect.

222. 1964 Agreement at page 2. This maritime boundary is described a second time at page 4 of the 1964 Agreement. This portion of the Agreement defines the common corner of Québec, Prince Edward Island and Nova Scotia as "the midpoint of the White Cape and Entry Island." The description proceeds as follows: *from this corner northerly to the midpoint between Amherst Island and White Cape; thence northeasterly to the midpoint between East Point (Magdalen Islands) and Cape St. Lawrence; thence north of east to the midpoint between St. Paul and East Point; thence northeasterly to the midpoint between Cape Anguille (Newfoundland) and East Point (Magdalen Islands) which constitutes the mutual corner of Newfoundland, N.S. and P.Q.*

The delimitation can be analyzed from the perspective of proportionality. Between the Isles de la Madeleine and Nova Scotia the water area division is equal. The facing shorelines of the two are relatively equal. On the other hand, the Québec shoreline in the Gulf is substantially longer and the full use of the Isles de la Madeleine in the delimitation gives Québec a substantial share of the Gulf.

c) The 1964 Québec - Prince Edward Island Line

Nicholson does not describe the water boundary between Québec and Prince Edward Island and provides no reference to an official description. The 1964 Agreement describes the Québec - Prince Edward Island maritime boundary beginning at a mutual corner for P.E.I., Québec and N.S. described as «the midpoint between Cable Head and South Cape (Magdalen Islands).»

From this mutual point the line runs west through the midpoint between South Cape and Cable Head; thence northwesterly to a point midway between South Cape and North Point; thence northwesterly to the midpoint between Miscou Island (N.B.) and Deadman Island (Magdalen Islands); at which point P.E.I., N.B. and P.Q. have a mutual corner²²³.

As is true for the other interprovincial boundaries with Québec, the full effect given to the Isles de la Madeleine predominates the delimitation. The 1964 Agreement line roughly approximates the equidistant line between Prince Edward Island and the Isles de la Madeleine. While Prince Edward Island is also an island its land area is many times larger than that of the Isles de la Madeleine; it covers a larger geographic area and is much closer to the mainland. It shields the portions of the coastlines of Nova Scotia and New Brunswick. Accordingly, *vis-a-vis* the Madeleine Islands, Prince Edward Island might justify the greater offshore area. Nevertheless, equidistance is utilized and the Isles de la Madeleine generate a substantial area for Québec.

While the length of the Québec coastline on the Gulf is substantially longer than that of Prince Edward Island, the length of the Isles de la Madeleine relative to that of Prince Edward Island which is opposite is not very substantial. Since equidistance was the principle that was used, Québec received the larger area. Considering the fact that this is an opposite situation in which all islands are given full effect, the delimitation takes fair account of the coastal frontages present here. These factors could, however, argue for a larger apportionment for all of the Maritime Provinces and a diminution of the impact of the Isles de la Madeleine. The dominate

223. 1964 Agreement page 3. The description on page 4 commences at a corner common to N.B., P.E.I. and P.Q. described as "the midpoint between Miscou Islands (N.B.) and Deadman Island (Magdalen Islands):" *from this mutual corner point east of south to a point midway between South Cape (Magdalen Islands) and North Point (P.E.I.); thence south-east to a point midway between South Cape and Cable Head; thence due east to the line joining the midpoint of East Point and Sight Point with the midpoint of White Cape and Entry Island, at which point is the mutual corner of P.Q., P.E.I. and Nova Scotia.*

position of Québec, as a whole, in the area does provide a justification for the 1964 Agreement Line.

Compared to its neighbors to the south, Prince Edward Island fares well. The water area allocated to it is probably at least one and one half times the total land area of the province. It does, of course, have a substantial unobstructed coastline in the Gulf not found in the cases of New Brunswick and Nova Scotia.

d) The 1964 Québec - Newfoundland Line

Nicholson does not describe the water boundary between Québec and Newfoundland and provides no reference to an official description. The 1964 Agreement delimits the Québec-Newfoundland maritime boundary in the Gulf of Saint Lawrence as follows: *starting at a point midway between Ile au Bois and Feralle Point on the southern extension of the north-south line on land between Québec and Labrador, southeasterly to the midpoint between Port St. Servan and Point Riche; thence southwesterly to the midpoint between Mecatina Island and Table Point; thence southwesterly to the midpoint between St. Mary Island and Cape St. Gregory; thence southwesterly to the midpoint between Heath Point and Cape St. George; thence southerly to the midpoint between East Point (Magdalen Island) and Cape Anguillo, which is the mutual corner of Québec, NFLD, and N.S.*²²⁴.

The 1964 Agreement does not contain a written delimitation of the Newfoundland - Québec maritime boundary in the Labrador area. The 1964 Agreement line described above stops in the water south-southeast of the Québec-Labrador shore boundary on the Gulf. While it does describe a boundary extension line into the water, that line is only used to identify the terminal point of the 1964 line. Québec maps, however, show the Labrador-Québec extension line as part of the maritime boundary²²⁵. Newfoundland's position on this matter is unknown.

The Newfoundland - Québec boundary described in the 1964 Agreement proceeds north from the trijunction with the Nova Scotia boundary line. It is a simplification of the equidistant line which uses the Isles de la Madeleine as part of the baseline. The influence of those islands extends only over a small portion of the boundary line, but the islands do deny Newfoundland access to the more central portion of the lower Gulf. The remainder of the boundary line is

224. 1964 Agreement, at pp. 6-7. On page 5 of the 1964 Agreement the same boundary is described running south to north: *from this mutual corner to the midpoint between Heath Point (Anticosti Island) and Cape St. George; thence northeasterly to the midpoint between St. Mary Island and Cape St. Gregory; thence northeasterly to the midpoint between Mecatina Island and Table Point; thence northeasterly to the midpoint between Port St. Servan and St. Riche; thence northeasterly to the midpoint between Isle au Bois and Ferolle Point at the southern extension of the north-south line on land between Labrador and Québec.*

225. See *Le Québec*, *supra* note 213.

drawn primarily between the mainland of both provinces, and this arises in an opposite situation. The Anticosti Island in the mouth of the Saint Lawrence River does form part of the Québec coastline in the area that affects a small portion of the line. Until the influence of the Isles de la Madeleine is reached the coastlines of the provinces in the area appear to be equal, and the water division is the same, assuming that the Saint Lawrence River mouth is ignored.

4.2 Hudson Bay

The boundary of Québec in the Hudson Bay and Hudson Strait areas is described in the 1912 boundary extension as follows:

*Commencing at the point at the mouth of the East Main river where it empties into James bay, the said point being the western termination of the northern boundary of the province of Québec as established by chapter 3 of the statutes of 1898, entitled An Act respecting the north-western, northern and north-eastern boundaries of the province of Québec; thence northerly and easterly along the shores of Hudson bay and Hudson strait; thence southerly, easterly and northerly along the shore of Ungava bay and the shore of the said strait; thence easterly along the shore of the said strait to the boundary of the territory over which the island of Newfoundland has lawful jurisdiction [...]*²²⁶

4.2.1 The Legal Status of Hudson Bay

As with the Gulf of Saint Lawrence, one must start with the normal baseline and consider exceptions to it. Unlike the Gulf, the argument for historic water status in Hudson Bay is more substantial.

Hudson Bay is an extremely large water body. From mainland to mainland its depth (north/south) is some 780 nautical miles if James Bay is included, if not this number decreases to 570 nautical miles. Its greatest width is 520 nautical miles (east/west), approximately. The normal baseline would use the mean low water line of the mainland and islands, closing lines at river mouths and 24 mile juridical bays, and low-tide elevations within twelve nautical miles of that baseline.

Geographically it appears that the entrance to Hudson Bay would be delimited approximately by closing lines located in the west between the mainland and the southern tip of Southampton Island, then at the eastern tip of that Island at Seahorse Point to the northern tip of Nottingham Island, then from the southern tip of Nottingham Island to Cape Wolstenholme on the mainland. Their combined length would be approximately 116 nautical miles. The specific location of these closing lines could be obtained by application to large scale charts of the 45 degree test

226. Statutes of Canada, 2 GEORGE V. Cap. 40, 1912; Nicholson, *supra* note 28 at 145.

discussed above. It has also been argued that the entrance to Hudson Bay is really at the eastern entrance to Hudson Strait²²⁷.

Although it is a well marked indentation containing landlocked waters, meets the semicircle test set out in Article 10 of the 1982 LOS Convention, and its coasts belong to a single state, Hudson Bay does not qualify as a juridical bay due to the fact that the mouth of Hudson Bay cannot be completely closed by a line or series of lines totalling 24 nautical miles or less. The narrowest entrance would be at the eastern end of Hudson Strait. The total length of the line segments needed to close that entrance would be approximately 54 nautical miles with most of that distance found across the main channel between Resolution and Button Islands.

As an over-large bay it is due a 24 mile fall-back line as provided by Article 10.5 of the 1982 LOS Convention. Within the Bay there are smaller bays qualifying for juridical bay status. James Bay is located at the southeastern corner of Hudson Bay. Its mouth is approximately 90 nautical miles wide between Long Island and Cape Henrietta Maria. The 45 degree test would locate that closing line more exactly. As an overlarge bay it may also obtain a 24 nautical mile fall-back line. In addition, subsidiary bays qualifying for juridical bay status (*e.g.* Rupert Bay) and river mouths could be closed. The fall-back line would not be available in Hudson Bay and James Bay if Québec were to become an independent state, thus creating a situation in which these bays would have coasts belonging to more than one state²²⁸.

Hudson Bay does not form part of a navigation route between one part of the high seas or exclusive economic zone and another. Historically, navigation in the waters of Hudson Bay has been limited to a maximum of four months a year²²⁹.

Arguments have been put forward for the historic bay status of the entire Hudson Bay and Hudson Strait. Writers often have expressed their views on the status of these waters and documented the relevant history. Perhaps the most complete review of the arguments against historic water status was made by Balch in the early part of this century²³⁰. Equally vehement arguments in favor of historic water status were put forward by Johnston twenty years later²³¹.

227. See Morin, *supra* note 164 at 183; and «Letter from the Bureau of Legal Affairs of 17 December 1973», 12 *Ann. Can. De droit int'l.* 277-79 (1974). For a discussion of the closing lines at the eastern entrance to Hudson Strait see section V.C. below.

228. 1982 LOS Convention, Art. 10.1.

229. Strohl, *supra* note 60 at 233; Pharand, *supra* note 36 at 199.

230. Balch, «Is Hudson Bay a Closed or Open Sea?», 6 *AM. Jour. Int'l. L.* 409 (1912); Balch, «The Hudsonian Sea Is a Great Open Sea», 7 *AM. Jour. Int'l. L.* 546 (1913).

231. Johnston, «Canada's Title to Hudson Bay and Hudson Strait», 15 *BRIT. YBK. INT'L. L.* 1 (1934).

Strohl devoted an entire chapter of his book to a study of the Hudson Bay and Strait claim²³². Balch lists and quotes numerous writers who expressed view that Hudson Bay was open sea including Vattel and Phillmore²³³.

After recounting the history of discovery, Strohl finds that the first purported claim to these areas was in the British charter to the Hudson's Bay Company in 1670. It included «all waters, lands &c., within the entrance to Hudson Strait, not possessed by any other British company or colony»²³⁴. The Treaty of Utrecht of 1718 states that, «the [King of France] shall restore to the kingdom [...] of Great Britain, to be possessed in full right for ever, the bay and streights of Hudson, together with all lands, seas, sea-coasts, rivers and places situate in said bay and streights, and what belong thereunto, no tracts of land being excepted, which are at present possessed by the subjects of France»²³⁵.

An 1857 map illustrating the extent of the territory placed under the authority of the Hudson's Bay Company covers the entire Hudson Bay²³⁶. This grant of authority continued to 1870 and Strohl is of the opinion that during this period England claimed complete sovereignty over these waters which was exercised by the Company²³⁷. France had disputed this claim but in 1713 it ceded its claim to territory in the area to England²³⁸.

In his classic treatise of 1758, *THE LAW OF NATIONS*, Vattel argued that Hudson's Bay could not become property of the coastal nation²³⁹.

232. Strohl, *supra* note 60 at 233-250.

233. Emer de Vattel, 1 *Le droit des gens ou principes de la loi naturelle* 142 (Amsterdam 1775); Phillmore, I *International law* 284 (3d ed. 1879).

234. Strohl, *supra* note 60 at 237; W. Manning, IV *Diplomatic correspondence of the United States-canadian relations 1849-1860*, pp. 402-08 (1945).

235. *Documents illustrative of the canadian constitution* 3 (W. Houston ed. 1891).

236. See Nicholson, *supra* note 28 at 58.

237. Strohl, *supra* note 60 at 238.

238. Strohl, *supra* note 60 at 238; J. Almon, 1 *Collection of treaties & C. Between Great Britain and other powers* 136 (1772).

239. E. de Vattel, *The law of nations* 129 (Chitty trans. 1834): *all we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of roads, bays, and straits, as still more capable of being possessed, and of greater importance to the safety of the country. But I speak of bays and straits of small extent, and not of those great tracts of sea to which these names are sometimes given, as Hudson's Bay and the Straits of Magellan, over*

During the nineteenth century the international law of the sea evolved to establish the three mile territorial sea limit and limits on the closure of bays to ten miles. Exceptions for historic bays were limited. Thus, Balch is able to identify numerous writers publishing in the latter part of the nineteenth century who supported strict limits and declared Hudson Bay to be open waters. The American-British Treaty of 1818, recognized the right of Americans to fish «within three marine miles of any of the coasts, bays, creeks, or harbors of His Britanic Majesty's Dominions in America»²⁴⁰.

The 1818 Convention between Great Britain and the United States permitted the inhabitants of both states to take fish along these coasts. The Convention specifically states that it is «without prejudice to the exclusive rights of the Hudson Bay Company»²⁴¹. The American negotiators explained this clause as follows: *to the exception of the exclusive rights of the Hudson's Bay Company, we did not object as it was virtually implied in the treaty of 1783 and we had never any more than British subjects, enjoyed any right there, the Charter of that Company having been granted in the year 1670. The exception applies only to the coasts and their harbours and does not affect the right of fishing in Hudson's Bay beyond three miles from the shores, a right which could not exclusively belong to or be granted by any nation*²⁴².

When an American vessel was seized in the Bay of Fundy the matter went to arbitration where it was found that the Bay of Fundy was a water body «over which no nation can have the right of sovereignty» and only bays where the headlands do not exceed ten miles in width could be closed²⁴³. While this award did not directly apply to Hudson Bay, it interpreted the 1818 Treaty that was arguably equally applicable to those waters.

In 1893, prior to that award, the British Government specifically addressed the legal status of Hudson Bay in written arguments before the international tribunal hearing the *Bering Sea* case.

which the empire cannot extend, and still less of a right of property. A bay whose entrance can be defended, may be possessed and rendered subject to the laws of the sovereign; and its is important that it should be so, since the country might be much more easily insulted in such a place, than on the coast that lies exposed to the winds and the impetuosity of the waves.

For the original French, see E. Vattel, *Le droit des gens* 324 (1758).

- 240. Fisheries, Boundary and Restoration of Slaves, 20 Oct. 1818, U.S. - U.K., 8 U.S. Stat. 248; *Documents illustrative of the canadian constitution* 285 (W. Houston ed. 1891).
- 241. Strohl, *supra* note 60 at 244; J.B. Moore, *I Digest of international law* 781 (1906).
- 242. VII *U.S. state papers* 167 (1818-19), Dispatch No. 50, Gallatin and Rush to Secretary of State Adams, dated London, 20 October 1818; Johnston, *supra* note 231 at 7.
- 243. The Case of the Washington, Mixed Claims Commission, Award of Umpire Bates, Moore, *I Digest of international law* 786 (1906).

In that dispute with the United States the British argued for open seas and limits on territorial jurisdiction. In that argument it took the position that it had no authority over foreign fishing in Hudson Bay²⁴⁴. This official British position made in an international arbitration with the interested states present is particularly significant.

The claim of authority over Hudson Bay was historically based on ancient views of closed seas that were very much under attack by the late 19th Century. Thus, Westlake wrote in 1904, *it is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen, were once made to sovereignty over the open sea, and which it is held have been gradually reduced to tolerable measure through such intermediate stages as that of the King's Chambers*²⁴⁵.

While Westlake supported the view that Conception Bay on the coast of the Newfoundland was exceptional based upon immemorial usage as territorial sea, he provides no support for Hudson Bay²⁴⁶.

The right of a coastal state to obtain historic bay status over certain waters has sometimes been linked to the ability of coastal states to subject the waters to the coastal state's control. Thus, Phillmore wrote in the nineteenth century, «the real question [...] is, whether it be within the physical competence of the nation possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded [...]»²⁴⁷.

He then went on to quote the excerpt from Vattel reported above in which Vattel argued specifically that Hudson's Bay could not be acquired by the coastal state²⁴⁸.

A similar view was expressed by Commissioner Bates when he found that the Bay of Fundy was not a bay as meant in the treaties of 1783 and 1818.

244. This British position is reported by Balch, 6 *AM. Jour. Int'l. L.*, *supra* note 230 at 444, which is shortly followed by a citation to "United States, No. 4 (1893) Bering Sea Arbitration, British Argument (London) pp. 7-8". In his article on the subject, Johnston, *supra* note 231, reviews Balch's arguments. He does not question the Balch report of this position. I have not had the opportunity to verify the report.

245. Westlake, *International law* 187 (1904).

246. Johnston also reports this movement away from title to vast bays and seas to the ten mile rule, but finds the title of the Hudson's Bay Company and its transfer to Canada in 1870 under the original description to establish an exception. Johnston, *supra* note 231 at 11-12.

247. Phillmore, I *International law* 274 (1879). See Vattel, *supra* note 239. See also, Balch, 6 *AM. Jour. Int'l. L.*, *supra* note 230 at 432-33.

248. See *supra* note 239.

*The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long; it has several bays on its coast; thus the word «bay» as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty*²⁴⁹.

Expeditions to explore Hudson Bay and Strait took place in 1884-87²⁵⁰. In 1894 the Prime Minister, Sir Charles Hibbert Tupper, in the course of a parliamentary debate took the position that the laws of Canada applied to Hudson Bay²⁵¹. The question arose because there was concern about foreign fishing and hunting in those waters. The government responded with the assertion of sovereignty and a denial that it has been inactive in enforcing its claim. Nevertheless, it said, *the remoteness of the region, however, has made it extremely difficult to ascertain with any degree of accuracy the correctness of these rumours [that foreign fishing had taken place]. Some steps have been taken, through the agency of the Department of Marine and Fisheries, to publish notices that the laws of Canada, apply to those waters; but it is only fair to say that since we are not as yet familiar with either the time that those vessels are likely to arrive or the portions of the bay where they may be found at any time, these notices have been to a great extent formal [...]. On one or two occasions we have, through the agency of the Hudson's Bay Company and through the Indian Department, endeavoured to obtain full information regard to the illicit trading which is said to have been carried on by small foreign vessels going there possibly to hunt, or engage in the whale or porpoise fishery, but the result of those efforts so far has not been such as to give us much definite information*²⁵².

In 1897 the administrative authority over the Bay and Strait was divided by an Order-in-Council that described administrative boundaries running through the waters²⁵³. But Strohl found that all the official Canadian maps showed the boundaries in Hudson Bay running along the coast and

249. United States, No. 4 (1893) Bering Sea Arbitration, British Argument (London) p. 145, quoted at Balch, 6 *AM. Jour. Int'l. L.*, *supra* note 230 at 435.

250. Johnston, *supra* note 231 at 14-15.

251. Debates, House of Commons, Canada, 4th Sess. 7th Parl., 57-58 VICT., 1894, Vol. II. pp. 3275-8. Johnston, *supra* note 231 at 13.

252. Debates, House of Commons, Canada, 4th Sess., 7th Parl. 57-58 VICT., 1894 p. 3278 (28 May 1984).

253. Strohl, *supra* note 60 at 238; *Statutes of Canada*, 1898, p. xxxvi. For boundaries see *Canada Gazette* vol. XXXI, No. 46 (14 May 1898), pp. 2613-14. See Johnston, *supra* note 231 at 13.

not through the waters²⁵⁴. Expeditions to assert Canadian authority were undertaken in 1902, 1904, 1906, 1908 and 1910²⁵⁵.

While Canada may have claimed jurisdiction over Hudson Bay and Strait, American whalers operated in the area at least during the period 1830-1900. Towards that latter part of the period the Americans were joined by Scottish whalers²⁵⁶.

The above record of the House of Commons Debates suggests that the Government was not very aware of these activities and took only limited action. Due to the technology of the time these vessels landed on the shores of Hudson Bay. Some of these facts were known to the Hudson Bay Company. Whether they obtained permission from the Company or were regulated in any way is not known. The writers have debated the legal implications of these landings and this knowledge²⁵⁷.

Strohl does report that in 1903 a Canadian Government ship was sent into Hudson Bay to reassert Canadian sovereignty over the area and to expel or subject to Canadian authority any United States whalers. But none were found. It is also reported that in 1908 one private fishing and hunting expedition from the United States was met and license fees demanded and paid²⁵⁸.

In 1906 a statute adopted by the Canadian Parliament imposed a whaling license fee, «[...] and inasmuch as Hudson's Bay is wholly territorial water of Canada, the requirements of this section as to licensing and as to the fee payable therefor, shall apply to every vessel or boat engaged in the whale fishery [...]»²⁵⁹.

In 1906-07 a patrol was conducted in Hudson Bay for the purpose of collecting whaling dues in Hudson Bay pursuant to 1906 amendment to the Fisheries Act which was made applicable to Hudson Bay when it called for the collection of the fee from, *any vessel or boat engaged in the whale fishery or hunting whales within the waters of Hudson Bay, or the territorial waters of Canada north of the 55th parallel of north latitude [...] and, in so much as Hudson Bay is wholly territorial water of Canada, the requirements of this section [...] shall apply to every*

254. Strohl, *supra* note 60 at 238.

255. Johnston, *supra* note 231 at 15.

256. J.T. Jenkins, *A history of whale fisheries* 350 (1921); Johnston, *supra* note 231 at 8-9.

257. Johnston, *supra* note 231 at 8-9; Bouchez, *supra* note 60 at 230.

258. Strohl, *supra* note 60 at 246; Johnston, *supra* note 231 at 15.

259. R.S.C. 1906, chap. 45 sec. 9(12); Johnston, *supra* note 231 at 14.

vessel [...] in any part of the waters of Hudson Bay, whether such vessel or boat belongs to Canada, or is registered and outfitted in...any other British or foreign country²⁶⁰.

In the same year United States Assistant Secretary of State Adee responded to a question regarding the Canadian claim of authority. He stated that, with respect to Hudson Bay, which is a body of water 900 miles long by 600 miles wide, and connected with the Atlantic Ocean by a strait about 400 miles in length and varying from 60 to 100 miles in width the United States will take the position that citizens of the United States have the right to whale and fish within [Hudson Bay] waters outside the three mile limit²⁶¹.

The revised Statutes of Canada of 1927 expressly restate in section 9(10) the 1906 language that fish licensing fees apply to all vessels in Hudson Bay, «inasmuch as Hudson bay is wholly territorial water of Canada» including foreign vessels²⁶².

In 1937 an Order-In-Council was passed under the Customs Act which drew a closing line across the eastern entrance to Hudson Strait²⁶³. It is possible to argue that the closing line at Hudson Strait described in this Order-in-Council never became legally effective. Paragraph IV.(1) calls for a map to be prepared to «mark out the territorial waters of Canada, adopting as a baseline for this purpose» the closing line at the eastern end of Hudson Strait. Paragraph IV.(2) states that government agencies should carry out their responsibilities consistent «with Canadian sovereignty over national and territorial waters so delimited.» Morin reports that no such maps were ever prepared²⁶⁴. Arguably, there was no delimitation called for by the Order, thus denying the closing entry into force as law.

The publication in the HACKWORTH'S DIGEST in 1940 reasserted the official United States position of 1906 that Hudson Bay was open sea beyond the normal three mile limit. It was again reported in WHITEMAN'S DIGEST, published in 1965 where it is written, «The United States has continued to dispute Canada's claim to include Hudson Bay in its territory»²⁶⁵.

260. A. Cook and C. Holland, *The exploration of Northern Canada* 302 (1978); *Statutes of Canada*, 1906, 6 EDW. VII, c. 13; R.S.C. 1906, c. 45, s. 12; Pharand, *supra* note 36 at 117.

261. I *Hackworth's digest* 700-01 (1940); Strohl, *supra* note 60 at 247.

262. An Act respecting Fisheries and Fishing, R.S.C. 1927, c. 73.

263. Order-in-Council P.C. 1937-3134 of 18 December 1937. See «Letter of the Legal Bureau of the Department of External Affairs», 12 *Ann. Can. De droit int'l.* 278-79 (1974); Pharand, *supra* note 36 at 129 n. 92; and Morin, *supra* note 164 at 183-84.

264. Morin, *supra* note 164 at 166.

265. 4 *Whiteman's digest* 237 (1965).

The degree or location of the enforcement actions in Hudson Bay is not known. But the whale licensing requirement ended with the end of whaling reported to be around 1915²⁶⁶.

In 1957 the question of the status of Hudson Bay arose in the House of Commons. The Minister of Northern Affairs and National Resources, Alvin Hamilton, answered *the waters of Hudson bay are Canadian waters by historic title in accordance with the universally accepted international law doctrine applying to historic bays. Canada regards as inland water all the water west of a line drawn across the entrance to Hudson strait from Button island to Hatton headland on Resolution island*²⁶⁷.

Inquiries by Strohl in 1959 produced the following information on the exercise of authority by Canadian officials in Hudson Bay:

The Canadian Government performs the following administrative functions in Hudson Bay at this time:

- (a) during the navigation season, the Canadian ice-breaking patrol vessel...acts as a depot ship in Hudson Strait [providing information to ships on ice conditions].*
- (b) Foreign ships have been asked to report when passing Cape Chidley, on the south side of the entrance to Hudson Strait, «but they do not always do so [...].»*
- (c) An Eastern Arctic Patrol visits sea coastal points where Eskimos congregate in the summer [...]*
- (d) There is a patrol by the Royal Canadian Mounted Police for the enforcement of criminal and civil law [...]*
- (e) Maintenance of aids to Navigation.*

Information received by [Strohl] from the Department of Transport, Ottawa, in a letter dated 17 March 1959, is quoted:

- 1. Insofar as this department is concerned there are no regulations in force in Hudson Bay and Hudson Strait for foreign shipping.*
- 2. This department maintains no enforcement agency in Hudson Bay and Hudson Strait.*
- 3. Ships bound for Hudson Bay are not required by this Department to obtain clearance*²⁶⁸.

This leads Strohl to conclude, «judging from the above-mentioned writings as well as from the information this writer was able to obtain from the Canadian Gooovernment (sic), it does not

266. Pharand, *supra* note 36 at 122.

267. House of Commons Debates, 23rd Parliament, 6 ELIZ. II, vol. II, 1957-58, p. 1169.

268. Strohl, *supra* note 60 at 239.

appear that sovereignty over this huge inland sea has been any recent source of pre-occupation among Canadian authorities»²⁶⁹.

At the same time Strohl was unable to find assertions by the United States subsequent to that made in 1906 which denied the Canadian claim. He explains this lack of attention on both sides by the limited economic value of the waters in question²⁷⁰.

I have not had the time or resources to thoroughly research the history of foreign navigation in Hudson Strait and Bay. I was able to acquire, however, information from the United States Coast Guard on its records of United States Coast Guard and Navy navigation in Hudson Strait. These records establish thirteen United States icebreaker operations in Hudson Strait during the period 1948 to 1957²⁷¹. The excerpts from ships logs and reports that I have inspected show no record of requests or grants of consent by Canadian authorities. Some of the activities would appear to be compatible only with high seas rights. Thus on 13 September 1948 the USCG Cutter Eastwind, while in Hudson Strait, reported that it test fired its «40 mm and two 20 mm guns expending all of the ammunition allotted for this purpose. The guns functioned without casualty, pilot balloons being used for targeting and about a dozen were shot down»²⁷².

269. *Id.* at 240.

270. *Id.* at 249-250.

271. They were as follows: USCGC Eastwind: 12-14 September 1948; USS Edisto: 19-21 September 1948; USS Edisto: 21-22 August 1956; USS San Marcos and USNS Boyce already at Coral Harbor; all vessels apparently exited Foxe Basin via Hudson Strait, dates unknown USCGC Westwind, USS Edisto, USS San Marcos, USS Rushmore, USNS Alatna, USNS Pvt. John R. Towle, USNS Mission Los Angeles, USNS Sgt Morris E. Crain: Aug.-Sept. 1957; Hudson Strait to Coral Harbor, Southampton Is.; operations in Foxe Basin & depart via Hudson Strait

Fax from Cdr. Stu Marsh, Ice Operations Division, US Coast Guard, G-N10 to Jonathan Charney, Vanderbilt Law School, dated 21 Feb. 1992, containing: Report of Task Force Eighty, Summer Arctic Operation 1948, CTF 80/A4-3/A9/rs, Serial 025 (12 Nov. 1948) pp. 1; Annex 1-(c) pp. 1, 12, 13; Annex 1-(d) pp. 1, 9; Memorandum to Commander Joint Task Group 6.3 from Commanding Officer, U.S.S. Edisto (AGB-2), Subject Post Operational Report, 14 Sept. 1956, doc. AGB2:JLR:vh1, A9 ser. 415, signed J.E. Plummer; MTS Atlantic Arctic Operations, CTF 6 Post Operation Report 1957, Commander Military Sea Transportation Service, Atlantic Area, Post Operations Report, Operation BAFOX (FD/N3:jbh, A4-3 Ser:0350, 17 Oct. 1957: Enclosure (1), Enclosure (2).

272. Report of Task Force Eighty, Summer Arctic Operation 1948, *supra* note 271, Annex 1-(d) (d) p. 9.

In 1957 Parliament of Canada supported the adoption of a system of straight baselines along the Canadian coastline that would close off Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence, among other water bodies. This plan was announced by the Prime Minister in 1963 and resisted by the United States. As a consequence, the straight baseline system was withdrawn²⁷³.

In 1963 Strohl wrote that the configuration of Hudson Bay made it a potential area for submarine operations by foreign states. While internal water status might give Canada more latitude for reaction to such a threat, he concluded that, Hudson Bay does not have the characteristics of a sheltered naval base or harbor, and thus does not have the intimate connection with the land that one usually associates with the bays in connection with defense. In sum, it is problematical whether possession of Hudson Bay as inland waters can be regarded as especially essential to the national security of Canada.

He then expressed the view that the national security argument will diminish over time²⁷⁴

Section 2 of the 1970 Arctic Waters Pollution Prevention Act defines the term «arctic waters» to include, «the waters adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude» bounded on the east by the equidistant line between Canada and Greenland up to one hundred nautical miles from the nearest Canadian land²⁷⁵. This definition places much of the northern portion of Hudson Bay, all of Hudson Strait and the northern portion of Ungava Bay within this definition²⁷⁶.

By letter dated 17 December 1973, the Canadian Bureau of Legal Affairs sought to identify the internal waters of Canada. Hudson Bay and Hudson Strait were among those listed²⁷⁷. But

273. III *United Nations, conference on the law of the sea* 51-52, U.N. Doc. A/Conf. 13/39 (1958); «Canada Sets 12-Mile Fishing Zone», *The Washington Post*, 5 June 1963, p. A17; and 4 *Whiteman's digest*, 1239-1240 (1965); S.A. Swarztrauber, *The three-mile limit of territorial seas* 187 (1972).

274. Strohl, *supra* note 60 at 250.

275. R.S.C. 1985, vol. I, c. A-12, s. 2.

276. Modern international law permits a pollution zone of 200 nautical miles from the baseline as a part of exclusive economic zone jurisdiction. 1982 LOS Convention, Art. 56.1(b)(iii). Thus, this assertion of pollution protection jurisdiction does not necessarily imply territorial sea jurisdiction, much less internal waters jurisdiction. It would, however, be compatible with and provide for such jurisdiction.

277. 12 *Ann. Can. De droit int'l.* 277-79 (1974).

it is also true that during the period 1956 to 1970, statements by the Canadian government did not make clear whether it claimed the waters as territorial sea or internal waters²⁷⁸.

Pharand has written that Hudson Strait forms one of the potential passages for the Northwest Passage. He has reported that there were 131 foreign passages into Hudson Strait during the period 1977 to 1985. These were all partial crossings that did not lead to other destinations²⁷⁹. This information was obtained from an officer in the Canadian Coast Guard. Whether or not Canadian consent was requested or obtained is not reported. One can presume, based on the source that Canada was aware of the transits.

Prior to 1985, no straight baselines were drawn by Canada to close Hudson Bay or Strait. Based upon his analysis of the history of the Northwest Passage, Pharand writes that, *the waters of the Northwest Passage were not internal on the basis of history before their enclosure by straight baselines [...] the extension of Canada's territorial waters to 12 miles in 1970 resulted in an overlap of territorial waters in Barrow Strait. This means that, since that date, all of the routes of the Northwest Passage must cross the territorial waters of Canada [...] [T]he Northwest Passage constitutes a legal or territorial strait [...] and presents an overlap of territorial waters*²⁸⁰.

278. See statement of Mr. Lesage, House of Commons Debates, 3rd Sess, 22nd Parliament, 4-5 Eliz. II, vol. VII, 1956, p. 6955; Hon. L.S. St. Laurent (Prime Minister), House of Commons Debates, 5th sess, 22nd Parliament, 5-6 Eliz. II, vol. III, 1957, p. 3186; Hon. P.E. Trudeau (Prime Minister), House of Commons Debates, 1st sess., 28th Parliament, 17 Eliz. II, vol. VI, 1969, p. 6339; Right Hon. P.E. Trudeau, Prime Minister, House of Commons Debates, 1st sess., 28th Parliament, 18 Eliz. II., vol. VIII, 1969, 15 May 1969, p. 8720; Mr. Beesley, Standing Committee on External Affairs and National Defence, House of Commons, 2d sess. 28th Parliament, 1969-70, 29 April 1970, p. 25:18-19. The claim of internal water status was made in 1975 by Secretary of State for External Affairs, Allan J. MacEachen. Standing Committee on External Affairs and National Defence, House of Commons, 1st sess. 30th Parliament, 1974-75, Issue No. 24, 22 May 1975, p. 24:-5.

279. Pharand, *supra* note 36 at 190-91, 199, 209. It is not clear how many of these crossings into Hudson Strait were made only with the actual permission of Canada. Crossings made without Canada's permission would be inconsistent with internal water status of these waters. If permission was secured, acceptance of internal water status would be supported. No research similar to that made by Pharand for the Northwest Passage has been made with regard to the possibility of foreign navigation in the Hudson Bay proper.

280. Pharand, *supra* note 36 at 224.

In 1985 Canada finally did close Hudson Bay and Hudson Strait by the system of straight baselines that it adopted for the Arctic Archipelago²⁸¹. The Government reasserted its internal water claim to these waters²⁸². The baselines close the eastern entrance to Hudson Strait and the entrances to the north in the Arctic Archipelago. If this system is legally effective, by definition the waters west of line at the entrance to Hudson Strait, including all of Hudson Bay and Hudson Strait would be today internal waters of Canada under international law.

The legal validity of the Canadian system of straight baselines in the Canadian Arctic has been challenged. The United States takes the position, «that there is no basis in international law to support the Canadian claim²⁸³. The United States objection is motivated in large part on the prejudice to United States freedom to navigate through the Northwest Passage²⁸⁴.

The system of straight baselines in the Canadian Arctic also drew an objection from the member states of the European Communities. A note delivered on behalf of those states by the British High Commissioner states, «[t]he Member States of the EC cannot therefor in general acknowledge the legality of these baselines and accordingly reserve the exercise of their rights in the waters concerned according to international law»²⁸⁵. The Canadian Department of External Affairs replied in a note which presented arguments in favor of the system of straight baselines and concluded that it «cannot accept the views set out in» the note from the EC²⁸⁶. This exchange of notes raises serious questions regarding the legal validity of this straight baseline system. Pharand is of the opinion that the system of straight baselines established by Canada for the Canadian Arctic Archipelago is consistent with international law²⁸⁷. His opinion is supported by the general literature.

281. Territorial Sea Geographical Coordinates (Area 7) Order (10 Sept. 1985, P.C. 1985-2739 of the Privy Council. See *Atlas of the straight baselines*, *supra* note 2 at 98.

282. Statement of Right Hon. Joe Clark, Secretary of State for External Affairs, House of Commons Debates, 1st sess. 33rd Parliament, 34 ELIZ. II, vol. V, 1985, 10 Sept. 1985, p. 6462-6464.

283. Letter to Hon. Charles Mathias, Jr., United States Senate, from James W. Dyer, Acting Assistant Secretary for Legislative and Intergovernmental Affairs, United States Department of State, 19 Feb. 1986. These views were communicated to the Government of Canada.

284. *Id.*

285. Note No. 90/86 of 9 July 1986.

286. Note No. JCD-0257 of 7 Aug. 1986 from Canadian Department of External Affairs to the British High Commissioner.

287. Pharand, *supra* note 36 at 252-55.

Under the *Fisheries Case* of 1951²⁸⁸ there is no right of transit in waters closed by a system of straight baselines. But both the 1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 4.5 (to which Canada is not a party), and the 1982 Law of the Sea Convention, Arts. 34-39 (which Canada has signed) protect the right of passage in waters enclosed by straight baselines under certain circumstances. The 1958 Convention protects the right of innocent passage if the waters were previously territorial sea or high seas. The 1982 Convention establishes the right of transit passage if the waters were used for international navigation and no alternative route of similar convenience exists. Whether such navigation rights would exist in the Northwest Passage if they are legally closed by the Canadian system of straight baselines is discussed by Pharand²⁸⁹.

It is not clear that the Canadian system of straight baselines in this area would continue to stand if Québec were to become independent. Article 7.6 of the 1982 Convention states: «the system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.»

This article carries forward a similar provision in the 1958 Convention on the Territorial Sea and Contiguous Zone, Article 4.5. Canada might be required to withdraw this straight baseline upon Québec's independence. The objective of this article is to protect access to the sea by states from restrictions that would accompany internal water status brought about by the unilateral establishment of straight baselines²⁹⁰. Under this theory the withdrawal of the straight baseline closure of Hudson Strait might reestablish these waters as lying seaward of internal waters. Presumably, Québec would have territorial sea, exclusive economic zone, and continental shelf rights in those areas. Rights of innocent passage and perhaps transit passage also would apply. This provision reflects a broad policy in the international law and law of the sea to provide all states with liberal access to and from the sea.

On the other hand, at the time of the enactment, no such cutting off of another state took place. Furthermore, Québec, might not have a territorial sea in the area to be cut off. If the area was historic internal waters before the establishment of the straight baseline closure or that closure perfected the historic status, all the waters behind the closing line would be internal waters of Canada. Québec may merely have a shoreline boundary with Canadian internal waters, not a territorial sea as specified in the article.

Discussions between the United States and Canada took place subsequent to the Canadian adoption of these straight baselines. When the United States Secretary of State visited Canada

288. *Supra* note 66.

289. Pharand, *supra* note 36 at 223-243.

290. The same objective is the basis for the definition of juridical bays which are limited to those whose coasts belong to a single state. 1982 LOS Convention, Art. 10.1.

in January of 1986 he was asked whether the United States should recognize Canadian sovereignty in the Arctic. He responded, *of course, we recognize Canada's sovereignty. At the same time there are problems about straits and passages that are important to us. And that we are engaged in a process of discussion [...] So, we hope that we will work this through properly*²⁹¹.

This statement could be interpreted as recognizing Canada's sovereignty over the Arctic waters, including the Hudson Bay and Strait areas. More likely it should be interpreted as a recognition of Canadian sovereignty over the land areas leaving the water areas open to discussion.

The discussions were resolved in part by the 1988 Canada - United States Agreement on Arctic Cooperation and Exchange of Notes Concerning Transit of the Northwest Passage²⁹². As a consequence, the United States agreed «that all navigation by U.S. icebreakers within waters [in the Arctic] claimed by Canada to be internal will be undertaken with the consent of the Government of Canada»²⁹³. This agreement expressly states that it does not affect the respective positions of the United States and Canada «on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties»²⁹⁴. Prime Minister Mulroney characterized this as «a practical solution that is consistent with the requirements of Canadian Sovereignty in the Arctic»; and President Reagan stated that «it is without prejudice to our respective legal positions and it sets no precedents for other areas»²⁹⁵. Arguably, the United States has only implicitly maintained its previous position on the legal status of these waters.

On the other hand, the United States agreement to obtain consent only applies to icebreakers. In the view of the United States these icebreakers conduct scientific research and consequently fall within the coastal states authority over the 200 nautical mile exclusive economic zone. The agreement does state that its purpose is «to increase...knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages»²⁹⁶. Thus, consent of the

291. *Department of state bulletin* 42 (Jan. 1986).

292. Agreement Between the Government of the United States and the Government of Canada on Arctic Cooperation, *done* 11 Jan. 1988, 28 *Int'l. Leg. Mat.* 142 (1989).

293. *Id.* Art. 3.

294. *Id.* Art. 4.

295. Canada - United States: Agreement on Arctic Cooperation and exchange of Notes Concerning Transit of Northwest Passage, 28 *Int'l. Leg. Mat.* 142 (1989). The agreement is terminable by either state unilaterally upon three months notice. Arctic Cooperation Agreement, *supra* note 292, Art. 5.

296. *Id.* para. 3.

coastal state is required and the United States maintains that its agreement with Canada constitutes no concession to the Canadian claim. In fact, the requirement of consent applies to all U.S icebreakers without reference to scientific research activities.

I am unaware of any historic facts that would provide an argument in favor of the historic bay status of James Bay as distinguished from Hudson Bay.

It would appear from the above reviewed facts that during the period that Hudson's Bay Company was active in the area a claim to Hudson Bay was made. That claim was consonant with the law of the time which recognizing coastal state authority in very large water bodies. Even so, these claims were disputed by writers and the Treaty with the United States of 1818 implicitly recognizes that Hudson Bay was open sea. United States opposition to the closed sea approach was evident from that time forward. Towards the latter part of the nineteenth century, foreign fishing took place in the Bay and the Canadian government admittedly was unable to exercise effective authority over that very large area.

Beginning in the early 20th Century, Canada continued to assert its claim to Hudson Bay and renewed its efforts with statutes, regulations and enforcement actions. It is not clear how vigorously Canada actually executed its claim to these waters. The United States opposition continued on paper by published references back to statements made in 1906.

In the period 1948 to 1957 there were a number of crossings by official United States government vessels of Hudson Strait apparently conducted on the basis of the freedom of the high seas with no objection by Canadian authorities²⁹⁷. After 1957 Canadian authorities began efforts to close Hudson Bay and Strait by a system of straight baselines. Objections by the United States caused these efforts to be deferred until 1985 when a system was adopted closing the eastern end of Hudson Strait. International objections by the United States and all the member states of the European Community followed²⁹⁸.

Subsequent to the 1988 Canada-United States agreement all United States icebreakers entering the Northwest Passage, which would include Hudson Strait, have been required by that agreement to notify and obtain Canadian permission to do so. Other United States ships are not covered by the agreement.

Important to a judgment on the status of Hudson Bay is the record of foreign navigation in those waters. We know that considerable foreign navigation took place prior to 1910 by whalers. I have identified no other direct evidence of foreign navigation in Hudson Bay proper, but my opportunities have been limited. To the extent that the Hudson Bay and Strait are viewed as a single unit the navigation in Hudson Strait documented by Pharand and by the United States

297. See *supra* note 271.

298. See *supra* notes 283 and 285.

Coast Guard is highly relevant. More extensive research may produce additional evidence. On the other hand, I have made informal inquiries with persons in the United States government charged with the US Freedom of Navigation Program. This program applies to waters in which the United States objects to coastal state claims. The United States actually exercises navigation in those waters to preserve and enhance navigational freedoms²⁹⁹. These inquiries produced no evidence of United States Government navigation or overflight in Hudson Bay proper.

In the absence of hard evidence of foreign navigation in these waters one is put on the horns of a dilemma. One could take the position that in the absence of any overt enforcement the claim is latent and not effective. Alternatively, one could make the argument that the international community has largely acquiesced in the clearly enunciated Canadian claim to these waters. Canadian historic claims to Hudson Bay and Hudson Strait are very well known to the United States and the rest of the world. The failure of the United States to continuously and publicly pursue its position in these waters gives greater credence to United States acquiescence, in fact.

The adoption of the Canadian system of straight baselines which closed Hudson Strait at the east and the Canadian Arctic Archipelago to the north was a significant development. Canada has a good argument that this system conforms to the international law rules permitting a system of straight baselines in areas where the coastline is deeply indented or fringed by islands³⁰⁰. The maintenance of these lines since 1985 seems to provide strong support for the internal water status of Hudson Bay. But objections by the United States and the members of the European Community place a shadow over this action.

On the other hand, these objections to the straight baseline system apply to the closure of the entire Canadian Arctic Archipelago. They do not focus on Hudson Bay and Strait. It is possible to maintain that while the system is objectionable as a whole, certain closures are not. If Hudson Strait and Bay were independently within Canadian internal waters the objections to the system of straight baselines would not pertain. This, of course, throws one back to the original historic water question. Although the straight baseline closure does provide further public confirmation of the Canadian position regarding those particular waters.

I am of the view that today the better argument supports the conclusion that Hudson Bay is internal waters of Canada. The conclusion represents a judgment call based upon the evidence that I have been able to assemble. It does not take into account other information relating to activities in the waters that could only be developed by substantial research focusing on ships logs, court records, enforcement official's records, information gathered by individuals and surveillance systems used by Canadian and United States defense and intelligence forces, and personal interviews of persons working in the area.

299. *US Freedom of Navigation Program*, Dec. 1988, GIST, Bureau of Public Affairs, U.S. Department of State.

300. 1982 LOS Convention Art. 7.1.

The independence of Québec might affect this status. The Canadian system of straight baselines might have to be redrawn to avoid cutting off Québec's access to the sea. While historic waters may be located off the coasts of two or more states, the opposition by one of the coastal states may make such a status impossible to sustain³⁰¹.

4.2.2 *Maritime Boundaries in Hudson Bay*

Regardless of the legal status of these waters, the maritime boundary question still remains, unless Québec's jurisdiction is limited to the shoreline as apparently described in that boundary. The earlier discussion suggests arguments why that boundary may not necessarily preclude maritime jurisdiction in Hudson Bay and Strait based upon interpretations of the term «shore» in the common law, Québec's claim to a portion of Canadian maritime rights, international law assumptions, and equity³⁰².

The case regarding the *Gulf of Fonseca* suggests that if Hudson Bay is historic waters a newly independent Québec may have undivided rights in the Bay³⁰³. In that event Canada and Québec may be required to agree on any use or disposition of these waters. Objection to the continuation of the historic water status by either state might terminate that status.

Québec occupies all of the eastern shore of Hudson Bay. The Northwest Territories include the northern shore, as well as the islands in the Bay. Ontario and Manitoba also front on the Bay. Québec's shoreline appears to comprise roughly one-third of the mainland shore of the Bay. As reported above, there is no part of Hudson Bay that is further than 200 nautical miles from the mean low water line of the mainland shore or islands in the Bay. Accordingly if the normal baseline rules were applicable to the Bay beyond the twelve mile territorial sea all of the waters of the Bay and the seabed would be within the exclusive economic zone. Thus, under no theory could persons exploit the resources of Hudson Bay without the permission of the coastal state(s).

If Québec is found to have offshore jurisdiction in Hudson Bay the maritime boundary would be difficult to delimit. There are numerous islands seaward of the mainland coast that are apparently not within the boundaries of Québec. Under that assumption these islands could limit the seaward extent of Québec's maritime jurisdiction in the Bay. An equidistant line drawn from these islands and from the mainland would limit Québec's maritime jurisdiction in the Bay to a small sliver. If these islands are found to be Québec territory the maritime boundary of Québec would be calculated from these islands to the advantage of Québec.

301. See *supra*, text at notes 67-69.

302. See *supra*, Section II.

303. See *supra*, text at notes 67-69.

Arguments made in many of the international cases, however, would support the view that these islands (if they are not Québec's) should be enclaved, due to their small size and location relative to the mainland. If these islands were enclaved then a boundary line, perhaps drawn by equidistance in the Bay by disregarding the islands, could be considered. This would provide Québec with a substantial portion of the Bay, closely in proportion to the length of its coastline relative to the remainder of the coastline (approximately one-third). The enclaved islands (using, perhaps, a 12 nautical mile limit or equidistant line when the islands are closer to the Québec shore than 24 nautical miles) would diminish this area somewhat. If the ultimate division of the water areas radically diverged from a result which approximated a one-third division of the area for Québec, further adjustments might be considered. This might be accomplished by diminishing the effect on the equidistant line of Southhampton Island and Cape Henrietta Maria in order to move the line to the west in favor of Québec. Those projections into the Bay might be viewed as inequitably diminishing Québec's access to an equitable maritime boundary.

The argument for a simple equidistant line could be made for the boundary in James Bay. This is a long thin bay where the mainland coastlines are largely opposite. The Canada-Denmark (Greenland) agreement would provide a good precedent for this result³⁰⁴. However, just as is true for Hudson Bay proper, the Québec territory does not appear to include islands in James Bay. Numerous islands and low tide elevations fringe the east side of the Bay just seaward of the Québec shoreline. In the middle of the Bay a number of islands are scattered throughout, along with low tide elevations. One extremely large island, Akimiski Island, projects eastward from the Ontario coastline to the middle of the Bay. Other islands near its eastern tip project further east.

There are a large number of islands located throughout James Bay. If they are not territory of Québec, it would be difficult to prevail with an argument for a strict equidistant line based upon the mainland shorelines even with an enclaving of islands by limited zones. This situation would be in many ways comparable to the dispute between Greece and Turkey in the Aegean Sea, which has so far been intractable³⁰⁵. Equity based arguments in favor of a maritime boundary near the middle of the Bay could be supported by the fact that Québec's mainland shoreline is equal in length to the Ontario mainland shoreline, the small size of many of the islands, and the projection of Akimiski Island into the Bay. The result is difficult to predict. I would expect that Québec might not be completely cut off from a maritime area in James Bay but its maritime zone would be rather limited and broken up. If some or all of the islands are Québec's the maritime boundary might be simpler and more favorable to Québec.

304. See in *International maritime boundaries*, *supra* note 5, Report No. 1-1.

305. See Johnston, *The theory and history of ocean boundary making*, *supra* note 35 at 154-159.

4.3 Hudson Strait

4.3.1 The Legal Status of Hudson Strait

In addition to the normal baseline, consideration has to be given to the historic water status of these waters and the effect of the Canadian straight baseline that closed the Strait at the east. The coast of Québec runs along the southern shore of Hudson Strait. The northern shore and islands in the Strait appear to be part of the Northwest Territories. The headlands at the eastern entrance to the Strait are both on islands which are, thus, within the Northwest Territories. The geographical entrance is a series of lines that would run approximately from East Bluff on Meta Incognito Peninsula and connect by a series of short closing lines the Savage Islands, Resolution Island, Button Islands, and Killinek Island, to the mainland. The specific location of these lines could be obtained by application to large scale charts of the 45 degree test discussed above. A similar line was described in the 1937 Order-in-Council which described a baseline for the Customs Act³⁰⁶. The combined length of these lines is approximately 54 nautical miles. The longest crossing is approximately 38 nautical miles. The Canadian system of straight baselines closes the entrance by lines slightly to the east of these entrance lines.

At the western entrance to Hudson Strait closing lines at the mouth would total 78 nautical miles, approximately. The passages at the western entrance narrow to less than 20 nautical miles, but if one were to pass to the west of Nottingham Island (and thus arguably enter Hudson Bay proper) the passages would exceed 30 nautical miles. The length of the Strait exceeds 400 nautical miles. Through the middle the Strait narrows to approximately 54 nautical miles. This strait forms one of the alternative routes to the Northwest Passage³⁰⁷. Navigation is limited to the months of July through October³⁰⁸.

Under international law, the normal baseline rule would apply to this strait unless it is historic waters or it is closed by a system of straight baselines. The normal baseline would run along the mean low water line of the mainland and islands and include low tide elevations within 12 nautical miles of that baseline. River mouths and 24 mile juridical bays would be closed. There are numerous such features along the shores of Hudson Strait.

Ungava Bay is a very large bay found at the southeastern end of the Strait. Its entrance could be found by the application of the 45 degree test discussed above. Geographically, its entrance would be located approximately along a line drawn between the mainland west of Eider Island and the northwestern part of Killinek Island. It would run north of and not intersect with

306. Order-in-Council P.C. 1937-3134 of 18 December 1937. See «Letter of the Legal Bureau of the Department of External Affairs», 12 *Ann. Can. De droit int'l.* 278-79 (1974).

307. Pharand, *supra* note 36 at 190-91, 199.

308. Pharand, *supra* note 36 at 199; Strohl, *supra* note 60 at 233.

Akpatok Island located within the Bay. The closing line would exceed 24 nautical miles (approximately 134 nautical miles). Accordingly, it is not a juridical bay but it would qualify for a 24 mile fall-back line. In addition, the normal baseline would be drawn within the Bay. If it were found to be an historic internal water bay it would be closed at the point established by the historic evidence. Otherwise, a 24 nautical mile fall back line and closing lines of juridical bays and river mouths would be utilized in addition to the mean low water line. If Québec becomes independent, it might not qualify for the fall back line. If one of its headlands is on Killinek Island and that island remains with Canada its coasts would belong to two states³⁰⁹. However, one could consider a headland further to the south located on Québec territory that would avoid this problem.

The historic water status of Hudson Strait is closely tied to that of Hudson Bay, since many of the claims, actions and counterclaims related to both water bodies³¹⁰. Particular historic evidence regarding Canadian actions in Hudson Strait has not been discovered. Nor have I seen evidence establishing a special historic bay situation for the subsidiary Ungava Bay. Since some of the evidence regarding Hudson Bay may not apply to the Strait and the Bay is further within the land territory of Canada than the Strait, the historic waters status of the Strait could be questioned. This is also true for Ungava Bay.

To the extent that these historic actions took place in areas outside of the Strait, such as Hudson Bay proper, their support for the Strait's historic water status would be problematical. Such actions would only support claims to the geographical areas in which they took place. The idea that contiguity would form the basis for a territorial claim has not been established in international law³¹¹. But it is true that sovereign actions supporting territorial claims implicitly apply to related geographical areas. Exercises of authority must be considered in the context of the circumstances of the territories in question. Thus, if there are limited human activities in the area and the claiming state's actions are sufficient to maintain control over all such activity that does take place there, such activities may be sufficient to form the basis for a claim that would prevail over all other states³¹². Accordingly, occasional but effective exercises of authority in various locations in the Hudson Bay and Hudson Strait area may be sufficient to form the basis for an historic waters claim to the entire area.

As discussed above, I have found solid evidence that United States government vessels engaged in significant navigation in Hudson Strait during the period 1948-1957. Weapons were fired at

309. 1982 LOS Convention, Art. 10.1.

310. See the discussion with regard to Hudson Bay above at Section V.B.1.

311. *Isle of Palmas case*, *Hague Ct. Rpts. (Scott) 2d ser. 83, 2 u.N. Rep. Int'l. Arb. Awards 829* (Perm. Ct. Arb. 1928).

312. *Id.*

balloon targets launched from such vessels while in the Strait³¹³. No evidence of Canadian consent or objection is known. These actions are directly incompatible with the status of these waters as Canadian territorial sea or internal waters.

In 1957 the question of the status of Hudson Bay arose in the House of Commons. The Minister of Northern Affairs and National Resources answered, *the waters of Hudson bay are Canadian waters by historic title in accordance with the universally accepted international law doctrine applying to historic bays. Canada regards as inland water all the water west of a line drawn across the entrance to Hudson strait from Button island to Hatton headland on Resolution island [...]*

Are the waters of Hudson strait Canadian waters? [...]

*Yes, by historic title*³¹⁴. Butler reports that the Soviet writer Barabolia established the classification of historic straits in which the coastal state would have complete control over navigation. Warships would require coastal state consent before entering such a strait. Among the straits listed are «the straits leading to Hudson Sound»³¹⁵. This classification, however, may relate more to transit rights of ships and aircraft than to territorial status.

An independent Québec would make the argument for historic water status of this strait more difficult since it would be located on the coasts of two states³¹⁶. The same would be true for a particular claim to Ungava Bay since one of its natural entrance points is located on Killinek Island which may be retained by Canada. Of course, one could claim a more southern closing line that would be drawn between two points on the coast of Québec.

As discussed above, Canada has closed the entire Strait at the east by its system of straight baselines. But the United States and the members of the European Community have objected³¹⁷. This closure strengthens the historic internal water claim to all the waters of the Strait. But the objections weaken the arguments for international acquiescence to the claim.

313. See *supra* note 271.

314. House of Commons Debates, 23rd Parliament, 6 ELIZ. II, vol. II, 1957-58, p. 1169.

315. W. E. Butler, *International straits of the world* 87, 141 (1978), citing P.D. Barabolia, «Problemy ispol'zovaniia mezhdunarodnykh prolivov», in *Okean, tekhnika, pravo* (M.I. Lazarev and L.V. Speranskaia, eds. Moscow 1972) p. 17. See also Bouchez, *supra* note 60 at 229-230.

316. Unlike juridical bays, historic waters may be located on the coasts of more than one state.

317. See *supra*, text at notes 283-285.

These objections to the system of straight baselines and the United States navigation in the Strait present obstacles to the internal water status of Hudson Strait. It is one of the access routes to the Northwest Passage. This fact makes the Hudson Strait claim significantly different from the Hudson Bay claim. As such, foreign countries have expressed a strong interest in keeping the navigation free. The Strait is, however, a minor and less desirable entrance to this Passage. The objections to the closure of the Passage in general might not pertain directly to the closure of Hudson Strait. Canada, however, may have a difficult time sustaining the historic water status of Hudson Strait. This view is consistent with Pharand who concludes that, «[i]t is highly doubtful that the waters of the Canadian Arctic Archipelago are historic internal waters over which it has complete sovereignty»³¹⁸. Since he includes Hudson Strait in his examination this conclusion appears to apply.

As a strait that may be closed by a system of straight baselines, it may be burdened by the regime of transit passage through straits as discussed above. It is possible that on the basis of Article 7.6 of the 1982 LOS Convention and its predecessor in the 1958 Convention on the Territorial Sea and the Contiguous Zone, Article 4.5, Canada would have to withdraw this baseline since it would cut off the maritime zones of Québec. Passage rights may be protected by this rule of law.

An independent Québec would share the coast of the Strait with Canada. The continuation of an historic water status might require the cooperation of the two coastal states and might give each an undivided interest in the waters. Equity might also argue for a sharing of these waters by Québec and Canada, since Canada acquired these waters on behalf of Québec and all the other provinces of Canada. On the other hand, the internal water status of the Strait might foreclose any claim to these waters since under international law they have the same status as internal waters, such as lakes and rivers.

4.3.2 Maritime Boundaries in Hudson Strait

Maritime boundaries may, however, be drawn between Québec and Canada in this area. Since this is clearly an opposite situation in a strait where the distance between the opposite shores is less than 200 nautical miles, the rule of equidistance is particularly appropriate to apply throughout its length. The Canada-Denmark (Greenland) agreement would provide a good precedent for this result³¹⁹. If the entire Strait is found not to be internal waters, the territorial sea and exclusive economic zones in the area would be measured from the normal baseline. If historic internal waters were found only in Ungava Bay, the bay closing line would form the

318. Pharand, *supra* note 36 at 251.

319. See in *International maritime boundaries*, *supra* note 5, Report No. 1-1. For a review of the maritime boundary agreements in straits and the predominant use of equidistance in those circumstances see, Legault and Hankey, *supra* note 122.

baseline for calculating the equidistant line in the Hudson Strait, as well as the territorial sea and the exclusive economic zone.

The only complication in this delimitation is a result of islands in the Strait which appear to be excluded from the territory of Québec and included in the Northwest Territories. Some of these islands are substantial, such as Charles Island and Salisbury Island, others are rather small. Many of them are found along the southern shore of the Strait just off of the Québec coast. This situation provides a strong circumstance calling for a line other than the equidistant line³²⁰.

Québec's coastline in the area approaches 50% of the entire coastline of the Strait. The islands are not large relative to the land size and coastline of Québec in the area, and many are found on the wrong side of the equidistant line drawn between the mainland coasts. This situation argues for enclaving of these islands with, perhaps, twelve nautical mile zones up to the equidistant line between the islands and the Québec coastline³²¹. Other adjustments to the equidistant line diminishing the effect of islands have been used in straits³²². Otherwise, the equidistant line drawn between the mainland coasts would appear to be appropriate for use. There is probably no basis for a further adjustment of that line to the south due to the relative size and particular location of the islands. The only exceptions might be in the case of the relatively larger islands of Charles and Salisbury, which might justify larger enclaves.

An interesting question arises at the eastern end of the Strait. If Québec became independent, a foreign state (Canada) would very likely hold the territory on both sides of the eastern entrance to the Strait. An equidistant line would curve away from the eastern mouth and reach land south of Killinek Island³²³. Québec would have no maritime zone at the eastern entrance of the Strait. Thus, its maritime zone would not connect with the Atlantic Ocean. Canada's maritime zones would encompass this entire entrance. Equitable arguments for a corridor to the open sea might be made, but they would be difficult to sustain.

320. See Bowett, *supra* note 143.

321. See in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 5: Continental Shelf Boundary Italy-Tunisia, Report No. 8-6; Continental Shelf Boundary, Italy-Yugoslavia, Report No. 8-7(1).

322. See in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 5: Continental Shelf and Fisheries/Economic Zone Boundaries Sweden-U.S.S.R., Report No. 10-9.

323. Killinek Island forms the southern entrance to Hudson Strait. It is shown on an official map of Québec as outside of the territory of Québec. See, *Le Québec*, *supra* note 213.

Conclusion

It is impossible to state with certainty where the maritime boundaries of Québec would be located if it were to become an independent nation-state. In the first place, all these maritime boundaries are negotiable with Canada. Due to the complexities and uncertainties of maritime boundary delimitation and the necessary interdependencies of Québec and the remainder of Canada, a negotiated resolution of the maritime boundary problem and related uses of the waters would be important to consider. As a potentially landlocked state, the assurance of a transit rights out through the Gulf of Saint Lawrence should be particularly important for Québec to obtain.

In the absence of an agreement with Canada, questions arise with respect to whether Québec would have any maritime zones and, if so, how they would be bounded. In my opinion, strong arguments favor a legal right to maritime jurisdiction in the Gulf of Saint Lawrence, even though under current law the Province of Québec does not appear to have authority over maritime areas in the Gulf. The same arguments in Hudson Bay and Hudson Strait may be more difficult to make due to the stronger arguments for the internal water status of those waters. But Québec's secession might prejudice this status and permit the normal maritime zones to apply. Equitable concerns can be found in international law favoring access to the sea and maritime jurisdiction. Similar arguments can be found within Canadian law based upon the Canadian Government's role as a representative of the provinces in external affairs. These arguments favor Québec's acquisition of authority in portions of the waters of Hudson Bay, Hudson Strait and the Gulf of Saint Lawrence.

If Québec does obtain rights in some or all of these waters, the maritime boundaries with Canada cannot be predicted with certainty. It is likely that due to the limited size of the areas involved the equidistant line, adjusted to take into account offshore islands, will play a major role. The islands of Hudson Bay might very well be enclaved giving Québec boundaries west of the islands near the coast. A similar result could be expected in Hudson Strait. The Isles de la Madeleine may be given full effect as they were given in the 1964 Interprovincial Agreement, but some diminution of effect by enclaving or proportional lessening may very well be required.

An independent Québec will have to resolve many boundary and management issues arising in its maritime areas. In the absence of a negotiated settlement with Canada, the resolution of the issues could be particularly difficult.