THE WATERS OF THE CANADIAN ARCTIC ISLANDS*

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The legal status of the waters of the Canadian Arctic Archipelago has been the subject of numerous questions in the Canadian House of Commons, since the announcement of a test voyage through the Northwest Passage, by the American oil tanker Manhattan *to Prudhoe Bay, Alaska. The author reviews the relevant principles of international law and suggests that Canada ought to draw two belts of territorial waters: one enclosing the islands south of Parry Channel with the mainland; and the other, around the Queen Elizabeth Islands north of the channel, thus leaving a strip of high seas throughout the Northwest Passage.*

I. INTRODUCTION

> Le droit maritime est une matière complexe qui peut donner lieu, cela se conçoit, à quelques divergences d'opinions. Bien entendu, de telles divergences doivent être réglées non pas de façon arbitraire, mais en respectant scrupuleusement les principes établis en droit international. [1]

The above passage is taken from a recent declaration, made by Prime Minister Trudeau, relating to the extent of Canada's sovereignty in the Arctic regions. Although he was quite emphatic about Canada's sovereignty over the islands and continental shelf of the Canadian Arctic, he was not as definite on the nature of Canada's jurisdiction over the water areas between the islands. He stated in particular that all countries were not prepared to recognize those waters as being inland waters and that the contrary opinion was that Canada's sovereignty is limited to the territorial sea around each island. [2] It is interesting to note, in passing, that this contrary opinion happens to coincide with that of the United States. [3] The Prime Minister

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[1] *Déclaration concernant l'archipel de l'arctique, le plateau continental et les eaux intérieures*, 113 DÉBATS DE LA CHAMBRE DES COMMUNES at 8720 (No. 150, May 15, 1969).

[2] *Id.*

[3] The United States does not accept the use of straight baselines to delimit territorial waters except in very few areas, "such as along the highly irregular and fragmented coasts of Yugoslavia, Norway, and Southern Chile." See *Sovereignty of the Sea*, 3 U.S. DEP'T STATE GEOGRAPHIC BULL. at 12 (April 1965). It rejects the "archi-

is willing nevertheless to have such differences of opinion settled on the basis of established principles of international law. Indeed, international law has an important role to play in the ordinary peaceful settlement of such an issue.

II. Role of International Law in Fixing Baselines

Although each state must decide how and when it will effect the delimitation of its territorial waters, such delimitation must be made in accordance with international law. More precisely, the act of delimitation is governed by domestic law, but its international validity is governed by international law. This was fully recognized by the International Court of Justice in the case of *United Kingdom v. Norway*, commonly referred to as the *Fisheries Case*, in 1951. The relevant passage of the judgment reads:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its

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pelago concept" which would "box-in" a group of islands by drawing a perimeter formed of straight baselines touching the outermost islands of the group. It regards this type of straight baseline as "no more justified than a corresponding line along the mainland." See *id.* at 13. The attitude of the United States has been quite consistent in its restrictive delimitation of territorial waters around groups of islands. In 1947, the legal advice given by the State Department with respect to the territorial waters of the Pacific islands, formerly under Japanese mandate and transferred under the trusteeship of the United States after World War II, was that each island had its own belt of territorial waters. See a memorandum by Meeker, *Territorial Waters of Former Japanese Mandated Islands*, MS. Dep't of State (Jan. 2, 1947) file 894.0145/1-247, *cited in*, 4 M. Whiteman, Digest of International Law at 281 (1965). In 1951, the United States sent a note to Ecuador protesting against its "assertion of a claim to a single belt of territorial waters around the entire Colôn Archipelago," as being contrary to international law. See Note, dated June 7, 1951, from the Government of the United States of America to the Government of Ecuador, *reproduced in*, 4 *Fisheries Case* [*United Kingdom v. Norway*], I.C.J. Pleadings 603, at 604 (1951). In December, 1957, the American Embassy in Djakarta delivered a note of protest to the Indonesian Government a few days after the latter had issued an announcement that all waters between the islands formed an integral part of the inland waters of Indonesia. See 4 M. Whiteman, Digest of International Law at 284 (1965). The United States sent a telegram of similar protest to the Philippines in January, 1958, and repeated its protest at the 1958 Conference on the Law of the Sea. *Id.* at 283-84. Commenting on the 1960 Conference, at which both Indonesia and the Philippines had reasserted their position, the chairman of the United States delegation wrote on March 31 of that year, that the nuclear-powered submarine "*Triton* passed submerged through waters within the Indonesian and Philippine archipelagos, which are claimed unilaterally by each of those nations as 'internal waters,' although they include vast high sea areas." See Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 Am. J. Int'l L. 751, at 753 (1960). He added that, since the right of innocent passage does not exist in such waters, it was for that reason that "we do not recognize the validity of this extensive and unilateral archipelago theory." *Id.* This refusal to accept the archipelago concept in drawing territorial waters is also followed by the United States with respect to Hawaii. Secretary of State Rusk wrote in 1964, in answer to an inquiry by Attorney General Kennedy, that it was "the Department's position that each of the islands of the Hawaiian archipelago has its own territorial sea, three miles in breadth measured from low water mark on the coast of the island." Reproduced in 4 M. Whiteman, Digest of International Law at 281 (1965).

> municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[4]

The implementation of this basic proposition, however, is made difficult in this instance because of the uncertainty of the rules applicable to archipelagos. The International Law Commission studied the question and drafted a special article on groups of islands as far back as 1952, but it eventually decided to delete the article completely from its draft, mainly because of disagreement on the breadth of territorial waters and the method of delimiting such waters. The Law of the Sea Conferences of 1958 and 1960 were not able to agree on a breadth of territorial waters, and left unresolved also the question of archipelagos as such. Nevertheless, the 1958 Convention on the Territorial Sea and the Contiguous Zone does have some application here, in that it contains provisions for the drawing of straight baselines where the coastline is deeply indented or where there is a fringe of islands along the coast. Although Canada has not yet ratified any of the Law of the Sea Conventions, the applicable provisions of the Territorial Sea Convention are basically a codification of the principles formulated in the *Fisheries Case*. There are some slight differences between the two, however, and it might be advantageous for Canada to rely on the decision of the International Court; consequently, both the Convention and the *Fisheries Case* must be examined carefully. A thorough study of the practice of states would also be relevant in order to determine the possible existence of a general practice which might possess the elements of an international custom, but such a study would be far beyond the scope of the present inquiry.[5]

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[4] [1951] I.C.J. 116, at 132.

[5] For an excellent study of state practice on this question, see Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, U.N. Doc. A/Conf. 13/18 (Preparatory Document 15) 1-38 (1957), 1 United Nations Conference on the Law of the Sea: Preparatory Documents 289-302 (Geneva 1958). His conclusion was that "no hard and fast rules exist as to the delimitation of the territorial waters of archipelagos." *Id.* at 35, 1 United Nations Conference on the Law of the Sea: Preparatory Documents at 301. A similar conclusion is reached by Mr. Sorensen with respect to oceanic archipelagos. See Sorensen, *The Territorial Sea of Archipelagos*, 6 Neth. Int'l L. Rev. 315, at 330 (1959). State practice does not seem to present any more uniformity today, except possibly among some of the arctic states. As already seen, *supra* note 3, the United States has completely rejected the archipelago theory and has objected to its use by other states. As for the Soviet Union, it does not appear to have subscribed to the theory either. Its 1960 "Statute on the Protection of the State Border" specifies that the breadth of 12 miles of coastal sea waters are to be "computed from the line of lowest ebb-tide both on the mainland and also around islands, or from the line of the farthest extremity of internal sea waters of the USSR." *See* 3 Sov. Stat. & Dec. No. 4, at 10 (Summer 1967). Mr. William Butler, who has made a special study of the legal régime of Russian territorial waters and has analysed the relevant Russian literature comes to the conclusion, with respect to the use of the straight baseline method, that "there has been no reference to its being applied to Soviet coasts." See Butler, *The Legal Regime of Russian Territorial Waters*, 62 Am. J. Int'l L. 51, at 63 (1968). Continuing in a clockwise direction, "Norway has not adopted the straight baseline system with respect to Svalbard". Letter from Royal Norwegian Embassy to the writer, June 10, 1969.

The present purpose is to attempt an appraisal of the legal situation relating to the waters of the Canadian Arctic Archipelago in the light of established international law. It is believed, however, that such an appraisal can be more meaningful if the legal issues are placed in their proper geographical perspective. What follows is a short discussion of the two main types of archipelagos and a description of the Canadian Arctic Archipelago.

III. Distinction Between Coastal and Outlying Archipelagos

Groups of islands vary in size and shape but they may be classified in two basic types, depending on whether they lie off the mainland or whether they are located out in mid-ocean. In the first case, they are called coastal or off-shore archipelagos, whereas in the second instance they are referred to as outlying or oceanic archipelagos. It is important to distinguish them, since established rules of international law might apply only to one type of archipelago. In 1957 at the request of the Secretariat of the United Nations, Mr. Jens Evensen of Norway prepared a paper on the question of the delimitation of the territorial waters of archipelagos and formulated very useful definitions.

Coastal archipelagos are defined as "those situated so close to a mainland that they may reasonably be considered part and parcel thereof, forming more or less an outer coastline from which it is natural to measure the marginal seas."[6] The typical example of such coastal archipelagos is the well known Norwegian "Skjaergaard." The Norwegian Government has estimated that 120,000 insular formations make up the "skjaergaard" (literally, rock rampart). These formations stretch all along the coast of the mainland and are natural appendages of the coast. The International Court has stated: "[W]hat really constitutes the Norwegian coast line is the outer line of the 'skjaergaard.' "[7] Other examples of such coastal archipelagos can be found off the coasts of Yugoslavia, Sweden, Iceland, Greenland, Finland, Alaska, the Soviet Union and Canada.

Outlying archipelagos are those "groups of islands situated out in the

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The letter does explain, however, that the reason for not using straight baselines is found in article 2 of the 1920 Svalbard Treaty, which provides for equal fishing and hunting rights among the parties within the islands specified and their territorial waters. As for the territorial waters off Greenland, Denmark has made a limited use only of straight baselines, as evidenced by the list of coordinates forming part of the Royal Decree of May 27, 1963. A letter from the Royal Danish Embassy to the writer, June 26, 1969, states that "in certain cases straight lines are drawn across bays and fiords at the nearest point of the mouth where the breadth does not exceed 10 nautical miles." Coming finally to Canada, it has adopted the straight baseline system on the coasts of Labrador and Newfoundland but it has not yet delimited its territorial waters in its Arctic regions.

[6] Evensen, *supra* note 5, at 5; 1 United Nations Conference on the Law of the Sea: Preparatory Documents at 290.

[7] [1951] I.C.J. at 127.

ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or [*sic*] outer coastline of the mainland." [8] This mid-ocean type of archipelago has also been defined as "a body of water studded with islands, rather than islands with waters." [9] In giving this description, Mr. Coquia had mainly in mind the Philippines, but the description could be applied to most oceanic archipelagos. Such a definition brings out the importance of the water area and the close relationship between the water and the land in such a group of islands. The following may be cited as examples of outlying archipelagos: the Faeroes (Denmark), Fiji Islands (United Kingdom), Philippines, Indonesia, Galapagos (Ecuador), Hawaii (United States), Spitzbergen (Norway) and Franz Josef Land (U.S.S.R.).

The examples of archipelagos given are not too difficult to fit into the basic types of archipelagos defined, but the Canadian Arctic Archipelago under review presents considerable difficulty in categorization. Understandably perhaps then, the literature on the subject does not mention the important archipelagos lying north of the mainland of two major Arctic states, the U.S.S.R. and Canada.

The Canadian Arctic Archipelago is divided into two main sections by a broad east-west waterway discovered by Sir Edward Parry[10] in 1819 which constitutes the greater part of the traditional route of the Northwest Passage. To the north of this waterway is a large group of islands known as the Queen Elizabeth Islands, [11] covering an area of over 167,769 square miles. [12] To the south of Parry Channel and north of Canada's mainland, the numerous islands excluding those of Hudson Bay and Hudson Strait[13] cover an area of 331,786 square miles. The whole archipelago forms a network of channels connecting the Arctic Ocean and Beaufort Sea with Baffin Bay and Hudson Strait. The archipelago "contains some 16 major passages that range in width from 10 to 120 kilometers and in depth to over 700 metres." [14]

The most important passages are those running east and west and forming Parry Channel: Lancaster Sound, Barrow Strait, Viscount Melville

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[8] Evensen, *supra* note 5, at 6; 1 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: PREPARATORY DOCUMENTS at 290.

[9] Coquia, *The Territorial Waters of Archipelagoes*, 30 ANNUAIRE DE L'ASSOCIATION DES ANCIENS AUDITEURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 35, at 51 (1960).

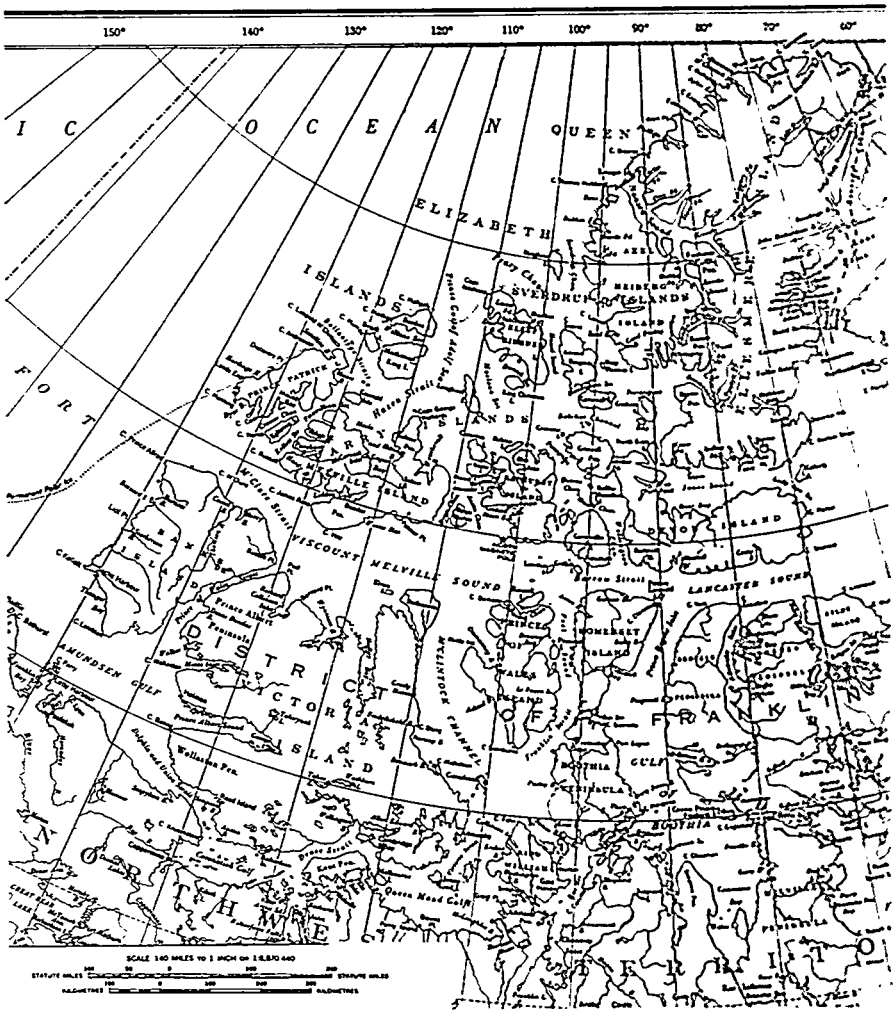
[10] The name "Parry Channel" to designate this waterway was approved on December 6, 1956 by the Canadian Board on Geographical Names. See 1 PILOT OF ARCTIC CANADA at 1 (Issued by Canadian Hydrographic Service, Department of Mines and Technical Surveys, 1959).

[11] In February, 1954, the Minister of Northern Affairs, Jean Lesage, announced in the House of Commons that Her Majesty had graciously allowed her name to be given to this group of islands. See 2 DÉBATS DE LA CHAMBRE DES COMMUNES at 1914, (No. 44, Feb. 5, 1954).

[12] See *Areas of Principal Islands*, [1967] CAN. Y.B. 16.

[13] *Id.*

[14] Collin, *The Waters of the Canadian Arctic Archipelago*, PROCEEDINGS OF ARCTIC BASIN SYMPOSIUM 128, at 128 (1963).


THE CANADIAN ARCTIC ARCHIPELAGO
150°
140°
130°
120°
110°
100°
90°
80°
70°
60°
I C
O C E A N
QUEEN
ELIZABETH
ISLANDS
FORT
VISCOUNT MELVILLE SOUND
LANCASTER SOUND
DISTRICT OF MACKENZIE
FRANKLIN
BOOTHIA GULF
BOOTHIA
PENINSULA
AMUNDSEN GULF
NORTHWEST TERRITORIES

Sound and M'Clure Strait. This latter strait is usually choked with polar ice, and for that reason, the traditional Northwest Passage lies through Prince of Wales Strait east of Banks Island. Geologically, there seems to be no doubt that all of these islands are located on the submerged plateau extending from the mainland and with it form a unit. Geographically, the archipelago has been divided, for description purposes, into sections.[15] Legally, however, the question arises as to whether these islands may be considered as constituting a single unit, justifying a uniform regime for the various bodies of water between them. This is a question which Canada should resolve before proceeding with a delimitation of its territorial waters in the Arctic. It seems to the writer that Canada has three main courses of action from which to choose in delimiting its territorial waters: it may draw a belt of territorial sea around each island, using the traditional coastline method; it may draw a single belt of territorial waters around the whole archipelago, using straight baselines; or it may draw two belts of territorial waters, one around that part of the archipelago north of Parry Channel and known as Queen Elizabeth Islands, and the other one enclosing the islands south of the channel along with the mainland, using straight baselines again.[16] Before attempting to suggest which course of action Canada could legally choose, keeping in mind her legitimate national interests as well as those of the international community, the applicability of straight baselines for archipelagos of both types must be studied.

IV. Straight Baselines for Coastal Archipelagos

1. *The Importance of Baselines Generally*

The proper fixing of a baseline is important because it determines how far seaward a coastal state may exercise jurisdiction within a certain breadth of territorial waters beyond the baseline. It also affects the extent of contiguous zones for purposes of customs, fiscal, immigration and sanitary regulations, since such zones may extend up to twelve miles "from the baseline from which the breadth of the territorial sea is measured."[17] The baseline of territorial waters has become significant also for the implementation of a contiguous fishing zone.[18] This concept has developed in recent years, particularly since the failure of the 1960 Law of the Sea Conference

[15] See the following: Baird, *Canadian Arctic Archipelago, in* Geography of the Northlands 353-54 (G. Kimble & D. Good eds. 1955); 1 Pilot Arctic of Canada at 1 (1959); and [1967] Can. Y.B. 16.

[16] There is another method known as the "arcs of circles," which enables one to follow the line of the coast, but it is of very difficult application for archipelagos and it was not retained by the International Court in the *Anglo-Norwegian Fisheries Case.*

[17] Art. 24(2) of the Convention on the Territorial Sea and the Contiguous Zone, A/Conf. 13/L.52, adopted on April 28, 1958, and entered into force on September 10, 1964.

[18] For an analysis of the legal nature of a contiguous zone, as envisaged by the 1958 Convention, see Morin, *La zone de pêche exclusive du Canada,* 2 Annuaire canadien de droit international 77, at 82 (1964).

to agree on a uniform breadth of territorial waters.[19] The adoption of a twelve-mile fishing zone either unilaterally or through bilateral and multilateral agreements has been so widespread among maritime Powers since 1960 that it is now possible to speak of an international custom well on the road to formation. Having regard to the important consequences of baselines, the 1958 Conference was careful to formulate strict rules for their applicability.

2. *The Geography Required for Straight Baselines*

Article 3 of the Territorial Sea Convention specifies that "[e]xcept where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."[20] It is obvious from this provision that baselines should follow the sinuosities of the coast, except in four special cases provided for in the Convention. These exceptions are: firstly, across the mouth of a river flowing directly into the sea;[21] secondly, across the mouth of a bay when the closing or straight baseline does not exceed twenty-four miles, except for historic bays;[22] thirdly in deeply indented coasts;[23] and fourthly, where there is a fringe of islands in the immediate vicinity of the coast.[24]

The drawing of straight baselines across mouths of rivers and bays is not a new development in international law. However, drawing straight baselines across deeply indented coasts and coastal archipelagos is a new development which received official sanction for the first time in 1951, with the decision of the International Court of Justice in the *Fisheries Case*. Both the judgment of the Court and the Convention on the Territorial Sea make it quite clear that the use of straight baselines is a system of exception and is permissible only in cases where the peculiar geography of a coast warrants a departure from the normal rule of the low-water mark along the sinuosities of the coast. The International Court described the type of coast which warranted such a departure in the following terms: "Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction."[25]

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[19] On the development of this concept, see Gotlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law*, 2 CAN. Y.B. INT'L L. 55 (1964).

[20] Art. 3 of the Convention on the Territorial Sea and the Contiguous Zone, A/CONF. 13/L.52, adopted on April 28, 1958, and entered into force on Sept. 10, 1964.

[21] *Id.* at art. 13.

[22] *Id.* at art. 7(4) & (6).

[23] *Id.* at arts. 4(1), 7(2).

[24] *Id.* at art. 4(1).

[25] [1951] I.C.J. at 128-29, in the *erratum*, published by the Court on October 22, 1956, *geometric* has been changed to *geometrical*.

Those two types of exceptional coastlines described by the Court were retained by the Law of the Sea Conference in 1958 and included in article 4 of the Convention. This article reads: "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." [26] As pointed out by Sir Gerald Fitzmaurice, the essential difference between the normal baseline and the straight baseline is that the latter is drawn *across water* whereas the former is drawn along the coast. [27]

The Canadian Arctic islands under review must therefore be held to constitute "a fringe of islands along the coast in its immediate vicinity," before the straight baseline method becomes applicable.

3. *Mode of Application of Straight Baselines*

Once it has been decided that straight baselines are permissible because of the peculiar geography of the coast, certain criteria must be followed in the drawing of those baselines; otherwise, their international validity will be in jeopardy. The substance of the criteria was first formulated by the International Court in 1951 and incorporated in the Territorial Sea Convention. Article 4, paragraph 2 of the Convention covers the first two criteria:

> The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. [28]

It must be noted that these two criteria are of a geographical nature and are made mandatory in the drawing of straight baselines.

The *first geographical criterion*, namely that straight baselines must not depart to any appreciable extent from the general direction of the coast, lends itself to considerable subjective judgment in its application; therefore, reference should be made to the Court's decision in the *Fisheries Case*. On the question of the degree of permissible departure from the general direction of the coast, the Court stated that straight baselines "[within reasonable limits, may depart from the physical line of the coast] . . . ." [29] In the *Fisheries Case* the Court was faced with a specific problem in the application of that criterion, because the United Kingdom challenged the delimitation of the

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[26] Art. 4(2) of the Convention on the Territorial Sea and the Contiguous Zone, A/CONF. 13/L. 52, adopted on April 28, 1958, and entered into force on Sept. 10, 1964.

[27] See Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law*, 31 BRIT. Y.B. INT'L L. 371, at 388 (1954).

[28] This article repeats practically verbatim the criteria formulated by the International Court. *See* [1951] I.C.J. at 133.

[29] This corrected passage of the Court's judgment was obtained by the International Law Commission from the Registry of the Court and can be found in [1956] 2 INT'L L. COMM'N Y.B. at 267. It appears also in an *erratum* published by the Court on October 22, 1956, and should be inserted in the [1951] I.C.J., English text, at 129.

Lopphavet Basin on the ground that it did not respect the general direction of the coast. In such a case, the Court said: "[O]ne cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone." [30] As a guideline, therefore, when one has to determine if a strait baseline has departed to any appreciable extent from the general direction of the coast, one ought to examine the coast as a whole and not one sector of it only. The Court came to the conclusion that, with respect to the baseline being challenged, "the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast." [31] It is worthy of notice in this respect that one point on the Lopphavet baseline was nineteen miles from the nearest point on land.[32] Although the criterion of the general direction of the coast contains a great degree of subjective appreciation, it is possible to obtain guidance from the Court's judgment when applying the criterion to concrete situations.

The *second geographical criterion*, formulated by the Court and retained by the 1958 Convention, is that "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters." [33] On the application of this requirement, which was taken literally from its judgment, the Court stated: "This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway." [34] At a previous point in its judgment the Court had specified that those sea areas did not have to be bays but it was "sufficient that they should be situated between the island formations of the 'skjaergaard,' *inter fauces terrarum*," [35] meaning literally "between the jaws of lands." The Court applied this criterion quite liberally in the case of the Lopphavet Basin which is an extensive body of water dotted with large islands separated by inlets terminating the various fjords. In all fairness to the Court, however, it must be mentioned that the Norwegian Government was also relying on an historic title in order to claim those waters as national or internal waters, and the Court accepted that the historic title relied upon was "clearly referable to the waters of Lopphavet." [36]

A third geographical criterion, made compulsory by article 4, paragraph 3 of the 1958 Convention, relates to the use of low-tide elevations in the drawing of baselines. The provision in question states that "[b]aselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar

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[30] [1951] I.C.J. at 142.
[31] *Id.*
[32] 2 *Fisheries Case*, I.C.J. Pleadings at 701 (1951).
[33] Art. 4(2) of the Convention on the Territorial Sea and the Contiguous Zone, A/CONF. 13/L. 52, adopted on April 28, 1958, and entered into force on Sept. 10, 1964.
[34] [1951] I.C.J. at 133.
[35] *Id.* at 130.
[36] *Id.* at 142.

installations which are permanently above sea level have been built on them." [37] Otherwise, as pointed out by the International Law Commission, "it would not be possible at high tide to sight the points of departure of the baselines." [38] Article 11, paragraph 1 of the Convention defines a low-tide elevation as "a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide." In the terms of the International Law Commission these elevations are referred to as "drying rocks" and "drying shoals." The 1958 Convention permits the use of such low-tide elevations in the drawing of baselines, provided that they have installations permanently above water such as lighthouses, whereas the International Law Commission had completely prohibited such use. [39] The International Court of Justice did not formulate any such criterion and, indeed, seems to have allowed Norway to use low-tide elevations even without lighthouses or similar installations.

In addition to the three compulsory criteria just reviewed, there is a *permissive criterion*: it is permissible to take into account regional economic interests in drawing certain particular baselines. The 1958 Convention provides:

> Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage. [40]

It should be noted immediately that the reference to "long usage" should not be interpreted as constituting a separate legal basis for claiming what are commonly known as "historic waters." [41] The nature of this permissive criterion is strictly economic, and the only purpose of adducing evidence of "long usage" of certain water areas by the local population is to prove the reality and importance of the economic interests alleged to be peculiar to a certain region of the coast. That criterion was borrowed from the judgment of the International Court which applied the concept of economic interests to the Lopphavet Basin. In that particular instance, however, the Court seemed to be satisfied that Norway possessed an historic title to those waters; its conclusion was based partly on the fact that the Norwegian Government had granted to one of its nationals exclusive fishing and whale hunting privileges at the end of the seventeenth century. [42] In addition, the Court found that fishing rights had been traditionally reserved to the local popula-

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[37] *Supra* note 33, at art. 4(3).

[38] Commentary to art. 5(1), of the International Law Commission's draft, [1956] 2 INT'L L. COMM'N Y.B. 267, at 268.

[39] *Id.* at 267.

[40] Art. 4(4) of the Convention on the Territorial Sea and the Contiguous Zone, A/CONF. 13/L. 52, adopted on April 28, 1958, and entered into force on Sept. 10, 1964.

[41] This distinction is properly made by a number of writers. See in particular Young, *The Anglo-Norwegian Fisheries Case*, 38 A.B.A.J. 243, at 244 (1952); and Evensen, *The Anglo-Norwegian Fisheries Case and its Legal Consequences*, 46 AM. J. INT'L L. 609, at 623-24 (1952).

[42] [1951] I.C.J. at 142.

tion because of an economic necessity. "Such rights," said the Court, "founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable." [43] This idea of reasonableness as a general and overriding consideration in determining the validity of straight baselines was mentioned in a number of instances during the course of the Court's judgment. It follows from the foregoing that the only time it is permissible to go beyond geographical considerations in the drawing of a straight baseline is where it is necessary to protect the economic interests peculiar to the region concerned, which interests have become well established by long usage. Another problem relating to the use of straight baselines is the question of setting a maximum length of such baselines.

4. *Length of Straight Baselines*

Except for the twenty-four mile closing line in the case of bays, the 1958 Convention makes no mention of any maximum length permissible for straight baselines. This does not indicate an omission on the part of the conference delegates, nor does it imply that the matter is of secondary importance. The question had already been considered by the International Court, but a maximum length was not retained as a criterion for determining the validity of straight baselines. In the case before it, the forty-seven baselines along the Norwegian coast varied greatly from a few hundred yards to forty-four miles. The United Kingdom had argued, by analogy of the old ten-mile rule for bays, that the maximum length for straight baselines should be ten miles. Although the United Kingdom was able to point to the practice of a certain number of maritime states in support of its argument, the Court was not satisfied that the practice had materialized into a general rule of law. It rejected the argument:

> In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals. [44]

The Court added that a selection of straight baselines could be made in certain cases and that the coastal state was in the best position to make that selection in accordance with the local conditions which it could best appraise. [45] Having regard to the criteria previously discussed, it appears, therefore, that it became unnecessary for the Court to fix a maximum length for straight baselines. In other words, if a straight baseline could be justified under the compulsory geographical criteria and also under the permissive

[43] *Id.*
[44] *Id.* at 131.
[45] *Id.*

criterion of an economic nature, it would be valid regardless of its length. Such was held to be the situation in the *Fisheries Case*, with regard to the straight baseline across the Lopphavet Basin which, as Waldock points out, was in effect a sixty-two mile line. [46]

It is worth repeating here, however, that the actual basis for the Court allowing this long baseline across the Lopphavet Basin was twofold: firstly, the special economic interests of the local inhabitants and secondly, satisfactory proof by the Norwegians of an established historic title to the waters of that basin. Consequently, it is not possible to invoke this decision as a precedent for declaring a similar line valid unless the same historic title can be established. Furthermore, it should be emphasized that the 1958 Convention imposes a limitation on the status of the newly enclosed waters which the International Court did not do. The Convention provides that "[w]here the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage . . . shall exist in those waters." [47] The International Law Commission would have preserved that right only where the waters had normally been used for international traffic, [48] but the conference delegates did not retain this suggested limitation. The right of innocent passage being preserved in that way, the question of a maximum permissible length for straight baselines becomes less important, at least theoretically. In practice, however, the coastal state will have a natural tendency to consider newly enclosed waters under the ordinary regime of internal waters and subject to its complete sovereignty. In the course of time, the establishment of such straight baselines is bound to be detrimental to the right of innocent passage by foreign ships, particularly in waters not normally used for international traffic. It would appear also that the question of the length of baselines acquires more importance in the case of outlying archipelagos, as will be seen later since there is no mainland to which the islands can be linked.

5. *Summary of the Law Applicable to Coastal Archipelagos*

Except where otherwise indicated, the principles summarized hereunder exist by virtue of both the Convention on the Territorial Sea and customary law as interpreted in the *Fisheries Case*. Those principles may be formulated in seven propositions:

1. Straight baselines may be used to join a fringe of islands along and in the immediate vicinity of a coast;

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[46] Waldock, *The Anglo-Norwegian Fisheries Case*, 28 BRIT. Y.B. INT'L L. 114, at 146 (1951). The point made by the author is that the forty-four mile line runs to an isolated submerging rock, and then runs a further eighteen miles to another rock three and one half miles away from the next base point.

[47] Art. 5(2) of the Convention on the Territorial Sea and Contiguous Zone, A/CONF. 13/L. 52, adopted on April 28, 1958, and entered into force on Sept. 10, 1964.

[48] See [1956] 2 INT'L L. COMM'N Y.B. at 267.

2. Straight baselines must not depart to any appreciable extent from the general direction of the coast;

3. The sea areas being enclosed must be sufficiently linked to the land domain to be subject to the regime of internal waters;

4. Straight baselines must not be drawn to and from low-tide elevations, unless they have lighthouses or similar installations permanently above sea level (Convention only);

5. The economic interests of a region may be considered in drawing particular baselines, providing such interests are clearly evidenced by long usage;

6. There is no maximum length for straight baselines except for bays, in which case the closing line must not exceed twenty-four miles (Convention only, regarding bays);

7. The waters enclosed by straight baselines are considered as internal waters, but the right of innocent passage continues to exist in water areas formally considered as part of the territorial sea or of the high seas (Convention only, regarding innocent passage).

V. Straight Baselines for Outlying Archipelagos

If the principles of law just discussed and summarized appear to be reasonably well established, it remains a question whether they are applicable to outlying archipelagos. The *Fisheries Case* was concerned only with a fringe of islands stretched along the coast of Norway, and the 1958 Convention on the Territorial Sea also confined itself to dealing with coastal archipelagos. Strictly speaking, therefore, the matter of outlying or mid-ocean archipelagos is still an open question. This does not mean, however, that no legal guidance can be gained from the *Fisheries Case* and the 1958 Convention. In the argument presented to the Court, the distinction between coastal and outlying archipelagos was not always made, and indeed it was argued by Norway that both types of archipelagos should be considered as units in the drawing of territorial waters. The Norwegian Government stated in its counter-memorial: "L'unité juridique de l'archipel est admise même quand il s'agit d'archipels océaniques. A *fortiori* l'est-elle quand il s'agit de complexes d'îles apparaissant comme l'accessoire de la côte."[49] The unity of archipelagos generally was not really contested by the United Kingdom; what it objected to strongly was the length of some of the baselines drawn by Norway. This question seems to acquire more importance in outlying archipelagos, since there is no mainland to which the islands can be linked. It is no longer possible to speak of the islands as constituting a mere extension of or appendage to the mainland. This does not mean, however, that some of the principles formulated by the Court are not of

[49] 1 *Fisheries Case*, I.C.J. Pleadings at 495 (1951).

general application. Surely the fundamental requirement that there be a close relationship between the sea areas and the land formations is as applicable to outlying archipelagos as to coastal ones. Consequently, the islands of an outlying archipelago ought to be sufficiently close together to constitute a single unit, thus permitting a single belt of territorial waters.

On this question of the principles applicable to outlying archipelagos, guidance may also be gained from the excellent paper already referred to and prepared by the Norwegian lawyer, Jens Evensen, on the eve of the 1958 Law of the Sea Conference. After a thorough study of state practice concerning outlying archipelagos, he concluded that no uniform practice existed and that one ought to look to the *Fisheries Case* for applicable principles. He said: "The criteria here laid down by the Court are equally applicable to outlying archipelagos and coastal archipelagos and the statements thus made are couched in general terms expressing basic principles of international law in this field." [50] It is my view that Evensen's statement is as applicable today as it was in 1957. No uniform state practice seems to have developed, and the 1958 Conference left the question of outlying archipelagos unresolved. The only provision in the 1958 Convention which relates specifically to islands is article 10; it confines itself to defining an island and to stating that "[t]he territorial sea of an island is measured in accordance with the provisions of these articles." The conference did not retain the draft provision of the International Law Commission which stated that "every island has its own territorial sea." [51] In these circumstances, it is difficult to understand the interpretation given to article 10 by A. L. Shalowitz who concludes that, since the Conference took no decision on the question of groups of islands, "it must be assumed that each island of such a group will be governed by the rule laid down in paragraph 2, that is, each will have its own territorial sea measured in the ordinary way according to the provisions of the convention adopted, and are not to be enclosed by a series of straight baselines." [52] This must be considered as a somewhat spurious interpretation, and a more accurate view is surely that the 1958 Convention simply left the question unresolved. [53] This does not mean, however, that no guidance can be gained from the criteria incorporated into the provisions of the Convention relating to coastal archipelagos. The reasoning by analogy with the *Fisheries Case* is now applicable with respect to the 1958 Convention. This is essentially the view of Professor Sorensen who concludes that "the criteria laid down by art. 4 of the Geneva Convention do offer some guidance in the matter." [54]

Having regard to the absence of both customary and conventional rules,

[50] Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, U.N. Doc. A/Conf. 13/18 (Preparatory Document 15) at 33 (1957), 1 United Nations Conference on the Law of the Sea: Preparatory Documents at 300.

[51] [1956] 2 Int'l L. Comm'n Y.B. at 270.

[52] 1 A. Shalowitz, Shore and Sea Boundaries at 227 (1962).

[53] See, for instance, the study of Sorensen, *The Territorial Sea of Archipelagos*, 6 Neth. Int'l L. Rev. at 330 (1959).

[54] *Id.* at 330.

as well as uniform state practice, it is probable that the International Court, if faced with the question of adjudicating on outlying archipelagos would look to its own past pronouncements for guidance. Proceeding by analogy with the rules relating to coastal archipelagos, it is submitted that the following propositions are warranted:

1. Straight baselines may be used to join a group of islands outlying in mid-ocean;

2. Straight baselines must not depart to any appreciable extent from the general direction of the coastal line of the archipelago;

3. The sea areas being enclosed must be sufficiently linked to the land domain of the archipelago to be subject to the regime of internal waters;

4. Straight baselines must not be drawn to and from low-tide elevations of the archipelago, unless they have lighthouses or similar installations permanently above sea level;

5. The economic interests of a region of the archipelago may be considered in drawing particular baselines, providing such interests are clearly evidenced by long usage;

6. There is no maximum length for straight baselines except for bays situated along the perimeter of the archipelago, in which case the closing line must not exceed twenty-four miles (Convention only, regarding bays);

7. The waters enclosed by straight baselines are considered as internal waters, but the right of innocent passage continues to exist in water areas formerly considered as part of the territorial sea or of the high seas and where those areas constitute a normal route for international traffic. [55]

VI. An Appraisal of the Legal Situation

As stated earlier, Canada has essentially three courses of action to follow in the delimitation of the territorial waters of its Arctic Archipelago. The present appraisal [56] is designed to examine these choices in the light of the relevant principles of international law just reviewed.

The *first course* open to Canada would be to draw a belt of territorial waters around each island, using the normal and traditional coastline method. Having regard to the width of most of the major passages between the islands in question and to the fact that Canada claims only the traditional three miles of territorial sea, this method would leave strips of high seas throughout the entire archipelago. This would not be in Canada's best

[55] The International Law Commission had suggested a similar qualification relating to international traffic with respect to coastal archipelagos; see [1956] 2 Int'l L. Comm'n Y.B. at 267. The 1958 Law of the Sea Conference did not retain the qualification but it is felt that, in the case of outlying archipelagos, such a qualification is essential for the legitimate protection and security of the local state.

[56] For a prior appraisal by this writer of the legal situation relating specifically to the Northwest Passage, see *Innocent Passage in the Arctic*, 6 Can. Y.B. Int'l L. 3, at 58-60 (1968).

interest, considering the fundamental right of states to take reasonable measures to insure their territorial integrity and national security. Furthermore, the economic development of those islands will necessitate an internal system of maritime communication between them. Looking at the interests of the international community of states and their right of free navigation, it must be conceded that, except for the straits constituting Parry Channel, the great majority of passages are of no practical use for navigational purposes. In the circumstances, Canada can disregard the coast-line method where the geography permits the use of straight baselines.

The *second choice* would be to draw a single belt of territorial waters around the whole archipelago, using straight baselines to join the outermost islands. The use of this method would certainly be in Canada's best interest, in so far as insuring its national security and future communication between the islands. On the other hand, the freedom of international maritime communication would be seriously limited, when one considers that the water areas enclosed would include those of the Northwest Passage. This constitutes a "legal strait" in that it connects parts of the high seas, regardless whether presently used for international navigation or not. Parry Channel, at its eastern entrance (Lancaster Sound), is at least fifty miles wide and averages about thirty-five miles until it reaches Prince Leopold Island on the south side of the channel, at the north-east tip of Somerset Island, where it narrows to about twenty-five miles. Barrow Strait is the only one of the four straits forming Parry Channel to have a small group of islands in the middle; the strait narrows to about fifteen miles with Young Island on the south and Lowther Island on the north. The route then continues clear through Viscount Melville Sound and widens to more than seventy-five miles before reaching M'Clure Strait, which averages about fifty miles, and attains close to one hundred miles at the western entrance. In other words, to "box-in" this route of the Northwest Passage would mean to draw a closing line of at least fifty miles at the eastern end and one of nearly one hundred miles at the other. All of the enclosed water areas, regardless of size, would become internal waters. Under article 5 of the Territorial Sea Convention, the newly enclosed waters would still be subject to the right of innocent passage, but not so under the *Fisheries Case.*

It is very doubtful that the geographical requirements which must exist under both the *Fisheries Case* and the Convention are met. Surely it would be stretching the geographical criteria beyond reasonable limits to consider the whole Canadian Arctic Archipelago simply as "a fringe of islands" along the northern coast of Canada, although they might be considered located "in its immediate vicinity," at least with regard to the islands south of Parry Channel. It is also most difficult to visualize how a series of baselines around the triangular-shaped group of islands north of Parry Channel, known as the Queen Elizabeth Islands, north of Parry Channel could be considered as not departing "to any appreciable extent from the general direction of the coast" which runs in an east-west direction. Furthermore, the sea areas constituting

Parry Channel, averaging about fifty miles in width, can hardly be considered as "sufficiently closely linked to the land domain to be subject to the régime of internal waters." Those are all compulsory criteria, under both the 1951 *Fisheries Case* and the 1958 Convention. As for the "economic interests of the region concerned," it is highly questionable whether proof can be made of "the reality and the importance" of such interests by "long usage." The Eskimos, constituting the local population, have not traditionally resided north of Parry Channel and have not depended on the resources of those waters. Indeed, there were virtually no native inhabitants in the Queen Elizabeth Islands' group until 1953 when the Canadian Government, perhaps conscious of implementing the principle of effective occupation, established several families of Eskimos in that region.[57] For all these reasons, it would seem that to follow this second course of action would be contrary to established principles of international law.

The *third possibility* would be for Canada to draw two belts of territorial waters, one enclosing the islands south of Parry Channel with the mainland, and the other around the Queen Elizabeth Islands north of the channel. As for the few islands in the middle of Parry Channel, all of them could probably fall within the normal rule and be given their own territorial waters. The implementation of this third possibility would leave a strip of high seas, bordered by two main belts of territorial waters, throughout Parry Channel. Such a delimitation protects the interests of the coastal state in giving it almost complete sovereignty over all water areas within each group of islands, but respects the principle of freedom of navigation in favour of the international community in retaining a strip of high seas which has considerable chance of eventual use for important international traffic. The question remains whether such a dual delimitation of the territorial waters of the Canadian Arctic Archipelago would be in accordance with established principles of international law.

It would appear that the southern section of the archipelago would meet the criteria, including the economic one, formulated by the International Court and incorporated in the 1958 Convention. In spite of their large size, these islands can be considered as constituting a "fringe of islands" along the north mainland coast of Canada, and are certainly located "in its immediate vicinity." Indeed, those peninsulas and islands, with the possible exception of Banks Island which is located north of Amundsen Gulf, could be truly regarded as mere extensions of and appendages to the mainland. The Amundsen Gulf, giving onto Beaufort Sea, has an opening of ninety-three miles and should not be closed off. Moreover, because of the permanent presence of polar ice in M'Clure Strait, navigation is much easier through Amundsen Gulf and Prince of Wales Strait; this latter route was the one followed by Larsen in 1944 and it might well remain the more favourable one for a long time.

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[57] Baird, *Canadian Arctic Archipelago, in* GEOGRAPHY OF THE NORTHLANDS 354 (G. Kimble & D. Good eds. 1955).

With respect to the Queen Elizabeth Islands, situated north of Parry Channel, they would be regarded as constituting a separate outlying archipelago. By analogy to coastal archipelagos, essentially the same criteria would be applicable as already explained. Ellesmere Island, which is by far the largest of all the islands in this group, could be regarded as a sort of mainland in relation to the rest of the islands which would represent its appendages or dependencies. Ellesmere Island has an area of over 82,000 square miles, which is almost as much as the total area of all the rest of the islands. Its coast is very similar to that of Norway and qualifies without any difficulty by itself for the use of the straight baseline system. The other straight baselines would follow the general coastline of the archipelago, and the sea areas enclosed are sufficiently linked to the land formations to justify their being given the status of internal waters. There is no real reason to object to the length of some of the baselines around this triangular-shaped archipelago, as the water areas enclosed could not be used for international navigation. The north side is bounded by the polar ice pack of the Arctic Ocean and the Northwest Passage to the south is left intact.

As a result of the foregoing analysis, it is suggested that the third course of action could be followed in the drawing of territorial waters in the Canadian Arctic Archipelago. Such a course would be in accordance with established international law in so far as the section south of Parry Channel is concerned, and ought to be legally acceptable for the northern section, by reason of the very close analogy with well established rules. On the legality of drawing straight baselines around an outlying archipelago, it must be emphasized that this is an open question, the matter not being covered by established international law. The issue is not whether such baselines are specifically permitted by international law but it is whether they are contrary to international law. This was the issue which the International Court had to face with respect to the Norwegian baselines, and its only decision was that the delimitation method in question and the baselines fixed in application of the method were "not contrary to international law." [58]

One more aspect of this suggested solution must be mentioned: foreign ships, not being able to navigate M'Clure Strait because of ice, could exercise their right of innocent passage through Prince of Wales Strait, which would not be closed off by straight baselines. There is an overlap of territorial waters in the middle of this strait due to the presence of a small island (Prince Royal); however, the strait would still link two parts of the high seas and the right of innocent passage would still exist. [59] This right must, of course, be exercised with due regard to the rights of the coastal state, and the latter may take certain protective measures to insure its territorial integrity and security.

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[58] [1951] I.C.J. at 143.

[59] For a discussion of this question, see the writer's article *Innocent Passage in the Arctic, supra* note 56.